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42 Cal.2d 11

BEYERBACH
v.
JUNO OIL CO. et al.

L. A. 22341.

Supreme Court of California.
In Bank.
Jan. 5, 1954.

Stockholder's derivative suit to compel third parties to transfer certain oil lease to defendant corporation and to account for and pay to the corporation sums received under the lease as rents and royalties. The Superior Court, Tulare County, Frank Lamberson, J., entered judgment dismissing the action because of plaintiff's failure to post required security within time allowed, and plaintiff appealed. The Supreme Court, Schauer, J., held, inter alia, that the statute under which plaintiff was required to post security was not unconstitutional.

Affirmed.

Carter, J., dissented.

Prior opinion, App., 254 P.2d 632.

1. Corporations 🔑214

In stockholder's derivative action, if court determines that defendant moving for order requiring plaintiff to furnish security has established probability that prosecution of action will not benefit corporation or its security holders, court shall fix amount and nature of security to be furnished by plaintiff for reasonable expenses, including expenses for which corporation may become liable by reason of statute requiring corporation to indemnify its officers for reasonable expenses incurred in defending suit based on alleged wrong of corporation. Corporations Code, §§ 830, 834.

2. Corporations 🔑214

A determination in stockholder's derivative suit as to furnishing of security by plaintiff is not a determination of the merits of any issue in the action. Corporations Code, §§ 830, 834.

3. Corporations 🔑214

The amount of security required by court to be posted by plaintiff in stockholder's derivative suit must be reasonable and may be changed from time to time within court's discretion. Corporations Code, §§ 830, 834.

4. Corporations 🔑214

Where court in stockholder's derivative suit requires that plaintiff post security as to any defendant, action shall be dismissed as to such defendant unless security is furnished within reasonable time fixed by the court. Corporations Code, §§ 830, 834.

5. Constitutional Law 🔑205(6), 249
Corporations 🔑203
Statutes 🔑79(2), 80(1)

Statute requiring plaintiff in stockholder's derivative action to furnish security for defendants' expenses if trial court finds that there is no reasonable probability that corporation will benefit from the action was not unconstitutional on ground that it denied plaintiff equal protection, though there was no comparable provision requiring corporation to post security for plaintiff's expenses if trial court found a probability that corporation would benefit from the action, and was not violative of constitutional provisions against special laws and against special privileges and immunities. Corporations Code, § 834; Const. art. 1, § 21; art. 4, § 25; U.S.C.A. Const.Amend. 14, § 1.

6. Constitutional Law 🔑249
Corporations 🔑203

Statute requiring plaintiff in stockholder's derivative action to post security for defendants' expenses when ordered to do so by court upon finding that there is no reasonable probability that corporation will benefit from the action is not unconstitutional as discriminating against poor stockholders who are unable to furnish required security. Corporations Code, § 834.

7. Constitutional Law 🔑305
Corporations 🔑205

A state may set terms on which it will permit litigations in its courts, and no type of litigation is more susceptible of regulation than that instituted by volunteer plaintiff-fiduciary who says that he seeks to enforce derivative rights for a corporation which refused to act through its board of directors to the end he demands. Corporations Code, § 834.

8. Constitutional Law 🔑249
Corporations 🔑203

Statute requiring plaintiff in stockholder's derivative action to post security for expenses when ordered to do so by court upon finding that there is no reasonable probability that corporation will benefit from such action is not unconstitutionally discriminatory because individual defendants, if sued by defendant corporation itself, rather than by plaintiff stockholder in his representative capacity, would not have been entitled to security. Corporations Code, § 834.

9. Corporations 🔑214

In stockholder's derivative action, it would be abuse of discretion for trial court to make award of costs or attorney's fees in favor of losing defendant and against a representative plaintiff in situation where suit materially benefited the corporation. Corporations Code, § 834.

10. Constitutional Law 🔑305
Corporations 🔑203

Statute providing for posting of security by plaintiff for expenses in stockholder's derivative action upon showing by defendants that there is no reasonable probability that action will benefit corporation is not violative of due process provision of state and federal Constitutions. Corporations Code, § 834; U.S.C.A.Const. Amend. 5; Const. art. 1, § 13.

11. Appeal and Error 🔑1011(1)
Corporations 🔑214

In stockholder's derivative action wherein defendants move for order directing plaintiff to post security, it is for trial court to weigh evidence on question whether there is no reasonable probability that action will benefit corporation, and its finding, based upon substantial conflicting evidence, is binding upon Appellate Court. Corporations Code, § 834.

12. Corporations 🔑214

In stockholder's derivative suit, evidence presented question for trial court as to whether defendants, who moved for order requiring plaintiff to post security for reasonable expenses, had met their burden of proving that there was no reasonable probability that the action would benefit the corporation. Corporations Code, § 834.

13. Corporations 🔑214

In stockholder's derivative suit to compel third parties to transfer certain oil lease to defendant corporation and to account for and to pay to such corporation sums, which exceeded $75,000, received under the lease as rents and royalties, wherein court properly found that there was no reasonable probability that corporation would benefit by such action, trial court did not abuse its discretion by ordering plaintiff to furnish $1000 security for the corporation and $5,000 each for the third parties. Corporations Code, § 834.

14. Corporations 🔑214

Order requiring plaintiff in stockholder's derivative action to post security of $1000 for reasonable expenses of the defendant corporation was not, in effect, an order fixing a retainer of such amount for the corporation. Corporations Code, § 834.

15. Corporations 🔑214

In stockholder's derivative suit, court, after determining upon sufficient evidence that there was no reasonable probability that corporation would benefit by the suit, did not abuse discretion in directing that form of security to be posted by plaintiff for expenses should be either cash or bonds issued by authorized security company. Corporations Code, § 834.

16. Corporations 🔑214

Provision of Code of Civil Procedure that wherever bond is required it may be an undertaking executed by two residents and householders, or freeholders, did not preclude court, which directed plaintiff in stockholder's derivative suit to post security for reasonable expenses of defendants, from requiring that the security be in the form of cash or bonds issued by security company authorized to issue such bonds. Corporations Code, § 834; Code Civ.Proc. §§ 1041, 1057.

17. Corporations 🔑210

In stockholder's derivative action, the rights of the corporation, not the rights of nominal plaintiff, are to be litigated, and the corporation is an indispensable party and the court has no jurisdiction to adjudicate its rights in its absence.

19. Corporations 🔑214

Dismissal of corporation at any stage in a representative action must result in discontinuance of the action, not for mere defect in parties, but for lack of jurisdiction to proceed.

19. Corporations 🔑213

Where plaintiff in stockholder's derivative action refused to deposit security required by court for corporation's expenses, action could not continue against such indispensable party, or in its absence against any other party, and trial court properly dismissed action as to all defendants. Corporations Code, § 834.

20. Motions 🔑59(3)

A trial court is without power to set aside a regularly made order involving judicial action, and cannot enter another and different order without notice to adverse party.

21. Motions 🔑58

In stockholder's derivative action, order fixing reasonable time for furnishing by plaintiff of security for expenses was a "judicial action", and motion seeking to amend such order could be entertained only upon notice to adverse parties and orders purportedly postponing time for deposit of security, having been made ex parte, were ineffective. Corporations Code, § 834.

See publication Words and Phrases, for other judicial constructions and definitions of "Judicial Action".

22. Corporations 🔑214

Trial court in stockholder's derivative action, had power, upon plaintiff's motion, to reconsider questions of appropriate amount and form of security required to be posted by plaintiff, and question whether it would grant or deny plaintiff's motion was addressed to court's sound discretion. Corporations Code, § 834.

23. Dismissal and Nonsuit 🔑79

Where, in stockholder's derivative action, plaintiff's application for reduction in the amount and change as to form of security for expenses was denied prior to judgment of dismissal of action for failure to post security within required time, fact that minute order for dismissal was entered prior to determination of plaintiff's motion was immaterial and did not invalidate the judgment of dismissal. Corporations Code, § 834.

◆

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SCHAUER, Justice.

Plaintiff, a stockholder of defendant Juno Oil Co., instituted a stockholder's derivative suit to compel defendants Henderson and Carpenter to transfer a certain oil lease to defendant Juno Oil Co. and to account for and pay to Juno sums received under the lease as rents and royalties. Defendants moved, under section 834 of the Corporations Code, for an order requiring plaintiff to furnish security for reasonable expenses which might be incurred by defendants in connection with the action. Plaintiff failed to deposit security as ordered by the trial court and the court dismissed the action. From the judgment of dismissal plaintiff appeals. He contends that the applicable portions of section 834 are unconstitutional, particularly in their requirement that plaintiff furnish security for the expenses of individual defendants who are sued not as officers or employes of defendant corporation but as third persons who dealt with the corporation; that defendants established no ground for requiring any security or, in the alternative, that the trial court abused its discretion as to the amount and form of security required; and that the court erred in dismissing the action at a time when plaintiff's motion to modify the original order in respect to its requirements as to form and amount of security was pending. We have concluded that each of these contentions is without merit.

[1–4] The applicable provisions of section 834 are found in paragraph (b) thereof. They are as follows: Within thirty days after service of summons in a stockholder's derivative suit the corporation or any defendant may move for an order, on notice and hearing, requiring plaintiff to furnish security. The motion may be based on either of the following grounds: (1) that there is no reasonable probability that prosecution of the cause of action against the moving party will benefit the corporation or its security holders; (2) that the moving party, if other than the corporation, did not participate in the transaction complained of in any capacity. At the hearing on the motion the court shall consider evidence material to the grounds of the motion and, when material, to a determination of the probable reasonable expenses, including attorney's fees, of the defense of the action. If the court determines that the moving party has established a probability in support of the grounds of the motion, it shall fix the amount and nature of security to be furnished by plaintiff for reasonable expenses, including expenses for which the corporation may become liable under section 830 of the Corporations Code.[1] A determination as to the furnishing of security is not a determination of the merits of any issue in the action. "The corporation and the moving party shall have recourse to such security in such amount as the court shall determine upon the termination of such action." The amount of security from time to time within the court's discretion. If the court requires that security be furnished as to any defendant, the action shall be dismissed as to such defendant unless the security has been furnished within a reasonable time fixed by the court.

The complaint herein alleges that plaintiff, defendant Henderson, and Scott Carpenter[2] orally agreed that defendant Juno Oil Co. would be organized to operate oil leases to be acquired by plaintiff and the individual defendants and transferred to the corporation in consideration of stock to be issued by it; that the corporation was formed and the stock issued; that plaintiff acquired and transferred to Juno certain oil leases; that the individual defendants undertook to and did acquire a certain oil lease, known as the Norris lease, but refused to transfer it to Juno as agreed; and that Juno, despite plaintiff's demands, refused to compel transfer of the Norris lease. The complaint seeks to compel transfer of such lease and payment to the corporation of proceeds therefrom allegedly received by the individual defendants for the benefit of the corporation.

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[1] Section 830 provides for indemnification by a corporation of a director, officer or employe for reasonable expenses incurred in defending a suit against him which is based on his alleged wrong to the corporation, if he has successfully defended or if the court finds that his conduct merits indemnity.

[2] Scott Carpenter is since deceased. The administratrix of his estate is named as a defendant. For convenience Henderson and Carpenter will sometimes be referred to as the individual defendants.

Plaintiff also joined three other individuals, directors of Juno Oil Co., as defendants, but he has since dismissed his appeal as to them because he wishes to emphasize issues as to the application of the security requirement to those who assertedly wrong the corporation, not as officers or employes, but as strangers.

Each defendant moved, under section 834 of the Corporations Code, that plaintiff be required to furnish security for probable reasonable expenses, including attorneys' fees, which might be incurred in defending the action. The motions were based on the ground that there was no reasonable probability that prosecution of the action would benefit the corporation and, in the case of the individual defendants, on the further ground that they did not participate in the transaction complained of. The trial court at the hearing of the motions considered substantially conflicting affidavits and testimony.

By formal order dated August 27, 1951, the trial court ordered that "plaintiff shall, within thirty days from the date hereof, deposit" security of $5,000 as to each of the individual defendants and $1,000 as to Juno, in the form of cash or bonds of a surety company, and that if plaintiff "fails to provide such security for any of the defendants herein, within the time herein provided, then upon a proper showing thereof, this action shall be dismissed as to any or all defendants for whom such security has not been given in the sums and in the manner as herein specified."

On September 24, 1951, plaintiff obtained an ex parte order which purported to grant him thirty days from the date thereof in which to deposit the security, and on October 22, 1951, plaintiff obtained another ex parte order which purported to grant him thirty days from the date thereof in which to deposit the security. On October 26, 1951, plaintiff filed a "Notice of Motion for Order Changing the Amount and Form of Security," by which he asked that the amount of security be reduced to $2,000 as to the individual defendants and $400 as to Juno, that plaintiff be permitted to file an undertaking executed by personal sureties, and that such security be furnished on or before December 1, 1951.

On October 30, 1951, defendants filed notices of motions to dismiss the action on the ground that plaintiff had failed to deposit the security required by the order of August 27, 1951. On November 19, 1951, the motions of plaintiff to change the form and amount of security and of defendants to dismiss the action were argued and taken under submission.

On November 27, 1951, defendant Juno Oil Co. filed another notice of motion to dismiss, and on November 28, 1951, the individual defendants filed a similar notice of motion. These motions were heard and submitted on December 3.

On December 14, 1951, the trial court granted the last mentioned motions of defendants. On December 19 the court denied plaintiff's motion to change the amount and form of security, denied without prejudice defendants' motions to dismiss of which notice had been filed on October 30, and entered the judgment of dismissal from which this appeal is taken.

[5] It appears that plaintiff did not comply with any part of the order for security. Instead, he contends that section 834 violates the equal protection clause of the federal Constitution (Amendment XIV, § 1) and the provisions of the state Constitution against special laws (art. IV, § 25) and against special privileges and immunities (art. I, § 21). Fundamentally, plaintiff's arguments as to constitutionality are answered, either directly or by necessary implication, by Cohen v. Beneficial Industrial Loan Corp. (1949), 337 U.S. 541 [69 S.Ct. 1221, 93 L.Ed. 1528] (which upheld the constitutionality of a New Jersey statute with a purpose similar to that of section 834; so far as appears, the New Jersey statute contained no provision as to, and the opinion does not discuss, individual defendants who were not officers or employes); and Hogan v. Ingold (1952), 38 Cal.2d 802, 243 P.2d 1 (in which the problem as to such individual defendants did not arise); see also Whitten v. Dabney (1915), 171 Cal. 621, 631, 154 P. 312 (which did not involve the problem of constitutionality

of the statute but which pointed out that "Not only should a plaintiff in such a fiduciary capacity [held to be equivalent to that of a guardian ad litem, who is not in his own right a party to the cause] be willing to take no act that did not first receive the sanction of the court of equity to which he has appealed, but, more than this, he is not permitted to take any act without such sanction"). However, inasmuch as some of the particular aspects of plaintiff's arguments as to the constitutionality of a provision for security for and possible indemnification of an individual defendant who is not sued as an officer or employe of a corporation appear to be advanced in this case for the first time we give specific consideration to those aspects of his arguments.

The unconstitutional discrimination exists, says plaintiff, because section 834 requires plaintiff to furnish security for defendants' expenses if the trial court finds that there is no reasonable probability that the corporation will benefit from the derivative action, but does not contain a comparable provision requiring the corporation to post security for plaintiff's expenses if the trial court finds a probability that the corporation will benefit. This is not a denial of equal protection. As was pointed out in Hogan v. Ingold (1952), supra, 38 Cal.2d 802, 812, 243 P.2d 1, "If the power of the state over this type of fiduciary litigation is plenary, as the Cohen case states [Cohen v. Beneficial Industrial Loan Corp. (1949), supra, 337 U.S. 541, 551, 69 S.Ct. 1221], then surely such litigation is subject to regulation of the type provided by section 834. * * * The stockholder will not incur any liability for costs if he does not essay to bring in equity a suit in the corporation's right. If he does bring such a suit he knows that he [like all others in his class] will be subject to the regulating provisions of the statute."

Although the law does not provide for deposit of security for plaintiff's expenses at the beginning of his action, it does provide, apart from statute, for charging against the corporation the costs and counsel fees of a plaintiff who has successfully maintained a representative action. (Fox v. Hale & Norcross Silver Mining Co. (1895), 108 Cal. 475, 477, 41 P. 328; Mason v. Drug, Inc. (1939), 31 Cal.App.2d 697, 702, 88 P.2d 929; see also Mann v. Superior Court (1942), 53 Cal.App.2d 272, 282, 127 P.2d 970; 152 A.L.R. 914.) Since counsel fees for maintaining the action in such a situation are measured in a material part by the benefits recovered on behalf of the corporation, and both costs and counsel fees are charged against the corporation and may be made payable out of or a lien against the fund recovered, there is little likelihood that a plaintiff might successfully maintain the action and yet be unable to collect an award for his expenses.

[6, 7] Plaintiff argues that section 834 unconstitutionally discriminates against poor stockholders who are unable to furnish the required security. But if plaintiff's argument in this respect were accepted then any statute which required the payment of a fee or the furnishing of security as a prerequisite to the filing of a complaint, the issuance or levying of a writ, the procurement of a record on appeal, etc., would be unconstitutional. Plaintiff relies upon Morganti v. Morganti (1950), 99 Cal.App.2d 512, 516, 222 P.2d 78 (see also Dribin v. Superior Court (1951), 37 Cal.2d 345, 349–350, 231 P.2d 809, 24 A.L.R.2d 864), where it was held that the right to divorce an incurably insane spouse could not constitutionally be limited to those who could guarantee that the spouse would be supported for his or her life expectancy. The Morganti case is not controlling or persuasive here; rather, the analogies suggested by defendants (requirement of filing fees, etc.) are pertinent. (See also Escobedo v. State Motor Vehicles Department of California (1950), 35 Cal.2d 870, 878, 222 P.2d 1.) More basically, it is also pointed out that the plaintiff here is not seeking to enforce any personal right; rather, he is seeking to have the court accept his nomination of himself to act in a fiduciary capacity in the nature of a guardian ad litem. As held in Cohen v. Beneficial Industrial Loan Corp. (1949), supra, 337 U.S. 541, 549 [69 S.Ct. 1221, 93 L.Ed. 1528], a state may set the terms on which it will permit litigations in its courts, and no type of litigation

is more susceptible of regulation than that instituted by a volunteer plaintiff-fiduciary who says that he seeks to enforce derivative rights for a corporation which refuses to act through its board of directors to the end he demands.

[8] Section 834 is unconstitutionally discriminatory in another respect, says plaintiff, because if the individual defendants had been sued by the defendant corporation itself, rather than by plaintiff stockholder in his representative capacity, they would not have been entitled to security. This effect of the statute does not create an unreasonable classification; every stockholder who, like plaintiff, is unable to induce the corporation, through its board of directors, to institute a particular action on its own behalf, and who undertakes as its volunteer representative to sue on the cause asserted by him, may be required to furnish security. The fact that there may be individual defendants who are sued by a corporation on causes deemed proper by it, rather than by a self-nominated stockholder-fiduciary on causes deemed proper by him, and thus cannot have the benefit of security, is not a cause for complaint by this plaintiff.

[9] Plaintiff points out that if he did furnish security and the action were prosecuted to judgment, defendants might "have recourse to such security in such amount as the court shall determine upon the termination of such action," and that under this last quoted portion of section 834 the individual defendants might be allowed to recover attorneys' fees from plaintiff if they ultimately prevailed, whereas plaintiff could not recover such fees from the individual defendants if he prevailed. For reasons and on the authorities already discussed as well as those immediately hereinafter summarized there is no merit in this contention. In extension of the same point plaintiff objects, further, that if the quoted language is read literally the defendants, both corporate and individual, might be allowed to recover expenses although plaintiff prevailed in the action. The present case has not come to the state where the last-mentioned problems would arise. However, in answer to the last argument, it may be suggested that it would appear to be an abuse of discretion for a trial court to make an award of costs or attorneys' fees in favor of a losing defendant and against a representative plaintiff in a situation where the suit materially benefited the corporation.

In support of his above stated contentions, plaintiff relies upon Builders' Supply Depot v. O'Connor (1907), 150 Cal. 265, 268–269, 88 P. 982, 17 L.R.A.,N.S., 909. The statute under consideration there provided for an award of attorneys' fees only to those who established their claims under the mechanics' lien law and not to those who successfully resisted such claims of lien. This court held, "A statute which gives an attorney's fee to one party in an action and denies it to the other, and allows such fee in one kind of action and not in other kinds of actions where, as in the statute here in question, the distinction is not founded on constitutional or natural differences, is clearly violative of the constitutional provisions above noticed [U.S.Const., Amendment XIV; Cal.Const., art. I, §§ 1, 21, art. IV, § 25]." However, as the Builders' Supply case recognizes and as defendants and amici curiae point out, so long as the basis of the classification is reasonable, the Legislature can provide that in various types of action only a successful plaintiff or appellant can recover attorneys' fees or only a defendant can appeal. (Missouri, K. & T. R. Co. v. Cade (1914), 233 U.S. 642, 649, 34 S.Ct. 678, 58 L.Ed. 1135 [statute providing that any person may present to his debtor a bona fide claim for services rendered, material furnished, overcharges on or damage to freight, or injury to stock, and that if the debtor does not pay within 30 days such person can sue upon the claim and, if his suit is successful, can recover not only costs but also reasonable attorneys' fees]; Engebretsen v. Gay (1910), 158 Cal. 30, 32, 109 P. 880, 28 L.R.A.,N.S., 1062 [Stats.1885, p. 147, as amended (Deering's Gen.Laws (1906), Act 3930, § 12), providing that plaintiff can recover attorneys' fees as well as costs in successful action to recover unpaid amount of street assessment]; Superior Wheeler Cake Corp. v. Superior Court (1928), 203 Cal. 384, 386–387, 264 P.

488 [former Code Civ.Proc., § 927j (Stats. 1921, p. 120), providing that unsuccessful defendant but not unsuccessful plaintiff can appeal from judgment of small claims court; the court emphasizes that it was plaintiff who invoked the quick and inexpensive small claims procedure and that if plaintiff wished a mutual right of appeal he could have invoked the regular jurisdiction of the justice's court]; Sacramento Municipal Utility Dist. v. Pacific Gas & Electric Co. (1942), 20 Cal.2d 684, 693–696, 128 P.2d 529 [Code Civ.Proc., § 526b, providing that if an unsuccessful plaintiff in a suit to enjoin the sale of public utility's bonds is interested in a public utility business of the same nature as that for which the bonds are proposed, such plaintiff is liable to the defendant for the costs, damages, and necessary expenses resulting from the suit]; City of Alturas v. Superior Court (1940), 36 Cal.App.2d 457, 459, 97 P.2d 816 [Code Civ.Proc., § 117j, providing that if a final judgment of the superior court is rendered against a defendant who appeals from a judgment of the small claims court he shall pay plaintiff an attorney's fee].)

The Legislature could determine that normally the officers and employes of corporations do not mismanage the corporation's funds, that usually if third persons deal wrongfully with the corporation the directors cause it to prosecute any proper right of action in its own name, and that it is not unlikely that some stockholders may abuse the remedy of the representative suit and institute such a suit (sometimes called a "strike suit") to gain personal advantage by obtaining a settlement from the corporate defendant rather than to benefit such defendant.[3] The Legislature could further take cognizance of the notorious fact that the bringing of groundless derivative suits by irresponsible persons has in some jurisdictions approached the character of a "racket." (Cohen v. Beneficial Industrial Loan Corp. (1949), supra, 337 U.S. 541, 548–549, 69 S.Ct. 1221; Lapchak v. Baker (1948), 298 N.Y. 89, 94–95, 80 N.E.2d 751.) It has been suggested that the representative suit has not been abusd by the bringing of "strike suits" in California as it has in some eastern states. But since there is a reasonable basis for the legislative determination that there is a probability that the remedy may be abused, that determination is binding upon the courts, and to assert that representative suits have not been used in bad faith in this state does not aid the stockholder in his attempt to have the legislation stricken down. (See Sacramento Municipal Utility Dist. v. Pacific Gas & Electric Co. (1942), supra, 20 Cal.2d 684, 694, 128 P.2d 529.) In these circumstances the Legislature, for the protection of third persons who have dealt with the corporation as well as for the protection of the corporation and its officers and employes, can constitutionally require that the stockholder who would act as in the nature of a guardian ad litem must, as a condition of prosecuting the action on behalf of the corporation, either show a reasonable probability that the suit will be successful or secure the payment of the defendants' expenses should they prevail. The Legislature, of course, can attribute some weight to the fact that the corporation has not seen fit to institute action on a cause which either belongs to it or to no one.

[10] Plaintiff argues that section 834 violates not only the requirement of equal protection but also the federal and state requirements of due process (U.S.Const., Amendment V; Cal.Const., art. I, § 13). This argument is answered by the consideration hat it is only *reasonable* expenses in an amount to be determined by the court on notice and hearing which plaintiff may be required to secure. (See Cohen v. Beneficial Industrial Loan Corp. (1949), supra, 337 U.S. 541, 552, 69 S.Ct. 1221.) It is to be noted that the California statute is even less susceptible to the charge that it violates due process than is the New Jersey statute upheld in the Cohen case, for the California

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[3] As amici curiae point out, the Legislature could also determine that "a plaintiff generally finds it easier to employ an attorney on a wholly contingent basis than does a defendant, thus not assuming any personal liability for fees unless he is successful, whereas a defendant will ordinarily have incurred such a liability regardless of the outcome of the case."

statute contains the safeguard, not found in the New Jersey statute, of a preliminary showing by defendants that there is no reasonable probability of benefit to the corporation from prosecution of the action.

[11, 12] Plaintiff claims that defendants have not met their burden of proving that there is no reasonable probability that prosecution of the action will benefit the corporation or its security holders. The evidence on this matter is conflicting.[4] "It is for the trial court to weigh the evidence and its finding, based upon substantial conflicting evidence, is in this as in every civil case binding upon the appellate court." (Wood v. Gordon (1952), 112 Cal.App.2d 374, 376, 246 P.2d 84.) In connection with his argument that defendants have not sustained their burden of proof as to lack of reasonable probability of benefit to the corporation or its security holders, plaintiff says further, "Manifestly, this is not such a 'strike suit' as was mentioned by the United States Supreme Court in its decision in the Cohen case. If it is not such a 'strike suit,' then the only possible reason for allowing security and costs for attorneys' fees entirely disappears." But the question before the trial court was not whether this was a "strike suit"; the question for that court was whether, regardless of plaintiff's motive in instituting the action, there was or was not a probability of benefit to the corporate defendant. "The argument that the statute was intended and should be limited to strike suits is unavailing in view of its language." (Wood v. Gordon (1952), supra, p. 377 of 112 Cal.App.2d, p. 86 of 246 P.2d.)

Since defendants' motion for security was properly granted on the ground that there was no reasonable probability that the action will benefit the corporation, plaintiff's contention that the individual defendants have not shown that they "did not participate in the transaction complained of" need not be considered.

[13, 14] Plaintiff urges that the trial court abused its discretion by ordering that he furnish an excessive amount of security to Juno, Henderson, and Carpenter. As previously stated, plaintiff was ordered to furnish security of $1,000 for Juno and $5,000 each for Henderson and Carpenter. Even if we assume, as argued by plaintiff, that if the action is to be tried on its merits it is Henderson and Carpenter who will carry the main burden of defending the suit and that the corporation need not actively resist the claims of plaintiff (see Meyers v. Smith (1933), 190 Minn. 157, 159, 251 N.W. 20; Slutzker v. Rieber (1942), 132 N.J.Eq. 412, 413, 415, 28 P.2d 528; Chaplin v. Selznick (1945), 186 Misc. 66, 58 N.Y.S.2d 453, 455), it does not follow that the amount fixed as to any defendant is unreasonable and beyond the range of judicial discretion. Obviously it is proper for the corporation, if its position is justified at all, to employ counsel, appear

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4. There is no written memorandum representing the entire agreement among the parties. The factual dispute is as to whether such agreement (which, so far as it was carried out, required organization of the corporation and issuance of shares to plaintiff and the individual defendants in consideration of plaintiff's transferring certain oil leases to the corporation and the individual defendants' paying certain sums to plaintiff) also required Carpenter and Henderson to acquire and transfer to the corporation the Norris lease, for which they were negotiating. Plaintiff testified that at a meeting of the parties prior to organization Carpenter and Henderson agreed to transfer such lease. Henderson testified that at such a meeting of the parties he said he would not transfer his interest in the Norris lease and Carpenter (since deceased) stated that he wanted more time to think the matter over. Another individual defendant, not a respondent here, testified that at such meeting Henderson said he would not transfer the Norris lease to the company and Carpenter said that he could not act at the time because the lease was "in litigation." Still another individual defendant testified that he did not recall hearing Carpenter say that he would transfer his interest to the company; that he said the lease "was under litigation * * * and nothing could be done about it." Although the testimony as to the dates of the meetings referred to is uncertain, the trier of fact could resolve such testimony favorable to defendants and find that at no time did Henderson and Carpenter agree to transfer the Norris lease to Juno.

in the proceeding by answer or otherwise, and move for the deposit of security for its expenses. It may be that if plaintiff had deposited security and the action had been tried, it might have developed that $1,000 would have exceeded the amount of Juno's reasonable expenses. But it does not appear as a matter of law that it was unreasonable to require security of $1,000 at the time the order was made. And the order that $1,000 be deposited as security does not constitute a determination that that will be the amount of Juno's costs and reasonable attorneys' fees; plaintiff is mistaken in his assertion that such order "was in effect an order fixing a retainer of $1,000.00 for the corporation"; under section 834 the amount of costs and attorneys' fees cannot be determined until the completion of the suit.

The requirement of security of $5,000 each as to Henderson and Carpenter does not appear so excessive (if excessive at all) as to constitute an abuse of discretion as a matter of law. At the time the order was made it had to be contemplated that the attorneys for those individual defendants would have to defend against the representative suit on the merits at a possibly extended trial if plaintiff saw fit to furnish the security and continue such suit; the complaint seeks not only to compel assignment of a described oil lease but also an accounting and the recovery of more than $75,000 alleged to have been wrongfully collected and withheld by the individual defendants; and the possibility of services and costs on appeal was to be considered. Pertinent to this subject—and tending also to derogate plaintiff's more basic arguments against the type of legislation here involved—is the fact that although no security has been furnished, defendants' attorneys have already rendered substantial services in the superior court on the primary and counter motions and on this appeal in defense of the attack made by plaintiff on the constitutionality of section 834 and the propriety of its application here.

Plaintiff's objection to the order requiring deposit of security extends not only to the amount but also to the form of security. The superior court ordered "that said security shall be deposited in the form of cash or a bond or bonds issued by a security company authorized to issue such bonds." As already mentioned, after the making of this order plaintiff moved for an order changing the amount and form of security. In support of this motion he filed an affidavit which avers that although he has assets the fair market value of which exceeds the amount of security required, he would sustain financial loss by converting those assets into cash, and that the surety companies which execute the bonds which the court order permits him to furnish demand cash collateral in the total amount of such bonds. It appears that before the trial court plaintiff emphasized the hardship to himself resulting from the requirement of cash, rather than the sufficiency or reasonableness of the form of security as a protection to the defendants.

[15, 16] On appeal plaintiff argues that the Code of Civil Procedure (§§ 1041, 1057)[5] provides that wherever a bond is required by any law of this state it may be an undertaking executed by two residents and householders, or freeholders, within the state. There is no such requirement of the acceptance of an undertaking executed by personal sureties in every case

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[5] Those sections provide in material part as follows:

Section 1041: "Whenever a party to an action or proceeding desires to give an undertaking provided to be given by any statute of this State, it shall be sufficient if the sureties sign an undertaking indicating that they are bound to the obligations of the statute requiring the undertaking to be given. Such undertaking may be in form as follows: * * *."

Section 1057: "In any case where an undertaking or bond is authorized or required by any law of this State, the officer taking the same must * * * require the sureties to accompany it with an affidavit that they are each residents and householders, or freeholders, within the State, and are each worth the sum specified in the undertaking * * *."

where security is necessary; the Code of Civil Procedure simply prescribes what the sureties must undertake and what the officer taking the bond must require in the event a freeholders' bond can be and is furnished. Section 834 of the Corporations Code, which relates specifically to and controls the present proceeding, does not prescribe the type of security which can be required; its provision that "the court shall fix the nature and amount of security" leaves the matter to the sound discretion of the trial court. Where the trial court determines upon sufficient evidence that there is slight probability that plaintiff's representative suit has merit and where from the nature and multiplicity of issues involved it appears that the trial might be an extended one, and that counsel might have to prosecute or defend appeals, we cannot hold that the court, as a matter of law, abused its discretion in fixing either the amounts or character of security here prescribed.

[17–19] It is furthermore to be observed that, regardless of the propriety of the order requiring deposit of security for the individual defendants, the judgment of dismissal is, for another and independent reason, the only proper judgment here. Plaintiff failed and refused to furnish the security for the corporation as ordered. The corporation is an indispensable party to a representative action brought on its behalf; its rights, not those of the nominal plaintiff, are to be litigated, and the court has no jurisdiction to adjudicate its rights in its absence as a party. Dismissal of the corporation at any stage in a representative action must result in a discontinuance of the action, not for a mere defect in parties, but for lack of jurisdiction to proceed. (Beach v. Cooper (1887), 72 Cal. 99, 103, 13 P. 161; Wickersham v. Crittenden (1892), 93 Cal. 17, 33, 28 P. 788; Turner v. United Mineral Lands Corp. (1941), 308 Mass. 531 [33 N.E.2d 282, 286].) Therefore, when plaintiff refused to deposit the security required for the corporation, the action could not continue against that indispensable party, or in its absence against any other party, and the trial court had no alternative but to dismiss as to all defendants.

[20, 21] Plaintiff contends, finally, that the court below erroneously dismissed the action at a time when his motion to change the amount and form of security was pending. As previously stated, the order of August 27, 1951, required that plaintiff deposit security within thirty days and that if he did not do so the action, upon proper showing, should be dismissed. Twice on ex parte application of plaintiff a judge signed an order purporting in effect to modify the original order (which had been regularly entered after hearing on notice), by extending the time for deposit of the security. Although defendants have, for the purpose of argument, assumed that the ex parte orders might be effective, at least in part, this assumption is contrary to the established rule that "the trial court is without power to set aside an order involving judicial action and regularly made, and enter another and different order *without notice* to the adverse party." (Harth v. Ten Eyck (1941), 16 Cal.2d 829, 834, 108 P.2d 675; Bond v. Farmers & Merchants Nat. Bank (1944), 64 Cal.App.2d 842, 848, 149 P.2d 722.) In this case the determination, and the fixing by the order, of the period which under all the circumstances shown would constitute a reasonable time for the furnishing of the security was just as much a part of the "judicial action" as was the determination and fixing of the amount and character of the security to be required. A motion seeking to amend that order in any particular which had been fixed as a part of judicial action could be entertained only upon notice to the adverse parties. It follows that the purported orders postponing the time for deposit of the security, having been made ex parte, were ineffective.

[22, 23] Plaintiff's subsequent motion to change the form and amount of security and the date for furnishing the same, however, was properly before the court for disposition, upon notice and after argument. Section 834 of the Corporations Code provides, "The amount of such security may thereafter from time to time be increased

or decreased in the discretion of the court upon showing that the security provided has or may become inadequate or is excessive." The trial court had power to reconsider the questions of the appropriate amount and form of security (see Harth v. Ten Eyck (1941), supra, pp. 833–834 of 16 Cal.2d pp. 677–678 of 108 P.2d) and it did reconsider those questions. But whether it should grant or deny plaintiff's motion was a matter addressed to its sound discretion. And it was only after it had determined, in the exercise of that discretion, that the motion should be denied that, on December 19, 1951, it entered the judgment of dismissal. The fact that the minute order for dismissal was entered on December 14 is immaterial.

For the reasons above stated the judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

EDMONDS, Justice.

I concur in the judgment upon the ground that the plaintiff failed to provide security for the corporation as ordered by the court.

CARTER, Justice.

I dissent.

It is my considered opinion that certain portions of section 834 of the Corporations Code, as applied here, are unconstitutional, particularly the requirement that plaintiff shareholder in a derivative suit furnish security for the expenses of individual defendants who are sued, not as officers or employees of defendant corporation, but as third persons who dealt with the corporation. Such a provision is violative of the equal protection clause of the federal Constitution (U.S.Const., Amendment XIV, § 1) and the provisions of the California Constitution against special laws (Cal.Const., art. IV, § 25).

Section 834 provides that within thirty days after service of summons in a shareholder's action the corporation *or other defendant* may move the court for an order requiring plaintiff shareholder to furnish security for the reasonable expenses, including attorney's fees of the corporation and the moving party which will be incurred in the defense of the action. This means that as a condition precedent to the maintenance of the action a stockholder plaintiff can be required to post security not only for the corporation's expenses but also for the expenses, including attorney's fees, *of third party defendants who are neither officers, directors, nor employees of the corporation.* It is in this respect that I would hold the statute unconstitutional as a denial of equal protection.

The majority recognizes the fact that this precise question has never yet been decided as it states: "However, inasmuch as some of the particular aspects of plaintiff's arguments as to the constitutionality of a provision for security for and possible indemnification of an individual defendant who is not sued as an officer or employe of a corporation appear to be advanced in this case for the first time we give specific consideration to those aspects of his arguments." In spite of this, the majority opinion proceeds to merely gloss over the issue by inadequately discussing the principal constitutional objection and then saying: "Fundamentally, plaintiff's arguments as to constitutionality are answered, either directly or by necessary implication, by Cohen v. Beneficial Industrial Loan Corp. (1949), 337 U.S. 541 (69 S.Ct. 1221, 93 L.Ed. 1528) * * *." Following this statement it admits that the New Jersey statute, involved in the Cohen case, "(* * * so far as appears, * * * contained no provision as to, and the opinion does not discuss, individual defendants who were not officers or employes) * *."

In the case of Cohen v. Beneficial Industrial Loan Corp., supra, 337 U.S. 541, 69 S.Ct. 1221, 1227, the United States Supreme Court upheld a statute requiring security to be posted *for the corporation* when a shareholder brings a representative suit. The court there held that such a classification was a proper one since the shareholder can be required by state legislation *to protect the corporation he seeks to represent*. It said: "And while the stockholders have chosen the corporate director or manager, they have no such election as to a plaintiff who steps forward to represent them. He is a self-chosen representative and a volunteer champion. The Federal Constitution does not oblige the state to place its litigating and adjudicating processes at the disposal of such a representative, at least without imposing standards of responsibility, liability and accountability which it considers will *protect the interests he elects himself to represent.*" (Emphasis added.) Thus it would appear that it may be proper for a state to require a stockholder plaintiff to protect the *interests he is representing* by posting security, but this cannot be construed to mean that he is to protect all interests including the third party defendants against whom he proceeds. The majority also cites Hogan v. Ingold, 38 Cal.2d 802, 243 P.2d 1, as answering "either directly or by necessary implication" plaintiff's arguments as to the constitutionality of section 834 but it follows this by saying: "(in which the problem as to such individual defendants did not arise) * * *."

The majority seems to feel that it is not essential to make a complete study of this constitutional question as is illustrated by the following statement: "* * * regardless of the propriety of the order requiring deposit of security for the individual defendants, the judgment of dismissal is, for another and independent reason, the only proper judgment here. Plaintiff failed and refused to furnish the security for the corporation as ordered. * * * Therefore, when plaintiff refused to deposit the security required for the corporation, the action could not continue against that indispensable party, or in its absence against any other party, and the trial court had no alternative but to dismiss as to all defendants." This argument is misleading as it overlooks the fact that even if plaintiff had posted security for the corporation he still would not have been able to proceed against the other defendants without first furnishing the security prescribed as to them. In view of this and the fact that grave questions of constitutionality were involved, plaintiff appears to have followed a proper course of action by appealing from the order of dismissal.

It is well recognized that the equal protection clause prohibits discriminating and partial legislation in favor of particular persons as against others in like condition. The United States Supreme Court has said that: "* * * equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; *that they should have like access to the courts of the country* for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition * * *." Emphasis added; Barbier v. Connolly, 113 U.S. 27, 31, 5 S.Ct. 357, 359, 28 L.Ed. 923.

The equal protection clause does not prevent the Legislature from setting up different requirements for different types and classes of litigants; however, a state legislature may not arbitrarily select certain individuals for the operation of its statutes since such selection is obnoxious to the equal protection clause. Legislation which is directed toward certain limited individuals and not against others can only be sustained if the classification is a reasonable one based on adequate grounds.

Under the provisions of section 834, a situation is presented where the plaintiff in a shareholder's derivative suit may be required to pay the defendant's attorney's fees if he is unsuccessful, but the defendant is not required to pay plaintiff's counsel fees if the latter wins. Such a statute gives one party greater rights and advantages than the other and is invalid unless there is some adequate reason why third party defendants should receive different treatment than the plaintiff shareholder. No such adequate reason has been advanced by the majority and I am convinced the legislation is arbitrary and a denial of the equal protection of the law in that the classification is an unreasonable one.

Discriminatory legislation of this type was held unconstitutional in Builders' Supply Depot v. O'Connor, 150 Cal. 265, 88 P. 982, 17 L.R.A.,N.S. 909. In that case the Mechanic's Lien Law provided for attorney's fees only to those who established their claim under said law and not to those who successfully resisted such claim of lien. In holding such a law unconstitutional this Court, 150 Cal. at page 268, 88 P. at page 983, said: "This provision is, in our opinion, violative both of the federal and the state Constitution—of the 14th amendment of the former, which guarantees to every person 'the equal protection of the law,' and of the provisions of the state Constitution which provide that general laws shall be uniform, prohibit special laws, and declare the inalienable rights of all men of acquiring, possessing, and protecting property. A statute which gives an attorney's fee to one party in an action and denies it to the other, and allows such fee in one kind of action and not in other kinds of actions where, as in the statute here in question, the distinction is not founded on constitutional or natural differences, is clearly violative of the constitutional provisions above noticed."

If plaintiff did furnish security and the action were prosecuted to judgment the individual defendants, under section 834, could recover attorney's fees from plaintiff if they prevailed but plaintiff could not recover such fees from the individual defendants if he prevailed. What sound basis can there be for the provision in section 834 which gives a third party defendant, who is not an officer or employee of the defendant corporation, this preferential treatment? Merely because an individual defendant is sued in a derivative suit does not put him in any substantially different position than if he had been sued directly by either the corporation or by plaintiff and for this reason he should not be entitled to any special consideration. It is true that the corporation shall be responsible for the costs and counsel fees of a plaintiff who has successfully maintained a shareholder's derivative suit but this does not remedy the situation since the plaintiff is still put to the disadvantage and expense of posting security for a defendant who is under no corresponding disadvantage.

Even if the shareholder could ultimately prevail, this requirement of an advance security for each individual defendant might impose such a severe financial strain upon the shareholder that he would be unable to raise the money and consequently be unable to continue with the derivative suit. In the instant case the trial court required a bond of $5,000 for each individual defendant. What if there had been twenty or more such defendants? How many small shareholders are in a position to post security bonds of $100,000 or more? As a practical matter a requirement of this type would keep most small shareholders from bringing derivative suits and is therefore highly discriminatory.

It has been said that the purpose of statutes of this type is to protect corporations, their directors, officers, and employees against so-called "strike suits" and the litigation expenses which may be unjustifiably foisted upon them; however the California legislation goes beyond this in that it imposes liability on the plaintiff for the expenses of successful stranger defendants under certain conditions.

It is frequently argued that the posting of such security in favor of the corporate defendant is justifiable since where the shareholder elects himself as the champion of the corporation's cause of action he should be liable for any expenses which he brings about should he be unsuccessful. See, Cohen v. Beneficial Industrial Loan Corp., supra, 337 U.S. 541, 69 S.Ct. 1221. Such an argument is not applicable where such special protection is given to a third party defendant who would be entitled to no special consideration if he had been sued directly by the corporation or by an individual plaintiff. The mere fact that the individual defendant is sued in a derivative suit does not put him at any greater disadvantage than if he were sued directly, and for this reason, he should not be entitled to special protection at the expense of the plaintiff shareholder.

Even prior to 1949 the California courts recognized that a plaintiff must meet certain requirements in order to maintain a shareholder's derivative suit. Such requirements were found necessary to protect corporations from the so-called "strike suit" or "shakedown suit" wherein a plaintiff sued primarily to harass the corporation into a pecuniary settlement. The early case of Whitten v. Dabney, 171 Cal. 621, 154 P. 312, helped to remove a primary cause of the strike suit by holding that once commenced a stockholder plaintiff could compromise his suit only under the strict surveillance of the court. However, in 1949 with the passage of section 834, the California Legislature went even further in the curtailment of stockholder's derivative suits. The California legislation was in part patterned after the New York Act (N.Y.General Corporation Law, McK.Consol.Laws, c. 23, § 61–b) but it went far beyond its predecessor in the requirement that plaintiff can now be held liable for the expenses of successful stranger defendants under certain conditions.

The primary purpose of legislation of this type has been said to be "to protect corporations, their directors, officers, and employees against so-called 'strike suits' and the litigation expenses which may be unjustifiably foisted upon them." Ballantine, Abuses of Shareholders Derivative Suits: How Far is California's New "Security for Expenses" Act Sound Regulation? 37 Cal.L.Rev. 399. In order to carry out this purpose the New York Law (N.Y.General Corporation Law, supra, § 61–b), the New Jersey Law (N.J.Stat. Ann. 14:3–14, 15) and the Pennsylvania Law (Pa.Stat.Ann., Tit. 12, §§ 1321–1323) each provides that the shareholder plaintiff post security for the expenses of the corporation and the other defendants for whose costs the corporation may be liable (i. e., directors, officers and employees). However, they do not require that he post security for the expenses of third person defendants who are neither directors, officers nor employees of the corporation since the corporation which plaintiff elects to represent would not be liable for such expenses. In California section 834 purports to go considerably further than the laws of its sister states in requiring the plaintiff shareholder to be liable for the attorney's fees of third party defendants even though the corporation itself could not be held liable for such expenses. Such a provision is not only unwarranted but it is a denial of the equal protection of the laws since it requires the plaintiff shareholder to post security for the third party defendants attorney's fees without imposing a corresponding liability on the third party defendant.

Some authorities hold that it is a prudent precaution to attempt some reasonable regulation of derivative actions to prevent strike suits, but I feel that the rule of Whitten v. Dabney, supra, 171 Cal. 621, 154 P. 312 (limiting the shareholder's right to settle derivative suits once commenced) and the provisions of section 834 requiring security for the corporation's expenses are sufficient. I see no sound reason why the plaintiff shareholder should be further limited by having to post security for the expenses of third party defendants.

Granting that some restrictions are necessary it should be remembered that "Great evils, however, will result if undue obstacles are placed in the path of a shareholder who has legitimate grounds for suing. The derivative action is practically the only remedy for calling the management to account for its wrongs against the corporation and to obtain restitution." Ballentine, Abuses of Shareholders Derivative Suits, supra, 37 Cal.L.Rev., 399, 416.

For these reasons I feel there is no adequate basis for the discriminatory provisions of section 834; that they violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and constitute an undue impediment to the very necessary stockholders derivative suit. It must be remembered that the reported decisions of this Court show many instances in which stockholders of corporations have been defrauded and that many derivative suits have been meritorious.

I would therefore reverse the judgment of dismissal.

122 Cal.App.2d 661

Ex parte GUTIERREZ.

Cr. 2492.

District Court of Appeal, Third District, California.

Jan. 19, 1954.

Habeas corpus proceeding. The Superior Court, Colusa County, Warren Steel, J., entered order discharging petitioner from custody, and state appealed. The District Court of Appeal, Van Dyke, P. J., held that record which disclosed a waiver by petitioner of his right to counsel, the entry of a plea of guilty with full knowledge of character of charges and proceedings, and refusal to permit petitioner to thereafter withdraw the plea, disclosed no loss of jurisdiction in trial court through failure to accord due process.

Order reversed.

1. Habeas Corpus ⇨85(1)

District Court in which complaint charging defendant with disturbing the peace and with battery was filed, and which issued warrant of arrest upon which defendant was apprehended, and before which defendant was brought and waived his rights to counsel, after being fully advised thereof, had jurisdiction over the subject matter and the person, and presumption of regularity of judgment entered on plea of guilty applied in subsequent habeas corpus proceeding. Pen.Code, §§ 242, 415.

2. Habeas Corpus ⇨85(1)

A petitioner seeking habeas corpus is not confined to face of record while attempting to sustain his burden of proving that his conviction was an invasion of his constitutional rights, but actual evidence introduced at trial if a trial was had, may be examined and court may receive in addition any proper evidence bearing upon the question of infringement of such rights.

3. Habeas Corpus ⇨85(1)

In habeas corpus proceeding, wherein it appeared that respondent had first pleaded not guilty to charges against him, but that he had changed his plea after judge allegedly indicated his displeasure, and that defendant's leave to withdraw plea of guilty after sentence was pronounced was denied, admission of evidence bearing primarily on guilt or innocence of respondent, was not error, when evidence was limited to purpose of throwing light upon issues involved in the habeas corpus proceeding.

4. Habeas Corpus ⇨113(12)

On appeal from order in habeas corpus proceeding discharging respondent from custody, evidence would be taken most strongly in favor of order appealed from, and conflicts would be resolved in favor of the respondent.

5. Constitutional Law ⇨257

In proceeding on petition for writ of habeas corpus by respondent who, after having waived right to counsel, entered plea of guilty to charges of disturbing the peace, and battery, wherein it was contended that respondent had first entered plea of not guilty, but that plea had been changed when judge indicated his displeasure, record, disclosing no contention of lack of knowledge on part of respondent of character and extent of charges against him, and of the proceeding being taken, disclosed no failure to accord due process to respondent.

6. Constitutional Law ⇨268

Fact that proceedings on charges of disturbing the peace and battery may have been hastily conducted was not a denial of due process to defendant who entered plea of guilty, in absence of some claim, supported by some showing, that because of the haste defendant was unable to act intelligently and with understanding as to what was transpiring.

7. Criminal Law ⇨274

A defendant charged with an offense is not entitled to gamble on the anticipated result of a plea of guilty, and when disappointed in the outcome, re-establish a right to a trial by withdrawing such plea, and refusal to vacate a guilty plea in such circumstances is not an abuse of discretion, when there is no evidence of duress, fraud or overreaching of his free will in connection with the plea.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., for appellant.

Cooney & Littlejohn, Colusa, for respondent.

VAN DYKE, Presiding Justice.

[1] Respondent, Jose Gutierrez, successfully petitioned the Superior Court in Colusa County for a writ of habeas corpus. The People appeal from the order of the trial court discharging him from the custody under which he was being held. The record shows that a complaint was filed against respondent containing two counts, by one of which he was charged with disturbing the peace. Pen.Code, Sec. 415. The other count charged him with battery. Pen.Code, Sec. 242. Upon filing the complaint the Judicial District Court issued a warrant of arrest and respondent was apprehended. He was brought before the court and advised of his rights to counsel, which he waived. He pleaded guilty and sentence and judgment were pronounced against him and he was ordered into custody to serve out his sentence. It thus appears that the court had jurisdiction over the subject matter and the person, and the presumption of regularity applies. Brush v. Smith, 141 Cal. 466, 75 P. 55; In re Bell, 19 Cal.2d 488, 500, 122 P.2d 22. Some six weeks after his commitment respondent filed his petition for a writ of habeas corpus. A hearing was held after the return was made and the record on appeal shows the following: Petitioner was 27 years of age, had been educated through the eight grade in Texas and California, and had lived in Princeton, California, for about eight years. His occupation was farm laborer and musician. He had been previously arrested on five occasions, in four of which the proceedings were dropped. To one charge he pleaded guilty and served a two months' sentence.

In the instant case he was arrested and taken to the Colusa County jail where he was held about 45 minutes. He was then taken to the justice's court along with five other defendants charged in the same complaint with the same crimes, three of which defendants were his brothers. All pleaded guilty, but when respondent was asked for his plea he at first pleaded not guilty. The judge, with an angry expression, exclaimed "What?" and respondent then said that he didn't want to wait for trial because he had a job in Sacramento and wanted to go there the next day, that he thought he could get out with a fine and that for these reasons he would plead guilty. The judge replied, "Do you want to make a guilty plea?" and respondent said "yes". He was thereupon sentenced to serve 90 days upon the count charging disturbance of the peace, 6 months upon the count charging battery, and in addition was fined $250 in default of payment of which he was to serve one day for each $2 of the fine. It was directed that the sentences run consecutively. Thereupon the respondent asked leave to withdraw his plea of guilty and to plead not guilty, to which the judge responded, "That is all", and court was adjourned. At the hearing on the petition for habeas corpus, over the objection of the People, the court received considerable evidence which bore primarily on the guilt or innocence of respondent. Such evidence was, however, limited to the purpose of throwing such light as might be given thereby upon the issues involved in the habeas corpus proceeding.

[2, 3] Appellant here complains of the trial court's action in receiving evidence touching upon the question of guilt or innocence. However, it is well settled that a petitioner seeking habeas corpus is not confined to the face of the record while attempting to sustain his burden of proving that his conviction was an invasion of his constitutional rights. The actual evidence introduced at petitioner's trial if a trial had been had may be examined and the court may receive any proper additional evidence bearing upon the question of infringement of such rights. In re Bell, supra, 19 Cal.2d at page 501, 122 P.2d 22. This evidence is, of course, not received in order to pass upon the sufficiency of the evidence to support a verdict or, in a situation such as presented by this appeal, where the judgment assailed rests upon a plea of guilty, to pass upon the guilt or innocence of the petitioner. As the trial court here properly stated, guilt or innocence was not an issue before him, and of course it follows as a corollary that in re-

viewing the trial court's order granting the writ no inference can be indulged that the trial court considered respondent to have been innocent of the charges made against him. We find no error in the receipt of the evidence for the limited purpose for which it was admitted.

[4, 5] Upon this appeal we are, of course, bound by the usual rule that the evidence must be taken most strongly in support of the order appealed from and conflicts must be resolved in favor of respondent. But applying this rule, we find no warrant for the setting aside of the judgment of the justice's court. Respondent does not contend that he did not know and appreciate the character and extent of the charges made against him; or that he did not know the character of the proceedings being taken; or that he did not know he had a right to plead not guilty to the charges made; or that he did not know he would receive the sentence of the court if he pleaded guilty. He does not contend that he was not advised of his right to counsel or that he did not understand that if he waived his right to counsel the proceedings would go forward upon his own representation of himself. And if such contentions were here advanced the record would not bear them out. Indeed, his petition, considered as a traverse, and summarized, advances only the following claims:

1. That petitioner was innocent of the charges against him.

2. That when brought before the court he "attempted to plead not guilty to the charge" but that the judge "argued with him about his plea, and that Petitioner thought that if he did not plead guilty he might be incarcerated for some time, and that he had a job in Sacramento and thought that if he should plead guilty he would merely get a fine and would be able to pay his fine and go free, and that was his sole and only reason for entering a plea of guilty."

3. That the proceedings in the justice's court were very hastily held and took but a few minutes of time.

4. That he was not represented by an attorney at any stage of the proceedings.

[6, 7] That respondent was not guilty was, as we have said, not an issue that he could tender in a habeas corpus proceeding; that the proceedings in the justice's court were hastily held is not a matter of complaint in the absence of some claim, supported by some showing, that because of the haste he was unable to act intelligently and with understanding as to what was going on. It may be said that most proceedings which involve arraignment and a plea of guilty are completed within a few minutes of time. If respondent stated any cause whatever for the issuance of the writ which he asked, it must be sought in his allegations as to the manner in which his plea of guilty was received. But here his petition does not go far enough in that it does not charge that the judge by arguing with him about his plea in any wise prevented him from pleading not guilty. If we now look to the evidence he introduced upon this matter we find that he did enter a plea of not guilty; that no argument was indulged in by the judge, although he exclaimed, "What?" with an angry mien; and that thereupon, and for the reasons given both in the petition and his testimony, he changed his plea. He has steadfastly maintained that he changed his plea because he wanted to get back to his job in Sacramento; thought that if he did not plead guilty he might be convicted and incarcerated for a considerable time; and thought that if he did plead guilty he would get nothing but a fine which he would be able to pay and go free. These matters, as he states in his petition, constituted his "sole and only reason" for entering "a plea of guilty." A defendant charged with an offense cannot be permitted to gamble on the anticipated result of a plea of guilty and when disappointed in the outcome reestablish a right to a trial. For aught that appears, the court was fully justified in refusing to vacate the guilty pleas. Petitioner's evidence fails to show any duress fraud or overreaching of his free will. People v. Outcault, 90 Cal.App.2d 25, 30, 202 P.2d 602. Although he testified that when he pleaded guilty the judge appeared to be angry, he does not claim that he was frightened into a withdrawal of his plea, but on the contrary takes the position that

under all the circumstances, including the apparent displeasure of the court, he concluded to attempt to obtain clemency by a plea of guilty.

The record here presented lacks any showing of any loss of jurisdiction through failure to accord due process.

The order appealed from is reversed.

SCHOTTKY and PEEK, JJ., concur.

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122 Cal.App.2d 509

GENERAL ELECTRIC CO.
v.
FEDERAL EMPLOYEES' DISTRIBUTING CO.

Civ. 20067.

District Court of Appeal, Second District,
Division 1, California.
Jan. 12, 1954.

Proceeding on motion by plaintiff to consolidate appeals and cross appeal of plaintiff and defendant. The District Court of Appeal, Drapeau, J., held that in absence of showing that defendant would be prejudiced by consolidation, rule providing that where several parties appeal from same judgment or any part or parts thereof, or where there is a cross appeal, a single record on appeal shall be prepared and filed within time prescribed for filing record at latest appeal, would prevail.

Motion granted.

1. Appeal and Error 🔑1074(3)

Technical objections to presentation of appeals are not favored and in absence of showing of injury to some right of adverse party, will not be sustained.

2. Appeal and Error 🔑595

In absence of showing that defendant would be prejudiced by consolidation of appeals and cross-appeal of plaintiff and defendant, rule providing that where several parties appeal from same judgment or any part or parts thereof, or where there is a cross-appeal, a single record on appeal shall be prepared and filed within time prescribed for filing record in latest appeal, would prevail. Rules on Appeal, rule 11(a).

Meserve, Mumper & Hughes, and E. Avery Crary, Los Angeles, for plaintiff-appellant.

Butterworth & Smith, Los Angeles, for defendant-appellant.

DRAPEAU, Justice.

Plaintiff has made a motion in this court for an order to consolidate "appeals and cross-appeal of appellant and respondent companies" from judgment and orders entered by the Superior Court in Case No. 609605.

From the Certificate of the Clerk of the Superior Court, and the affidavit of plaintiff in support of the original notice of motion, the following facts have been marshaled:

Plaintiff sought in the lower court to permanently enjoin defendant and others from "advertising or selling any commodity manufactured by plaintiff under the trademark 'General (GE) Electric', at less than fair trade prices."

On July 15, 1953, the trial court granted the motion of defendant for nonsuit at the conclusion of plaintiff's case.

On July 20, the court signed a document entitled Formal Judgment of Nonsuit, setting forth the grounds upon which the nonsuit was granted, and ordering that the preliminary injunction be dissolved.

On August 13, the trial court signed an "Order Correcting Minute Order Nunc Pro Tunc and Vacating Judgment Inadvertently Entered on Erroneous Minute Order", which was entered on August 17, 1953. This order stated that through inadvertence and misprision there had been omitted from the minute order entered by the Clerk on July 17, 1953, a provision that the preliminary injunction then in force be vacated and dissolved, that such minute order be considered a memorandum only for the guidance of counsel and that a formal order embodying the decision of the Court be prepared by counsel for defendant. It also provided, that the said original minute order of July 15, 1953 (entered July 17, 1953) was thereby vacated and cancelled, and ordered that the judgment of nonsuit signed by the Court on July 20, 1953, "is the final judgment and decision of this Court upon defendant's motion for nonsuit herein."

On August 17, 1953, a minute order was made vacating the order of July 15, 1953.

On September 8, 1953, plaintiff filed its notice of appeal from all of the above mentioned orders and the purported judgment.

On October 2, 1953, plaintiff's motion for a new trial was granted.

On October 20, defendant appealed from the order granting the new trial.

Thereafter, on October 30, plaintiff filed its notice of cross-appeal by which it "appeals from all orders and purported judgment appealed from in its Notice of Appeal filed September 8, 1953."

In all three appeals requests for preparation of Clerk's and Reporter's transcripts have been filed, to-wit: by plaintiff on September 8 and October 30; and by defendant on October 29, 1953. Plaintiff avers that the record required by it on its appeal and cross-appeal will be identical and the record required by defendant includes all of the record.

It is also averred as follows: "It is necessary that plaintiff pursue both its appeal and cross-appeal * * * by reason of the fact that one of the points urged by defendant in its appeal as evidenced by points and authorities submitted to the trial court in opposition to plaintiff company's motion for new trial, will be that plaintiff company's notice of intention to move for new trial was not filed within the time allowed by law."

In opposition to the motion, defendant asserts that "The party against whom a judgment has been rendered and who has taken and perfected a valid appeal therefrom has no right thereafter to take a second appeal from the same judgment." It is not necessary to pass upon that point in connection with the motion now before this court.

Rule 11(a) of Rules on Appeal, 36 Cal.2d 13, provides as follows:

"Where several parties appeal from the same judgment or any part or parts thereof, or where there is a cross-appeal pursuant to Rule 3(a) or 3(b), a single record on appeal shall be prepared and filed within the time prescribed for filing the record in the latest appeal. Such record shall be prepared in accordance with Rules 4 and 5 unless all appellants give notice of intention to proceed under Rule 7, or unless the parties stipulate to proceed under Rule 6. Unless the superior court orders otherwise, the initial expense of preparing the record shall be borne equally by the parties appealing. (*As amended, effective Jan. 1, 1951.*)"

[1, 2] As was stated in Sharick v. Galloway, 12 Cal.App.2d 733, 736, 55 P.2d 1196, 1198, "Technical objections to the presentation of appeals are not favored and, in the absence of a showing of injury to some right of the adverse party, will not be sustained." See, also, McClure v. Donovan, 82 Cal.App.2d 668, 186 P.2d 720.

It has not been indicated that defendant will be prejudiced by a consolidation of the three appeals. Consequently, Rule 11(a), supra, should prevail.

The motion to consolidate appeals is granted.

WHITE, P. J., and DORAN, J., concur.

122 Cal.App.2d 498

McCOSKER et ux. v. McCOSKER et ux.

Civ. 8296.

District Court of Appeal, Third District,
California.

Jan. 11, 1954.

In parents' action against their son and his wife to have resulting trust declared in certain real and personal property and for an accounting of profits derived from such property, the Superior Court, Lake County, Benjamin C. Jones, J., rendered judgment adverse to defendants, and they appealed. The District Court of Appeal, Schottky, J., held that the appeal taken was so lacking in merit and had been so inadequately presented that it must be regarded as frivolous and a penalty assessed against defendants.

Affirmed.

1. Appeal and Error ⚿757(3), 931(1)

Reviewing court must presume that record contains evidence to support every finding of fact, and appellant who contends that some particular finding is not supported is required to set forth in his brief summary of material evidence upon that issue, on penalty of having error assigned deemed waived.

2. Trusts ⚿89(1)

In parents' action against their son and his wife to have resulting trust declared in certain real and personal property and for an accounting of profits derived from such property, trial court's finding that resulting trust had been created was fully supported by record, notwithstanding defendants' contention that gift presumption had not been overcome.

3. Limitation of Actions ⚿103(2)

Statute of limitations did not begin to run until there had been repudiation of resulting trust. Code Civ.Proc. § 343.

4. Limitation of Actions ⚿39(11)

Four-year statute was applicable to parents' action against their son and his wife to have resulting trust declared in certain real and personal property and for an accounting of profits derived from such property. Code Civ.Proc. § 343.

5. Costs ⚿260(4)

Defendants' appeal from adverse judgment, in parents' action against their son and his wife to have resulting trust declared in certain real and personal property and for an accounting of profits derived from such property, was so lacking in merit and so inadequately presented that it would have to be regarded as frivolous. Rules on Appeal, rule 26(a).

6. Costs ⚿260(1)

District Court of Appeal has duty in extreme situations to discourage taking of appeals in civil cases upon frivolous grounds, or solely for delay. Rules on Appeal, rule 26(a).

7. Costs ⚿260(6½)

Where appeal in civil cases is taken upon frivolous grounds or solely for delay, it is usually unknown to District Court of Appeal whether appeal was inspired by insincere or negligent advice given by attorney or by insistence of stubborn client, and hence penalty should usually be imposed upon party and matter of responsibility left to private adjustment. Rules on Appeal, rule 26(a).

8. Costs ⚿260(1)

Purpose of imposing penalty where appeal in civil cases taken upon frivolous ground or solely for delay is to discourage practice which hampers administration of justice, and not merely to chastise individual litigant. Rules on Appeal, rule 26(a).

9. Costs ⚿263

Penalty of $150 was imposed against defendants for having taken frivolous appeal. Rules on Appeal, rule 26(a); Code Civ.Proc. § 957.

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Burke & Rawles, by John E. Nelson, Ukiah, for appellants.

H. G. Crawford, Lakeport, for respondents.

SCHOTTKY, Justice.

Respondent parents brought an action against their son and his wife to have a resulting trust declared in certain real and personal property and for an accounting of the profits derived from said property. The trial court found that the parents owned an undivided one-half interest in the real and personal property, ordered that an account be taken by a referee, and upon the settlement of the referee's final report, gave judgment accordingly. The son and his wife have appealed from said judgment, their appeal being filed by different counsel than the one who represented them in the trial court. Appellants have filed an opening brief of less than two full pages, have filed no closing brief, and at the time of the oral argument appellants' counsel, although present, waived argument.

One of the points raised is that there is insufficient evidence to support the finding of a resulting trust, and the sole statement of appellants on this point is as follows: "Where a father and son are dealing and one transfers property to the other, there is a presumption that there was a gift and this presumption must be overcome by the evidence. This burden rested upon the plaintiff and he failed to fulfill the obligation of overcoming the presumption."

[1, 2] Although the reporter's transcript consists of 340 pages, appellants make no reference whatever to said testimony. The rule is well established that a reviewing court must presume that the record contains evidence to support every finding of fact, and an appellant who contends that some particular finding is not supported is required to set forth in his brief a summary of the material evidence upon that issue. Unless this is done, the error assigned is deemed to be waived. Kruckow v. Lesser, 111 Cal.App.2d 198, 200, 244 P.2d 19. It is incumbent upon appellants to state fully, with transcript references, the evidence which is claimed to be insufficient to support the findings. The reviewing court is not called upon to make an independent search of the record where this rule is ignored. Goldring v. Goldring, 94 Cal.App.2d 643, 645, 211 P.2d 342.

Notwithstanding appellants' failure to quote from or refer to the record we have examined it and it shows the factual situation to be substantially as follows: The son lived with his parents until he was 22 years of age. For approximately ten years during that time he worked in his father's dairy business. When the son was 22 years old he received from his father a bill of sale for the herd and dairy equipment and, also, an assignment of certain claims belonging to the father. This was in 1932. There is some question whether the transfer was made to forestall an attachment or as compensation for the son's work. It appears that the bill of sale and assignment covered practically all of the father's assets.

Thereafter, the Ricks property in Mendocino County was purchased. There is a conflict in the evidence as to who was the actual purchaser, but the son signed the contract of purchase and the deed named him as vendee. The deed was delivered in 1939. The parents lived on the property until it was sold in 1944; the son lived there only a part of the time. There is evidence that both the father and the son made improvements on the property and also made payments for taxes and on the purchase price, but there is a dispute as to the extent of the improvements and payments made by each. The father cared for the livestock and buildings, and the son did the same when he was on the property. In 1942, at the father's request, the son and his wife gave the father a deed conveying a one-half interest in the Ricks property. The son admitted at the trial that the deed was given so that he could not put his parents "out on the road." This deed was not recorded.

The Ricks property was sold in 1944, and the purchase price paid to the son. Later in 1944, the son and his wife entered into an agreement with the owners of the Hand ranch in Lake County for the purchase of that property. The testimony is conflicting as to the respective parts played by the father and the son in negotiating and concluding both the sale of the Ricks property and the purchase of the Hand ranch. There is evidence to show that almost two-thirds of the selling price received for the Ricks property was used to make the down payment for the Hand ranch.

Shortly after the purchase agreement was signed, the son moved his parents from the Ricks property in Mendocino County to the Hand ranch in Lake County. He also moved the livestock and equipment. The son visited the ranch from time to time, but did not live there until he moved his family there in the summer of 1948. Both the father and the son worked on the ranch, but there is the usual conflict in the evidence as to how much work each performed. From time to time the son sold livestock from the ranch and did not account to his father for any part of the proceeds.

We are satisfied that the trial court's finding that a resulting trust was created is fully supported by the record.

[3, 4] Appellants' second point that respondents' action was barred by section 343 of the Code of Civil Procedure is likewise without any merit. They argue: "The evidence in this case, taken most satisfactorily against the defendant, would be to the effect that the defendant had collected certain moneys of plaintiff as his agent, and that he had failed to pay them over to the principal; however, more than 4 years had elapsed prior to the institution of the action and the statute of limitations was plead, thus rendering the claim barred by the statute of limitations at the time the suit was instituted."

The record shows that appellants repudiated the trust on January 22, 1947, and that the action was filed on March 4, 1949. The trust being a resulting trust, the statute of limitations did not begin to run until there had been a repudiation of the trust. Lezinsky v. Mason Malt Whiskey Distilling Co., 185 Cal. 240, 244, 196 P. 884. This being an action to establish a trust and for an accounting incidental thereto, the applicable statute of limitations is section 343 of the Code of Civil Procedure which is a four-year statute. Hannah v. Canty, 175 Cal. 763, 768, 167 P. 373; Rubinstein v. Minchin, 46 Cal.App.2d 115, 119, 115 P.2d 537. The instant action was brought within two years and two months after the repudiation of the trust and consequently it is not barred by the statute of limitations.

[5–9] The appeal in this case is so lacking in merit and has been so inadequately presented that we must regard it as frivolous. It would not be fair to other litigants who have had the hearing of their appeals delayed by this appeal, nor would it be fair to this court, to fail to assess a penalty for such a frivolous appeal. As was said in Sipe v. McKenna, 105 Cal.App.2d 373, at page 375, 233 P.2d 615, at page 616:

> "* * * it is obvious that the present appeal is unjustified, vexatious and frivolous and was taken solely for the purpose of delaying and harassing plaintiff. This appeal has not only caused plaintiff an unnecessary expense but has consumed the time of this court which might have been spent in determining meritorious cases. Such appeals apparently can be discouraged only by the imposition of a penalty on the offender as authorized by section 957 of the Code of Civil Procedure. [Citing cases.]"

And as was said in Vickter v. Pan Pacific Sales Corporation, 108 Cal.App.2d 601, 604, 239 P.2d 463, 465:

> "Rule 26a, Rules on Appeal, recognizes the power and implies the duty of reviewing courts to impose penalties for frivolous appeals. It is a power which is seldom used, although the occasions for its use appear to be on the increase. We deem it to be our duty in extreme situations to discourage the taking of appeals in civil cases upon frivolous grounds, or solely for delay. While a penalty may be imposed either upon the party or his attorney, it will usually be unknown to the court whether the appeal was inspired by insincere or negligent advice given by the attorney or the insistence of a stubborn client. Therefore, the penalty should usually be imposed upon the party, and the matter of responsibility be left to private adjustment. The purpose of the imposition of penalties in such cases is to discourage a practice which hampers the administration

of justice, and not merely to chastise an individual litigant."

The judgment is affirmed and respondents are awarded $150 as damages for a frivolous appeal, the same to be assessed as costs on appeal.

PEEK, J., and PAULSEN, J. pro tem., concur.

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122 Cal.App.2d 457

PEOPLE v. KINDER.

Cr. 789.

District Court of Appeal, Fourth District, California.

Jan. 6, 1954.

Defendant was convicted of second degree burglary and of illegally administering an anaesthetic, with felonious intent. The Superior Court, San Diego County, Dean Sherry, J., entered judgment and denied new trial and defendant appealed. The District Court of Appeal, Griffin, J., held that evidence, together with reasonable inferences that might be drawn therefrom, were sufficient to establish corpus delicti for purpose of admitting claimed confession or admissions of defendant in evidence.

Judgment and order affirmed.

1. Criminal Law 🔑1144(13)

On defendant's appeal from judgment of conviction, District Court of Appeal would view evidence most favorably to the people.

2. Criminal Law 🔑517(4)

To authorize the reception into evidence of defendant's confessions or admissions, a prima facie showing of the corpus delicti is sufficient, and such showing may consist of circumstantial as well as direct evidence and reasonable inferences to be drawn therefrom.

3. Criminal Law 🔑517(4)

The corpus delicti need not be established beyond a reasonable doubt or even by a preponderance of the evidence for the purpose of receiving admissions or confessions.

4. Criminal Law 🔑406(1), 517(4)

In prosecution for crimes of second-degree burglary and illegally administering an anaesthetic, with felonious intent, evidence was sufficient to establish corpus delicti for purpose of admitting claimed confession or admissions of defendant in evidence. Pen.Code, §§ 222, 459.

5. Criminal Law 🔑410

The mere argument of counsel is not evidence and is not admissible as such unless made as a factual admission formally made and entered in the course of a trial.

6. Criminal Law 🔑410, 1169(12)

In prosecution for crimes of second-degree burglary and illegally administering an anaesthetic, with felonious intent, allowing prosecution to read into evidence a remark made by defendant's counsel in opening statement to jury at a former trial wherein such counsel stated that defendant vaguely remembered can of ether sitting on the floor of home he had entered and picked it up and started out with it was error, but was not prejudicial in view of defendant's evidence indicating that defendant did have the can of ether with him on that occasion. Pen.Code, §§ 222, 459.

7. Criminal Law 🔑371(1)

On rebuttal of defendant's testimony, when he has testified as to his innocent intent, evidence of similar offenses is admissible to rebut his testimony as to his claimed intent where prior acts attempted to be established show an intent by the defendant to commit the same offense with which he stands charged.

8. Criminal Law 🔑371(6)

Where defendant was asked on direct examination by his counsel about what his intentions were when he made advances toward woman whose apartment he allegedly entered with intent to commit rape and he denied any intent to commit an act of sexual intercourse with her, allowing prosecution to ask defendant whether he remembered crawling in bed with another woman on another date while she and her husband were sleeping in a tent on the beach was proper under rule that evidence of similar crimes may be admitted to prove intent. Pen.Code, §§ 222, 459; Const. art. 1, § 13.

9. Criminal Law ⟾1171(1)

In prosecution for crimes of second-degree burglary and illegally administering an anaesthetic, for purpose of rape, allowing prosecution to suggest several reasons why defendant left side of bed of woman whose apartment he allegedly entered and moved to the other side was not prejudicial misconduct, since reasons advanced were merely conjectures on part of prosecution and ultimate question was left to jury. Pen.Code, §§ 222, 459.

10. Criminal Law ⟾1035(6), 1166½(6)

In prosecution for crimes of second-degree burglary and illegally administering an anaesthetic, for purpose of rape, judge's remarking during voir dire examination of jurors that he did not believe it was the law that every element of the crime, such as specific intent, had to be proved beyond a a reasonable doubt was not prejudicial error in absence of objection or request to strike and in view of subsequent instruction. Pen.Code, §§ 222, 459; Const. art. 6, § 4½.

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Clifford L. Duke, Jr., San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Dep. Atty. Gen., for respondent.

GRIFFIN, Justice.

A jury convicted defendant of the crime of burglary (second degree) under Penal Code Section 459, in count one of an information charging that on November 14, 1952, he entered the home of Edward N. Petrick with the intent to commit rape. In count two he was charged and convicted of the crime of illegally administering an anaesthetic, under section 222 of the Penal Code, in that he administered ether to Petrick and his wife Gladys with the intent to enable himself to commit rape upon the wife. Judgment was pronounced and defendant was ordered committed to a state prison, the sentences on each count to run concurrently. Defendant's application for examination as a sexual psychopath was granted and sentence was suspended pending such examination. This appeal followed.

It is defendant's first claim that independent of his claimed admissions or confessions, no corpus delicti of either offense was established by the evidence, and that therefore any evidence of his claimed admissions or confessions was erroneous, citing such cases as People v. Fleming, 94 Cal. 308, 29 P. 647; People v. Simonsen, 107 Cal. 345, 40 P. 440; and People v. Mize, 80 Cal. 41, 22 P. 80.

[1] Viewed from the aspect most favorable to the people, as we must, People v. Renek, 105 Cal.App.2d 277, 281, 233 P. 2d 43, the salient facts are that on November 14, Petrick, with his wife and family, were living on Saipan Street, in Oceanside, in a two-bedroom apartment. About 4:15 a. m. that day Petrick was awakened by feeling someone pushing against his right side. He thought it was their son wanting to come into bed with him and his wife. The defendant jumped out of their bed and was nude excepting for a pair of socks he had on. After ordering Petrick to turn off the light he had just turned on, defendant went to the far side of the bed and stooped down as if picking up something from the floor. Defendant insisted he could explain everything and offered a story about being out with some girls that evening and thought he had found their apartment. He appeared to Petrick to be sober and knew what he was doing. Defendant grabbed his clothes and left through the door which Petrick said had been left closed and thought to have been locked. Petrick chased defendant through the housing quarters and his wife left for the neighbors. The police were notified. After a chase the police found defendant partially dressed and returned him to the

Petrick home. As they re-entered they smelled a "terrible odor" like ether emanating from the pillow and sheet upon which Mrs. Petrick's head had been resting, and on which was noted some wet substance. The sheets on the wife's side of the bed contained this wet substance and were discolored with mud at the foot of the bed (apparently from mud on defendant's socks).

It also appears from the evidence produced by the people that a Mr. Wagner and his wife were living in an apartment near-by. Between 4 o'clock and 4:15 that morning Mrs. Wagner was awakened from her sleep by something cool being dripped on her face. She looked up, saw a man resembling defendant, screamed, and Mr. Wagner awakened and told the man to get out. That man was asking if "Dorothy lived here". He then turned and ran down the stairs. He was partially dressed and in his stocking feet. Wagner thought the intruder had a shiny object like a metal container in his left hand at the time. He noticed an odd smell in the bedroom like "rubbing alcohol". It was later discovered that in the kitchen several cupboard doors and a drawer had been left open but nothing was missing.

A Mr. Fortune and his wife lived nearby and about 4:15 that morning Mrs. Fortune was awakened by some man in their apartment calling "Betty" near their bedroom door. Mr. Fortune told him he was in the wrong house and the man left. They later observed muddy stocking footprints from the front door to the bedroom door and also smelled a peculiar odor like a "hospital smell". They believed their door had been locked before they retired. At the trial it was stipulated that the person entering their apartment was "probably the defendant". Mr. Fortune said the intruder's voice was clear and his speech coherent.

A police officer entered the Wagner home and smelled the strong odor which he believed was ether or chloroform. In front of this address was a Buick automobile. Under it was found a can and a Marine Corps man's shoe. It was near here that the defendant was accosted by the officers, wearing only one such shoe. The officers detected on the person of defendant a similar odor to that of the contents of the can. They asked him where he was going and he said he was returning to the Marine Base and wanted to know why they were stopping him. Defendant repaired to the back seat of the officers' car and seemed exhausted from running. To the officers he appeared to be sober and mentally normal. The can which was found by the officers was taken to be analyzed and its contents were found to contain ether. There was a slit made in the top of the can by some instrument. At the trial the stains on the sheet and pillow from the Petrick's residence were identified as having possibly been made by ether.

After defendant's arrest a signed statement was made by him consisting of questions and answers, the gist of which was that in the early morning hours of November 14, defendant went to his locker room at Camp Pendleton and took from it a can containing ether, which he had previously taken from sick bay; that he had previously been out with two girls (Fran and Dorothy) and two of his buddies; that after leaving the buddies at the base he "cashed himself away" in the trunk of the car and was driven back to Oceanside unbeknown to the girls; that he got out of the trunk of the car after the girls had gone in their home; that he knocked at a residence which he believed was their home but no one came to the door; that he tried several doors of different homes and entered some of the places; that in one home he opened the can of ether with a table knife and shook some of the contents on the bed where two persons were lying; that he turned and left when the man asked him what it was that he had spilled on him; that he entered another place and that the door was unlocked; that he removed all of his clothing except his socks and sprinkled some ether on the pillow and got in bed and discovered that a woman was asleep on the pillow next to him; that he knew there were two persons in the bed and that it was his intention to sprinkle the ether to put the persons to sleep and to criminally assault the woman; that he put his arm around her, although he did not touch her bare flesh, and after being there about a minute he discovered he did not like the ether smell so he got out of that side of the bed and got on the other side of it and discovered a man was beside him; that he heard some talking between the man and woman and asked the man where he could find the bathroom and told him not to turn on the light; that he went over and picked up the ether can and his clothing and left; that while running he fell down, lost his shoe, and threw the ether can under the car; and that while carrying the open can from one house to another he spilled some in his trousers pocket. When questioned later about his reasons for entering these homes the officer asked him if one reason might have been to commit murder and defendant answered "No". He was then asked if he intended to have sexual intercourse with the lady after he removed his clothes and he answered: "That sounds the most logical"; that "I guess what I intended actually to do was to have sexual intercourse, everything was hazy and dim, but that is the only clear thing that can be a motive". However, defendant stated just before signing this statement that he was looking for the two girls that were in the car and he "was after them".

At the time of trial defendant testified to about the same story. He said that he had the ether in his locker because at one time a medical corps man had given him a whiff of ether and it had an exhilarating effect; that he did not have any thought, notion or intention of raping anybody when he went into Petrick's home; that he had no idea why he took off his clothes and got in their bed unless it was because he was tired and wanted to go to bed; that when he fell down and dropped the ether can he inhaled the vapors from it because he felt it would have the same effect as whiskey; that by what he said in his written statement he did not mean to convey the idea that when he went into the Petrick house he intended to have sexual intercourse with Mrs. Petrick nor did he intend to put people to sleep with the ether; that he was not sure that he had the can of ether in the Petrick home, but he remembered having it with him through most of the night and guessed he did have it in there; and that he was sure he never did "anything like this" before. Defendant was then asked if he did not remember crawling in bed with a Mrs. Gallegos while she and her husband were sleeping in a tent on the beach in Oceanside about August 17, 1952. He replied he did not remember any such incident and denied knowing the parties. After defendant so testified the prosecution produced Mr. and Mrs. Gallegos, who testified they were awakened by someone intending to have intercourse with Mrs. Gallegos under a somewhat similar method of approach as related by defendant in the Petrick case, excepting no ether was present. On that occasion the husband was awakened by his wife's screams. He jumped out of bed and knocked the defendant down and the military police were called and took the defendant away. Gallegos testified the defendant appeared to be sober on that occasion.

Defendant then took the stand and admitted the occurrence but contended that he just went into the tent and that some woman then screamed and the man hit him, and after that he "was just trying to find out what everything was about". He then assigned the reason for his first telling the jury it did not occur and that he never saw the Gallegoses before as being that his attorney advised him this other claimed offense could not properly be placed before the jury because evidence of it was inadmissible, since the trial court, in a previous trial, so held when such evidence was offered as part of the people's evidence in chief. Counsel for defendant indicated to the court that he did so inform the defendant and now claims that he was led to believe by the district attorney that such evidence would not again be offered at defendant's second trial; that therefore it was prejudicial error to cross-examine the defendant on this subject.

Defendant produced a marine who testified he was with defendant on the night of November 13th when they drank liquor in several bars in Oceanside. He testified that when they returned to barracks defendant was either "playing possum that he was drunk or he was drunk"; that he did not know defendant had a can of ether and never spoke to the defendant about "whiffing ether to get high".

[2-4] To authorize the reception into evidence of the defendant's confessions or admissions a *prima facie* showing of the corpus delicti is sufficient. This showing may consist of circumstantial as well as direct evidence and the reasonable inferences to be drawn therefrom. The corpus delicti need not be established beyond a resonable doubt or even by a preponderance of the evidence for the purpose of receiving confessions or admissions. People v. Gouldy, 69 Cal.App.2d 6, 10, 158 P.2d 59; People v. Sparks, 82 Cal.App.2d 145, 155, 185 P.2d 652; People v. Kelly, 70 Cal. App. 519, 523, 234 P. 110. The evidence produced, together with the reasonable inferences that may be drawn therefrom, were sufficient to establish the corpus delicti for the purpose of admitting the claimed confession or admissions of the defendant in evidence. People v. Kittrelle, 102 Cal. App.2d 149, 227 P.2d 38; People v. Nye, 38 Cal.2d 34, 36, 237 P.2d 1; People v. Cline, 138 Cal.App. 184, 194, 31 P.2d 1095.

[5, 6] Defendant next complains because the court allowed the deputy district attorney to read into evidence in the instant case a remark made by defendant's counsel in his opening statement to the jury at the former trial, wherein he stated that defendant vaguely remembered the can of ether sitting on the floor of the Petrick home and picked it up and started out with it. In his opening statement in the instant trial he indicated that the evidence would show defendant did not take the can of ether in the house. The mere argument of counsel is not evidence and is not admissible as such unless made as a factual admission formally made and entered in the course of a trial. People v. Hogel, 73 Cal. App. 216, 238 P. 815.

The error in admitting the argument and statement of counsel as to what defendant expected to prove was not prejudicial because the evidence and the statement of the defendant indicates that he did have the can of ether with him on that occasion.

[7, 8] The next contention is that defendant was wrongfully compelled to testify against himself when asked on cross-examination about the Gallegos' event occurring on August 17, 1952, and it is further argued that the evidence of the other offense was inadmissible, citing Article I, Section 13, California Constitution, and such cases as People v. Arrighini, 122 Cal. 121, 54 P. 591; People v. Huston, 45 Cal. App.2d 596, 114 P.2d 607; People v. Asavis, 22 Cal.App.2d 492, 71 P.2d 307; People v. Schmitz, 7 Cal.App. 330, 94 P. 407, 419, 15 L.R.A.,N.S., 717; and People v. McCarthy, 88 Cal.App.2d 883, 200 P.2d 69.

Since defendant was asked, on direct examination by his own counsel about what defendant's intentions were when he made the advances toward Mrs. Petrick, as indicated, and since he denied any intent to commit an act of sexual intercourse with her, the question elicited on cross-examination was proper and the evidence produced was clearly admissible under the rule established in People v. Peete, 28 Cal.2d 306, 169 P.2d 924; People v. Kynette, 15 Cal. 2d 731, 104 P.2d 794; People v. Coltrin, 5 Cal.2d 649, 55 P.2d 1161; and People v. Harrison, 46 Cal.App.2d 779, 117 P.2d 19, to the effect that on rebuttal of the defendant's testimony, when he has testified as to his innocent intent, evidence of similar offenses is admissible to rebut his testimony as to his claimed intent where the prior acts attempted to be established show an intent by the defendant to commit the same offense with which he stands charged.

In People v. Zabel, 95 Cal.App.2d 486, 213 P.2d 60, it was held that rebuttal evidence is properly received under the rule that evidence of similar crimes may be admitted to prove intent where, as in the case at bar, intent is an issue and criminal intent is denied by the defendant. See, also, People v. Zatzke, 33 Cal.2d 480, 202 P.2d 1009; and People v. Nye, 38 Cal.2d 34, 237 P.2d 1. No prejudicial error is shown in allowing the prosecution to cross-examine the defendant in reference to the

Gallegos affair under the circumstances related.

[9] Next, it is argued that the deputy district attorney was guilty of prejudicial misconduct in suggesting several reasons why defendant left Mrs. Petrick's side of the bed and moved over with Mr. Petrick on the night indicated. The reasons advanced were merely conjectures on the part of the prosecutor. The ultimate question presented was left to the jury. The reason advanced may have been faulty and the deduction from the premises illogical, but this was a matter for the jury ultimately to determine, and not a subject for exception on the part of opposing counsel. People v. Willard, 150 Cal. 543, 552, 89 P. 124; People v. Carter, 116 Cal.App.2d 533, 253 P.2d 1016.

[10] Lastly, defendant contends that the trial judge committed prejudicial error during the voir dire examination of the jurors when he interrupted counsel for defendant and remarked that he did not believe it was the law that every element of the crime, such as *specific intent*, had to be proved beyond a reasonable doubt. No objection was made to the remark and no request was made to strike it. Later, the court did properly instruct the jury that as to *specific intent*, the jurors must be convinced beyond a reasonable doubt as to that element before it can return a verdict of guilty. It will be presumed that the jurors followed the instructions as given to them by the judge in his formal charge, and not what he may have believed the law to be in a discussion with counsel during a general questioning of the panel as to their qualifications or for cause. People v. Grimes, 113 Cal.App.2d 365, 371, 248 P.2d 130. No prejudicial error resulted. Art. VI, Sec. 4½, Constitution of California. In the absence of timely objection to the remark or a request for a proper admonition to the veniremen, defendant may not now be heard to complain. People v. Guasti, 110 Cal.App.2d 456, 243 P.2d 59.

It is charged in the amended information that the defendant was previously convicted in the State of Washington of the crime of second-degree burglary, a felony. Defendant denied this prior charge. The record does not indicate what disposition, if any, was made of it. Since no point is made of that fact, we will not consider it.

Judgment and order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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122 Cal.App.2d 480

KANE v. SKLAR.

Civ. 19716.

District Court of Appeal, Second District, Division 3, California.

Jan. 7, 1954.

Rehearing Denied Feb. 3, 1954.

Action for damages and accounting of profits of defendant's business arising out of alleged breach of employment contract whereby plaintiff was to receive a salary, a percentage of profits, and was granted option to purchase one-half of assets. The Superior Court, Los Angeles County, Otho G. Lord, Judge pro tem., found contract was terminated by mutual consent and awarded plaintiff his unpaid salary and money loaned, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that evidence that plaintiff, following an argument with employer, took away his personal belongings from place of business, and employer did not see employee again, supported finding that employment had been terminated by mutual consent and that there had been an abandonment of the agreement.

Judgment affirmed.

1. Appeal and Error 🔑989

In determining whether evidence is legally sufficient, on appeal, only evidence which tends to support the finding may be considered, and testimony given by losing party and his witnesses must be disregarded as far as it is contradictory to that of judgment holder.

2. Contracts ⚷322(1)

In an action for breach of contract, it is incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by contract. Civ. Code, § 1439.

3. Contracts ⚷252, 352(6)

An executory contract may be rescinded, abandoned, or terminated, either wholly or in part, by mutual consent of respective parties at any stage of their performance, and question whether there was an intent to abandon a contract is one of fact to be ascertained from all facts and circumstances surrounding the transaction.

4. Master and Servant ⚷40(3)

In action for breach of an employment contract, evidence, including evidence that employee, following an argument with employer, took away his personal belongings from business premises, and that employer never saw employee again, supported trial court's finding that employment had been terminated by mutual consent and that there had been an abandonment of the agreement. Civ. Code, § 1439.

5. Appeal and Error ⚷197(4)

Where question of abandonment, in action for breach of contract, was one of the issues that were tried without objection, the point that question of abandonment was not within issues pleaded could not be raised for first time on appeal.

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Ernest M. Silver, David I. Lippert, Los Angeles, for appellant.

Harry C. Cogen, Milton N. White, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff brought this action for damages and an accounting of the profits of defendant's business, and also for an amount alleged to be due him for unpaid salary and money loaned. Judgment was in favor of plaintiff for $225 and he appeals.

The action was based upon an alleged breach of a contract by which defendant employed plaintiff to assist him as sales manager and assistant in the conduct of a business in men's wear. The contract recited that plaintiff was possessed of experience in the business and was leaving a lucrative employment in order to become associated with defendant. Plaintiff was to receive $125 per week salary and also 50 per cent of the net profits of the business. He was granted an option to purchase half of the assets of the business for $43,500, which option was to be irrevocable as long as he performed his services under the agreement. No time was fixed for exercise of the option. The term of the employment was to extend until the option was exercised, or until it expired. If plaintiff exercised his option, the parties were to enter into a partnership agreement under which they would have equal shares.

Plaintiff entered defendant's employ March 13, 1950. The contract was executed and dated April 7, 1950. Plaintiff's services were terminated August 11, 1950. The court found that "by the joint acts of the parties hereto and with their joint consent, the employment of said defendant terminated on August 11, 1950." The court found that defendant did not promise plaintiff a lifetime position and that the employment was subject to termination at the will of defendant. $225 was awarded plaintiff as unpaid salary and money loaned.

[1] Plaintiff alleged that he had been discharged without cause. The only question which requires decision on the appeal is whether there was substantial evidence to justify the finding that the employment of plaintiff was terminated by mutual consent. Although the evidence was sharply conflicting as to the circumstances under which plaintiff left the business, familiar rules require that the testimony given by plaintiff and his witnesses, insofar as it was contradictory of that of the defendant, be disregarded. In determining whether the evidence was legally sufficient we may consider only the evidence which tends to support the finding in question. That evidence may be briefly summarized. On August 4, 1950, defendant's accountant presented a statement showing a net loss for the period January 1, 1950 to June 30, 1950, of $9,064.86. Defendant made ef-

forts to borrow money from a bank for working capital, and was unsuccessful. He discussed the precarious condition of the business with plaintiff and they went together to plaintiff's former employer for the purpose of securing a loan, but were again unsuccessful. By August 11th there was insufficient money to meet the payroll. When defendant was informed of this fact he advised plaintiff of the situation and suggested that they both defer drawing their salaries. Plaintiff objected; he became aggressive, insisted on having his salary, and threatened to go to the Labor Commissioner with a complaint. Defendant remonstrated with plaintiff, but the latter stated that if he could not get his pay he was through. He dropped his keys on defendant's desk and walked out, but returned later and took away his personal belongings. Defendant did not see or converse with him again about the matter.

Although the essential allegation of the complaint was the claimed discharge of plaintiff, the finding that the employment was terminated by mutual consent negatived this allegation. The finding establishes that plaintiff was not discharged but quit voluntarily, and that defendant did not breach the contract.

[2] The action is primarily for breach of contract. It was therefore incumbent upon plaintiff to prove that he was able and offered to fulfill all obligations imposed upon him by the contract. Civ.Code, § 1439. Plaintiff failed to meet this requirement; by voluntarily withdrawing from the contract he excused further performance by defendant.

[3, 4] "An executory contract may be rescinded, abandoned, or terminated, either wholly or in part, by the mutual consent of the respective parties at any stage of their performance." Sanborn v. Ballanfonte, 98 Cal.App. 482, 487, 277 P. 152, 155; 12 Cal.Jur.2d p. 404. The question whether there was an intent to abandon a contract is one of fact to be ascertained from all the facts and circumstances surrounding the transaction. Lohn v. Fletcher Oil Co., Inc., 38 Cal.App.2d 26, 100 P.2d 505; Tompkins v. Davidow, 27 Cal.App. 327, 335, 149 P. 788. There was sufficient evidence to support the finding that the employment of plaintiff was terminated by mutual consent. It should be construed as a finding that the contract was abandoned by the parties and certainly it negatived the allegation of the complaint that plaintiff was discharged. If plaintiff was not discharged he had no action for damages, and if the contract was abandoned he had no right to a share of the profits, if there had been any. Inasmuch as plaintiff failed to prove breach of the contract by defendant, and in view of the finding that he (plaintiff), voluntarily terminated his employment and consented to an abandonment of the agreement, judgment was properly rendered in favor of the defendant as to plaintiff's claim for damages.

[5] Plaintiff directs attention to the fact that the answer of defendant did not plead abandonment of the contract and claims that the finding of abandonment was outside the issues. Defendant does not answer this point. The answer denied that defendant had breached the contract. When that denial was found to be true plaintiff could not prevail in an action for damages. The finding of abandonment of the contract also established termination of a right to a share of the profits and to purchase a half interest in the business. Plaintiff was not hurt by the finding insofar as it denied him those rights. It was in evidence that the business continued to lose money and was placed in liquidation the following year. Even if the question of abandonment was not within the issues pleaded it was within the issues that were tried without objection, and the point may not be raised for the first time on appeal. 3 Cal.Jur.2d § 149, p. 618.

It is unnecessary to consider defendant's further contention that plaintiff's employment was terminable at will.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

122 Cal.App.2d 411

EMPIRE STEEL BLDG. CO.
v.
HARVEY MACHINE CO.

Civ. 19884.

District Court of Appeal, Second District,
Division 1, California.
Jan. 4, 1954.

Rehearing Denied Jan. 21, 1954.

Hearing Denied March 3, 1954.

Action for breach of a building contract. From a judgment of the Superior Court, Los Angeles County, J. F. Moroney, J., in favor of the plaintiff, the defendant appealed. The Court of Appeal, Doran, J., held that the trial court's finding that the parties had entered into a contract was sustained by substantial evidence that there was no error in the admission of evidence and that action of the trial judge in suggesting a compromise did not establish any prejudgment of the case.

Judgment affirmed.

1. Appeal and Error ⚷989

A reviewing tribunal may not weigh the evidence or determine factual issues where record discloses substantial evidence supporting trial court's finding.

2. Contracts ⚷28(3)

Evidence sustained finding that negotiations for construction of a foundry building by plaintiff for the defendant progressed beyond the preliminary stages and that a definite agreement was reached for construction of the foundry.

3. Contracts ⚷31

In absence of statutory requirement an oral agreement is binding unless it is clear that parties intended that agreement is not to be effective until reduced to writing.

4. Evidence ⚷139

In action for breach of building contract evidence of prior building contracts between the parties was admissible to show practice of commencing work before oral contracts had been reduced to writing and was not inadmissible on ground that it could not be used to establish the contracts at issue.

5. Trial ⚷29(1)

Action of trial judge in suggesting a compromise before plaintiff had rested its case did not establish that defendant was deprived of a fair trial because trial court had prejudged the case where trial proceeded and defendant's case was fully presented.

6. Trial ⚷29(1)

Although efforts of trial judge who encouraged settlements out of court are ordinarily to be commended, such efforts should not compel either litigant to make a forced settlement.

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Louis C. Viereck, Los Angeles, for appellant.

Elmer J. Walther, Los Angeles, for respondent.

DORAN, Justice.

The defendant herein is appealing from a judgment in favor of plaintiff in the amount of $30,000, of which $29,400 is for loss of profits, and $600 for expenses incurred by plaintiff. In the spring of 1951, the Harvey Machine Company, appellant, entered into negotiations with officials of the Empire Steel Building Co., respondent, in reference to construction of a foundry building on appellant's property. At that time Empire was engaged in constructing a "pot-room" building for Harvey; the latter was in a hurry for the foundry to be constructed, and desired work to be started immediately.

Construction of the foundry involved two parts,—cement work for foundations and floor and steel work which formed the building proper. At Harvey's request, Empire submitted a price of $148,750 for the cement work, and $139,761 for the steel work, upon the condition that Empire be given both units of the work. If the steel work only was to be done, then the price was to be $150,000. The Harvey officials suggested that Empire reduce the total price to $275,000.00 for the whole job. Empire was then given the steel contract at $150,000, and agreed to consider the $275,000.00 price for the entire job. This was on June 1, 1951, a Friday, and at Harvey's insistence, engineering work on the steel project commenced on the following Monday.

On Tuesday, June 5, according to testimony by Gordon Anderson, Empire's secretary and treasurer, "I told Mr. Leo Harvey that we had given it considerable thought and the best that we could do the entire job for would be $280,000 and he said, '$280,000, okay.' He says, '$5000 one way or the other doesn't make any difference to me as long as I get the building on time.' I said, 'Well, we have always made our previous deliveries and commitments on time, right?' And he said, 'Yes,' and I said, 'Well, we will schedule—we are going full blast on the steel work now, and we will schedule the concrete work right along with it'. He said, 'Okay, I am glad to see you boys get the deal,' and he shook my hand, and I thanked him and that was about it; that was the end of the conversation". There was similar, corroborative testimony given by Arthur M. Andersen, president of Empire Steel Building Co.

Between the 5th and 15th of June there were various telephone conversations between appellant's president, Homer Harvey, and Empire's president in respect to rushing the job through, in which Empire assured Harvey that the engineering work was progressing, and that "We will finish the job as scheduled". (September 15, 1951.) No written contract was executed.

On June 15, President Homer Harvey telephoned Empire's president, "It looks like we will have to abandon the foundry building", and further said, "As you know, we are having trouble with the building department getting our permit and unless we get the permit we will have to abandon the entire project, which it appears at this time, so don't do anything further on the job and we will pay you for your expense and engineering".

That same day, upon learning that the foundry permit had been issued that day, Empire again called Harvey and inquired, "What do you want to lie to me for?" President Harvey, according to Empire's president, "stuttered and stated, 'Well, you are $30,000 high. We got another bid for $30,000. Do you want to cut your price?' I said, 'No sir. We have got a contract with you and I intend to follow our portion of the contract and I intend that you follow your portion of the contract. We have got a contract together'." At a later conversation Harvey denied that any contract at all had been given to Empire. Harvey entered into a written contract with the firm of Vinnell Company, Inc. for construction of the building at a price of $265,933.31, and the present action followed resulting in a judgment for plaintiff.

It is appellant's contention that "The evidence does not support the findings or the judgment." Among other things the trial court found that "Empire and Harvey entered into an oral agreement on June 1, 1951 * * * that Empire would furnish the materials and labor necessary to fabricate and erect the steel portion of a foundry building * * * for which Harvey agreed to pay Empire the sum of $150,000.00; that at the special instance and request of Harvey and on June 4, 1951, Empire entered upon the performance of said agreement and performed certain engineering work necessary * * *; that on June 5, 1951, Empire and Harvey entered into another oral agreement * *, which final agreement * * * also provided for the furnishing of the plumbing and concrete work and all other materials and labor required for the construction and erection of said foundry building complete, in accordance with plans which were furnished to Empire by Harvey * * * for which Harvey agreed to pay Empire the sum of $280,000.00; that it was understood * * * that said agreement would be reduced to writing by the issuance of a purchase order in accordance with the usual practice and custom of said parties."

It was further found that Empire had agreed to and was ready to furnish a completion bond upon receipt of a purchase order from Harvey, but that the latter refused to reduce said final agreement to writing, without which writing Empire could not obtain such a bond. The court found that at Harvey's request, "Empire continued to and did perform engineering work necessary to carry out said final agreement and, in addition thereto, devoted considerable time in negotiating with persons and firms for the performance of portions of said work, and arranging for materials necessary for the construction of said building" of the reasonable cost and value of $600. Empire performed such work continuously until June 15, 1951, "at which time Harvey notified Empire to stop all work provided by said agreement", and thus prevented Empire from further performance. It was further found that in former agreements between the parties for construction of building, "in all cases at the special instance and request of Harvey, (Empire) commenced the performance of said agreements before the same had been reduced to writing by Harvey", and that later such agreements had been duly reduced to writing by Harvey.

[1] Appellant's brief is largely devoted to an analysis of the testimony and evaluation thereof, to the end that the reviewing court shall determine that the trial court arrived at the wrong decision. But such argument ignores the well established tenets of appellate procedure which prohibit a reviewing tribunal from any attempt to weigh the evidence or determine factual issues in cases where the record discloses substantial evidence in support of the trial court's findings.

[2] The evidence herein, given by the contending parties, was, of course, in more or less direct conflict; Empire asserting that the negotiations amounted to a final contract on which performance immediately commenced at Harvey's request. Harvey, on the other hand, contended that these were mere preliminary and incomplete negotiations which never reached the status of a legal contract. This issue the trial court was obliged to determine as a question of fact. That the testimony given, and reasonable inferences from the evidence as a whole, furnish substantial support in favor of the findings and judgment cannot be doubted. And the fact that another court, whether trial or appellate, might conceivably arrive at a different decision, can furnish no ground for reversal. The question herein was clearly one of fact for the trial court to determine.

The appellant's contentions that "The alleged contracts are unenforceable because they are uncertain and indefinite, and there was no meeting of the minds upon the essential elements", and that "The evidence establishes that any agreement between the parties would necessarily have to be in writing and would not become effective until the terms thereof were reduced to writing and executed by them", are not persuasive. Again it may be pointed out that these propositions relate to questions of fact.

The record contains substantial evidence from which the trial court could find that the parties were in definite agreement concerning all the essential elements of the contract, and that Harvey was so satisfied with the arrangements that Empire was repeatedly urged to proceed with the building so that it might be completed by September 30, 1951.

[3] In the absence of statutory requirement, as said in respondent's brief, "an oral agreement reached by the parties is binding unless it is clear that the parties intend that the agreement is not to be effective until reduced to writing". Johnston v. Twentieth Century-Fox Film Corp., 82 Cal.App.2d 796, 820, 187 P.2d 474. And in the case of two former buildings constructed for Harvey by Empire, work had been commenced several days before the contract was put in writing.

[4] Appellant also complains that the trial court erred in the admission of evidence concerning the two prior building contracts between plaintiff and defendant, saying: "The fact that there had been contracts between the parties previously in nowise tended to prove that they entered into the contracts at issue". The latter statement, however, is beside the issue; such evidence was not received for the purpose of proving that the parties entered into the present contract, but rather in respect to the practice of commencing work before previous oral contracts had been reduced to writing. It is conceded by appellant that evidence of prior dealings between parties is admissible where tending "to illustrate the transaction in question (10 Cal. Jur. p. 825)." Nor does the record indicate

any reversible error in respect to exclusion of evidence offered on the part of the appellant.

[5] Finally, it is claimed that "Appellant was prevented from having a fair trial for the reason that the trial court prejudged the case". This complaint is predicated upon the fact that before plaintiff had rested its case and before defendant had started to put on its case, the trial judge called the parties into chambers and suggested a compromise, stating that at that point of the trial, "it looked as though there was a contract".

At the hearing of defendant's motion for new trial, the trial court denied that the case had been prejudged, and said: "At that time both Mr. Leo Harvey and Mr. Homer Harvey had testified, and the Court had the benefit of their testimony. The Court simply told how the evidence stacked up at that time, as he saw the case, and it was quite apparent to the Court that Mr. Leo Harvey was lying—that he was evasive * * * and that Mr. Homer Harvey was not giving straight answers but was quite evasive * * *". The trial then proceeded; the judge took it under submission for some thirty days and "very carefully weighed the evidence and studied the law".

[6] The rule is correctly stated in Rosenfield v. Vosper, 45 Cal.App.2d 365, 371, 114 P.2d 29, 33 as follows: "Although efforts on the part of a trial judge to expedite proceedings and to encourage settlements out of court are ordinarily to be commended, such efforts should never be so directed as to compel either litigant to make a forced settlement." In the instant case there is nothing to indicate that any pressure was imposed in order to effect a compromise. The trial proceeded at some length, the defendant's case was fully presented, and the case taken under submission before being decided. Aside from the appellant's unsupported statement to that effect, there is nothing to suggest that the trial court prejudged the case.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

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122 Cal.App.2d 427

UNITED STATES CAS. CO.
v.
INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8486.

District Court of Appeal, Third District, California.

Jan. 5, 1954.

Rehearing Denied Feb. 1, 1954.
Hearing Denied March 3, 1954.

Insurance carrier of employer sought annulment of award of compensation by the Industrial Accident Commission to employee. The District Court of Appeal, Paulsen, J. pro. tem., held that evidence sustained finding of Industrial Accident Commission that there was a causal relationship between accident and cancer of breast, so as to entitle employee to compensation.

Award affirmed.

1. Workmen's Compensation ⚷1409

An award of compensation may not be based on surmise, conjecture or speculation.

2. Workmen's Compensation ⚷1396

Whether there is a relationship between accident and cancer is a subject peculiarly within the realm of expert medical opinion in compensation proceeding.

3. Workmen's Compensation ⚷1504

Evidence sustained finding of Industrial Accident Commission that there was a causal relationship between accident and breast cancer, so as to entitle claimant to compensation.

4. Limitation of Actions ⚷13

Generally, a mere request for delay, in absence of a promise or agreement not to plead statute of limitations, does not estop one from asserting the statute.

5. Limitation of Actions ⚷13

When a debtor's conduct is such as to mislead creditor, who acts thereon in good faith and fails to commence his action within statutory period, debtor is estopped to rely on statute of limitations, even though there was no intent on part of debtor to mislead.

6. Equity ⚷54

Equity does not wait on precedent, which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for the intervention of equity.

7. Limitation of Actions ⚷13

When debtor abandons his policy of silence and inaction, and by word and conduct does things reasonably calculated to lull his creditor into a sense of security and to delay action beyond statutory period, an estoppel to invoke statute of limitations may arise.

8. Limitation of Actions ⚷199(1)

Question whether conduct of debtor has been such as to estop debtor to assert statute of limitations against creditor is not a question of law but one of fact.

9. Workmen's Compensation ⚷1303

Where employer was actively engaged in an effort to have investigation made by its insurer concerning claim by employee for injuries, and that fact was well known to insurer, and insurer, repeatedly and over a long period of time, delayed action on claim but promised that further medical examinations would be had, and such combined actions started before statutory period of one year had run and continued almost to date of filing of compensation proceeding, Industrial Accident Commission was justified in finding that insurer was estopped to invoke one year limitations. Labor Code, §§ 5405, 5411.

10. Workmen's Compensation ⚷975

Knowledge, if obtained from any source by managing agent of employer, concerning injury of employee, was sufficient to place responsibility on employer for medical expenses. Labor Code, §§ 4600, 5402.

11. Workmen's Compensation ⚷975

Duty imposed on an employer, who has notice of injury to an employee, under statutory provision placing responsibility for medical expenses on employer when he has knowledge of injury of employee, is not, in the first instance, the passive one of reimbursement, but the active one of offering aid in advance and of making whatever investigation is necessary to determine the extent of employer's obligation and the needs of the employee. Labor Code, §§ 4600, 5402.

12. Workmen's Compensation ⚷998

Evidence sustained finding of Industrial Accident Commission in compensation proceeding that employer had sufficient notice of injury of employee to entitle employee to reimbursement for self-incurred medical expenses. Labor Code, §§ 4600, 5402.

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Mullen & Filippi, San Francisco, for petitioner.

T. Groezinger, San Francisco, for Industrial Acc. Com.

James A. Clayton, Sacramento, for Moynahan.

PAULSEN, Justice pro tem.

Petitioner, an insurance carrier, seeks the annulment of an award of the Industrial Accident Commission in which respondent Gae P. Moynahan was found to have sufferred an industrial injury and was awarded compensation benefits, including self-incurred medical expenses.

According to the testimony of Mrs. Moynahan she was 39 years of age and was employed as a bookkeeper by the Sonotone Corporation. While she was stocking shelves a heavy box of batteries fell upon her and injured her right breast. At the time she did not report this to her employer or request medical care but went to her own physician, Dr. Arthur F. Wallace. He treated her for a cracked rib, which she was not sure resulted from that accident, but did not treat her breast, although it was bruised. Her breast continued to be sensitive until October, 1951, at which time she returned to Dr. Wallace. Examination revealed a cancerous condition of the breast and it was removed on November 7, 1951. She returned to work on the 23rd of that month. She first discussed the matter with the local manager of Sonotone Corporation, Mr. Trousdale, in August, 1951, but made no official report or demand for compensation or medical assistance until five days after her operation.

The employer's manager, Mr. Trousdale, on learning of Mrs. Moynahan's contentions, wrote to his home office and received in reply a letter informing of the name of the local representative who would handle the claim, i. e., Brown Brothers.

Mr. Trousdale called Brown Brothers on November 23, 1951, and a representative from the adjusting agency came out and took a personal report from respondent Moynahan. She did not hear from Brown Brothers for some time. Then she called them and they had done nothing about it. She called every day for over two weeks and they still had no report on the accident and had heard nothing from the insurance company (petitioner). She talked to Mr. Trousdale about three or four weeks after she reported the accident on November 12, 1951. He called Brown Brothers and learned they had not heard from the insurance company. Mr. Trousdale called about three weeks later and the man who had been handling her case was no longer with the company. She next heard from Brown Brothers some time in the latter part of December, 1951. At this time a man told her he had written letters on it to the insurance company.

After that she called them practically every day but had no satisfaction. Most of the time the girl who answered the telephone informed her that no one was in the office who was cognizant of her case. Twice she did get in touch with someone who knew about it. The first time she was told he had not received word from the San Francisco office of petitioner and would call within two or three days. He did not call back. Three weeks or a month elapsed and she got no call and had no reply. Brown Brothers finally assigned another man to the case, a Mr. Carrico.

Mr. Carrico called her two weeks prior to April 22, 1952, to arrange an examination on April 22nd by Dr. McKibbin. About five weeks after Mr. Carrico called to arrange the examination with Dr. McKibbin of April 22, 1952, she contacted the office of Brown Brothers and was told the adjuster had written petitioner and was awaiting a reply. Afterwards the insurance company wanted to arrange another examination for July of 1952 but it was never so arranged.

About this time Mr. Trousdale wrote a letter to the home office wondering why applicant had not received a reply from Brown Brothers. Mr. Trousdale received in response a letter dated July 16, 1952, stating that the carrier had been contacted and they wished to arrange for a second medical examination and would let Sonotone know of further developments.

During this period several letters passed between Mr. Trousdale and his home office, clearly indicating that efforts were being made to get petitioner or its adjusters to investigate and act on the claim; and that petitioner was aware of the efforts of the employer to have some kind of action taken.

For some time after Mr. Trousdale had received the letter of July 16, 1952, Mrs. Moynahan continued her efforts to secure information from Brown Brothers but received none. In August she was told by a clerk in their office that petitioner had decided her claim was noncompensable. Immediately after that the home office advised her that she might bring the matter before the Industrial Accident Commission if dissatisfied.

The finding of the commission that the injury occurred on March 13, *1951* is challenged as unreasonable and based on speculation.

Dr. Wallace, testifying with the aid of his office records, stated that the original treatment was given in March, *1950*; that he treated Mrs. Moynahan for gastroenteritis in March, 1951; and that she came in on November 1, 1951, complaining of a cold and "coincidentally mentioned that she had just recently noticed a lump in her breast."

It must be admitted that the testimony of Dr. Wallace, supported by his office records, points most persuasively to the earlier date. However, Mrs. Moynahan testified that the injury occurred on March 13, 1951. The commission, faced with this conflict, found that it occurred on the later date, and the binding nature of such a finding, based upon conflicting evidence, is too well established to require citation of authority.

Petitioner contends that the evidence is insufficient to establish a causal relationship between the accident and the cancer.

[1, 2] An award of compensation may not be based upon surmise, conjecture or speculation. Owings v. Industrial Accident Commission, 31 Cal.2d 689, 192 P.2d 1; William Simpson Construction Co. v. Industrial Accident Commission, 74 Cal.App. 239, 240 P. 58. But whether or not there is such a relationship is a subject peculiarly within the realm of expert medical opinion. Children's Hosp. Soc. v. Industrial Accident Commission, 22 Cal.App.2d 365, 71 P.2d 83; Hartford Accident & Indemnity Co. v. Industrial Accident Commission, 140 Cal.App. 482, 35 P.2d 366; William Simpson Construction Co. v. Industrial Accident Commission, supra.

[3] The finding of the commission was based upon the testimony of Dr. Wallace who stated that "there are numerous reports in the medical literature stating that a single trauma has been the provoking cause of cancer. No one knows, actually, of course, what causes cancer, and experimentally it has been caused hundreds of different ways, including trauma. * * * I would not be able to say whether trauma caused it in this incident, but it is suspicious, and I would, in all fairness to the patient, have to say it could be a probable cause. * * *" In his medical report, received in evidence, he expressed the opinion "that the trauma most probably instituted the formation and growth of the tumor." On cross-examination, the doctor stated the relationship at times in terms of *possibilities.*

On the question of the character of proof required to support a finding of this kind, it is said in City and County of San Francisco v. Industrial Accident Commission, 183 Cal. 273, at page 283, 191 P. 26, at page 29: "It, of course, cannot be said that from these facts it is certain that Slattery contracted his sickness because of his employment. But certainty is not required. It is not even required that the award be, in our judgment, in accord with the preponderance of the evidence, in order that we be not at liberty to annul it. We cannot disturb the award unless we can say that a reasonable man could not reach the conclusion which the commission did."

The subject was fully reviewed in Pacific Employers Insurance Co. v. Industrial Accident Commission, 19 Cal.2d 622, 122 P.2d 570, 141 A.L.R. 798, and the statement set forth above again approved. The court further observed that each case necessarily depends upon its own facts and that no comprehensive formula is available; that the question is one of fact and all reasonable inferences are to be drawn in favor of the award. See, also, Industrial Indemnity Co. v. Industrial Accident Commission, 115 Cal.App.2d 684, 252 P.2d 649; Maryland Casualty Co. v. Industrial Accident Commission, 64 Cal.App.2d 162, 148 P.2d 95.

Directly in point is Travelers Insurance Co. v. Industrial Accident Commission, 33 Cal.2d 685, 203 P.2d 747, where the medical opinion was at times given in terms of possibilities but it was also stated that "there is a probability that he was suffering from lead poisoning." It was there held that such evidence was sufficient. It must be so held in the instant case.

At the hearing petitioner set up the defense that the claim was barred by the statute of limitations. It was found, however, that petitioner was estopped to rely on it and it now argues that the evidence was insufficient to support that finding.

Section 5405 of the Labor Code provides that in cases of this kind proceedings for the collection of benefits must be commenced within one year from the injury. Section 5411 provides that "The date of injury, except in cases of occupational disease, is that date during the employment on which occurred the alleged incident or exposure, for the consequences of which compensation is claimed."

Dr. Wallace fixed the date of the injury as March, 1950, and petitioner has based its arguments largely upon that date. Mrs. Moynahan fixed the date as March 13, 1951, and the commission so found. In view of our conclusion that the finding in that respect is sufficiently supported, we will accept the later date as correct in the consideration of the questions that follow. Mrs. Moynahan filed her application for adjustment of her claim September 24, 1953, or more than eighteen months after the date fixed by her for the injury. Inasmuch as more than one year admittedly elapsed in any event, the exact date of the injury is unimportant except to the extent that it bears on the question of estoppel.

Petitioner does not deny the long delay in acting upon Mrs. Moynahan's request for consideration of her claim or that she frequently and persistently inquired to find out what, if anything, was being done. It rests upon the proposition that there was no affirmative action of any kind on its part that could give rise to an estoppel.

It is conceded that neither the petitioner, its adjusters, nor the employer ever promised to pay the claim or to recognize its validity. Nor was any inducement offered for delay. The most that can be said is that Mrs. Moynahan was led to believe at all times if she would wait a little longer petitioner would give her another medical examination, conduct further investigations and then pass on the validity of her claim.

The rule as applied to cases of estoppel to plead the statute of limitations is stated as follows in Carruth v. Fritch, 36 Cal.2d 426, at page 433, 224 P.2d 702, at page 706, 24 A.L.R.2d 1403: "One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought." In that case plaintiff was assured that she would be compensated for medical expenses and loss of salary without litigation. A review of the authorities in this state and elsewhere indicates that in the vast majority of cases where estoppel was successfully invoked some such affirmative action was taken by the party who later sought to set up the bar of the statute and that it was a direct cause of the delay.

[4, 5] It is a general rule that a mere request for delay, in the absence of a promise or agreement not to plead the statute of limitations, does not estop one from asserting it. 130 A.L.R. 29; 24 A.L.R.2d 1426. But when a debtor's conduct is such as to mislead his creditor, who acts thereon in good faith and fails to commence his action within the statutory period, the debtor is estopped to rely on the statute. And it is not necessary that there should have been an intent to mislead. Industrial Indemnity Co. v. Industrial Accident Commission, supra.

The case of Benner v. Industrial Accident Commission, 26 Cal.2d 346, 159 P.2d 24, 26, is similar in many respects to the present case. There, the claimant, who was a nurse, contracted tuberculosis while working in a hospital. Her husband wrote the superintendent of the hospital who replied "expressing a preference to settle the matter". In this connection he also stated that the hospital relied for advice upon the doctor who was the chief of its medical service and upon the insurance carrier. On several occasions the superintendent asked for more time. At a still later date the representative of the insurance carrier, when contacted, also asked for more time to investigate the case. The commission made no finding on the issue of estoppel. However, the court said: "But the commission had a right to consider the evidence which was favorable to the petitioner on the issue of estoppel. In fact such evidence was without substantial conflict both as to the conduct of the hospital authorities and of the representative of the insurance company." After reviewing the evidence, the court stated further: "It follows that the employer and its insurance carrier cannot escape the consequences of their acts or conduct affirmatively engaged in to procure delay for purposes of settlement, or investigation or otherwise".

Petitioner argues that the case is not authority for holding the evidence to be sufficient in this case; that it is distinguishable for the reason that the superintendent expressed a preference for settlement. If petitioner's argument is sound, the statement concerning "conduct affirmatively engaged in to procure delay for purposes of settlement, *or investigation or otherwise*," is meaningless. (Italics added.) The expression of the superintendent clearly recognized the need for advice and investigation and the court clearly based its conclusions on the combined effect of all the acts and conduct of both the hospital authorities and the carrier.

[6] Whether or not the Benner case is a controlling precedent, both the law and the facts of this case compel us to accept the conclusion of the commission on this question. "Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention." Times-Mirror Co. v. Superior Court, 3 Cal.2d 309, 44 P.2d 547, 557.

[7, 8] Affirmative action does not consist always of promises of settlement or expressions of hope for amicable adjustment of claims. When the debtor abandons his policy of silence and inaction, and by word and conduct does things reasonably calculated to lull his creditor into a sense of security and delay action beyond the statutory period, an estoppel to invoke the statute of limitations may arise, and this is not a question of law but one of fact. Industrial Indemnity Co. v. Industrial Accident Commission, supra.

In this case the evidence shows clearly that the employer was actively engaged in an effort to have an investigation made by petitioner and that this was well known to petitioner; that petitioner repeatedly and over a long period of time, delayed action but promised that further medical examinations would be had; that these combined actions started before the statutory period had run and continued almost to the date of filing the application with the commission.

[9] The question was for the commission, the evidence was sufficient, and the finding cannot be disturbed.

Petitioner makes the final point that the employer did not have sufficient notice of the injury and that Mrs. Moynahan was not, therefore, entitled to reimbursement for self-incurred medical expenses.

[10] Section 4600 of the Labor Code places the responsibility for medical expenses upon the employer when he has knowledge of the injury. Such knowledge, if obtained from any source by the managing agent, is sufficient. Labor Code, sec. 5402. "In every case the employer should be given a fair opportunity to furnish to the employee the treatment required on account of the injury or to substitute his own treatment for that procured. Obviously, in order that he be given such an opportunity, the notice or knowledge of the injury must be such as to afford a reasonable notification of the need of medical treatment or claim thereto on account of the injury. * * * However, even though he first becomes aware of the necessity for treatment at the time the employee is being treated by a physician of his own choice, the employer is obliged then to tender treatment else he becomes liable for the value of services rendered thereafter." Bethlehem Steel Co. v. Industrial Accident Commission, 70 Cal.App.2d 382, 161 P.2d 59, 62.

While the record does not give the details of the conversation, according to Mrs. Moynahan she discussed the accident with Mr. Trousdale in August and he expressed his regret. She did not ask for medical aid but made her own arrangement. In November, she remained away from work for the operation and Mr. Trousdale visited her at the hospital.

[11] The duty imposed upon an employer who has notice of an injury to an employee is not, in the first instance, the passive one of reimbursement, but the active one of offering aid in advance and of making whatever investigation is necessary to determine the extent of his obligation and the needs of the employee. Draney v. Industrial Accident Commission, 95 Cal.App.2d 64, 212 P.2d 49.

[12] The award for reimbursement covered bills that accrued as the result of the operation in November and after the discussion in August. The evidence is sufficient to support the finding.

The award is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

122 Cal.App.2d 447

PEOPLE v. DECKER et al.

Cr. 791.

District Court of Appeal, Fourth District, California.

Jan. 5, 1954.

Defendants were charged with six counts of burglary and one count of conspiracy to commit theft. After jury's verdict and following denial of motions for new trial and applications for probation, the Superior Court, San Diego County, Dean Sherry, J., entered judgments of conviction for second degree burglary on three counts as to two defendants, and appeals were taken. The District Court of Appeal, Mussell, J., held that evidence sustained finding that service stations were entered with intent to commit theft, and that record did not show that verdicts were obtained by casting lots or by means other than fair expression of opinion on part of jurors.

Judgments and order affirmed.

1. Burglary ⚿41(3)

In second degree burglary prosecution, evidence was sufficient to show that service stations were entered with intent to commit theft.

2. Criminal Law ⚿866

Record was insufficient to show that verdicts were obtained by casting lots or by means other than fair expression of opinion on part of jurors.

◆

Thomas Whelan, San Diego, for appellants.

Edmund G. Brown, Atty. Gen., and James D. Loebl, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendants were charged with six counts of burglary and one count of conspiracy to commit theft. A jury found defendants Edward B. Decker and Cecil E. Cooper guilty of counts I, II, VI and VII and not guilty as to counts III, IV and V. Defendant Helen Decker was found not guilty on each of the seven counts and the trial court, on motion of defendants, set aside the jury's verdict as to count VII, in which a conspiracy was alleged. The jury determined the crimes in counts I, II and VI to be burglary of the second degree. Following the denial of motions for a new trial and applications for probation, the court rendered judgments against defendants Edward B. Decker and Cecil E. Cooper and sentenced them to the state prison at Chino. They urge that the judgments and order denying their motions for a new trial should be reversed, on the grounds (1) that the evidence is legally insufficient to support the verdicts and (2) that the jury was guilty of misconduct in that its verdicts were decided by lot and by means other than a fair expression of opinion on the part of all the jurors.

Facts.

Count I: On January 5, 1953, between 10:00 and 10:30 a. m., Mrs. Mary Trytten drove into the Texaco service station at 3638 El Cajon Blvd. in San Diego. She got out of her car and asked the attendant, Mr. Munsterman, to check the oil, gas, battery and tires. While she was talking to him, she happened to look into the service station and saw defendant Decker standing at the door drinking a "coke". She testified that she then saw defendant Cooper take "a blue box off the shelf, put it in his hand and slip it inside of his coat. And as he did so, Mr. Decker spoke to him or turned his head and I didn't hear what he said, but it looked as though he spoke to him and he immediately * * * Mr. Cooper came out and engaged me in a conversation and kept me talking." Mrs. Trytten then left the service station, drove a short distance, stopped her car, and with a pin, scratched the license number of defendants' car on the back of an envelope. The number was 4A95731. She then telephoned to the station and talked with the attendant. She testified further that a blue box (found in defendants' car by the arresting officers and introduced in evidence) was similar to the one she saw Cooper take from the shelf and put under his coat.

Mr. Munsterman testified that the defendants drove up to the station in a green '41 or '42 Buick; that Mrs. Trytten was there at the time; that Decker got a "coke" and was standing in the doorway while Cooper was in the station; that after he checked the tires on the Buick, defendants got in the car and drove away; that within fifteen or twenty minutes after Mrs. Trytten had gone he received a telephone call from her; that he then noticed that some spark plugs were missing from a shelf in the station; that as soon as he hung up the 'phone, an inventory was taken of the spark plugs and they were "short" 71 plugs.

Count II: Marvin L. Braun, owner of a Texaco service station at 6409 Pacific Highway, San Diego, testified that Mr. Cooper and Mr. and Mrs. Decker drove a green Buick car into his station on January 5, 1953, at approximately noon; that they said they wanted to use the 'phone; that while they were in the station, he serviced three other cars and as the defendants were ready to leave, he checked the oil and water in their car and noticed that the oil stick had been broken and welded; that just after the defendants had left, he entered the station and noticed that some of his spark plugs were missing from the usual place for them on a shelf; that within 30 minutes he made an inventory and found that 53 spark plugs were missing. Braun was shown a box containing J–8 Champion spark plugs, discovered in the trunk compartment of the Buick when the defendants were arrested and recognized it because he had marked it with an "X". He testified that he had purchased this box of plugs from the Motor Hardware and Equipment Company a short time before January 5, 1953, and that this was the only box with an "X" on it which he had.

Count VI: John C. McLaughlin, operator of a service station at Del Mar, testified that he saw the defendants at his station at approximately noon on January 5, 1953; that they were driving a green Buick car and asked to use the hoist to check the muffler; that after the car was on the hoist, Cooper asked him to lubricate it, and while he and Cooper were under the car, Decker was in the station for a while; that at about 6:00 p. m. that evening he noticed that a number of boxes of spark plugs were missing and after taking inventory, he found that 77 plugs were gone. He was shown six boxes of spark plugs which were found in the trunk compartment of the defendants' car and identified them by the price mark which he had written on five of them in heavy crayon and on the other one in a "thin pen mark".

The testimony of the prosecution as to the fifth count of the information was that Mr. Hicks, owner of a service station at Cardiff, saw the defendants at the station on December 19, 1952. He jotted down their license number and it was 4A95731. He checked the oil in the car and found that the oil stick had been broken and welded. The defendants spent some time in the salesroom of the station and after they left, he discovered that a great many of his spark plugs were missing. Defendants came back to the station on January 4, 1953, and after being in the station for a short time, left; that defendant Cooper, on leaving, said "Well, we had just as well shove off. We wont do any good here."

As to count four of the information, Lloyd Donahoo, operator of a service station at 7640 El Cajon Blvd. in San Diego, testified that he saw the defendants with another woman in his station on December 19, 1952, at approximately 3:00 p. m.; that he put their car on the hoist and then saw the other woman standing in the door of his office while Mrs. Decker was in the back seat of the car and the other two defendants were helping him service it; that the next day he found that approximately 92 spark plugs were missing from the shelves in the station.

As to the third count, William Clark testified that the three defendants came into the service station at 7982 Prospect Avenue, La Jolla, on the afternoon of January 4, 1953; that two of them entered the station and Mr. Decker asked him to check the oil in the car. George Fiano, owner of the station, testified as to a cash shortage of $32.29 discovered on the evening of January 4, 1953.

On Monday afternoon, January 5, 1953, at approximately 1:00 p. m., highway patrol officers stopped the defendants in the Buick car and upon arrival of the San Diego police officers, the car was searched and the spark plug boxes which were later identified by witnesses for the prosecution, together with 123 spark plugs, were found in the trunk compartment thereof.

Defendant Cooper testified that he acquired the spark plugs in 1950 in partial payment of a debt. He denied that he was in the county of San Diego on December 19, 1952, and produced witnesses who testified that on that day he was in the vicinity of Hollywood and Huntington Beach.

[1] The evidence clearly shows that the defendants were acting together to victimize the operators of filling stations in San Diego county. Cooper was seen taking spark plugs from the shelf in the service station at 3638 El Cajon Blvd., San Diego, and Decker entered the station at Del Mar while the other two defendants were outside. The boxes in which some of the spark plugs were kept were found in defendants' car when they were arrested and were identified by prosecution witnesses. The evidence is amply sufficient to justify a reasonable inference that the appellants entered the service stations with the intent to commit theft. People v. Smith, 84 Cal.App.2d 509, 512, 190 P.2d 941.

[2] Appellants claimed misconduct of the jury is based upon affidavits filed by them in which it is stated that one of the jurors, in the jury room and during their deliberation, was heard to ask "Will those of you who voted not guilty as to count one, vote guilty as to count one, if we all agree to vote not guilty as to count three?" There is nothing in the record to indicate that this question was answered in the affirmative or the negative and nothing to indicate that the jurors agreed to vote in accordance with the suggestion, if it was a suggestion. The jury properly found that the evidence offered in support of count three of the information did not support a verdict of guilty on that charge and that the evidence was sufficient as to count one. The record does not support appellants' contention that the verdicts were decided by lot and by means other than the fair expression of opinion on the part of the jurors. The trial court properly rejected the affidavits and denied the motion for a new trial. People v. Sherman, 97 Cal.App.2d 245, 256, 217 P.2d 715.

Judgments and order affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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122 Cal.App.2d 342

PEOPLE v. CLARK.

Cr. 2913.

District Court of Appeal, First District, Division 1, California.

Dec. 30, 1953.

Rehearing Denied Jan. 14, 1954.

Hearing Denied Jan. 27, 1954.

Appeal from a conviction in the Superior Court, City and County of San Francisco, Eustace Cullinan, Jr., J., of burglary with prior conviction. The Court of Appeal, Peters, P. J., held that evidence of possession of recently stolen articles, with corroborating evidence, sustained the conviction.

Affirmed.

1. Burglary 🔑42(3)

Evidence of possession of recently stolen property and other circumstances sustained conviction of burglary.

2. Criminal Law 🔑1173(2)

In prosecution for burglary, error in failing to instruct, of court's own motion, that unexplained possession of recently stolen property would not alone support conviction, was not prejudicial where there was much corroborating evidence.

3. Criminal Law 🔑1137(1)

In prosecution for burglary, admission of list of articles found in defendant's room by officers was not error, where defendant first mentioned the list in cross-examination of officers attempting to show that officers had taken property without accounting, and where defendant expressly consented to such admission, though defendant was representing himself without counsel

4. Criminal Law ⚿1137(1)

By electing to appear in propria persona, defendant cannot secure material advantages denied to other litigants, and cannot consent to introduction of evidence after first introducing the subject matter himself, and then complain on appeal that his invitation was accepted.

◆

George A. Sears, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Defendant was charged with burglary, and with a prior 1938 burglary conviction. At the trial he admitted the prior burglary charged, and also admitted that in 1945 he had been convicted of, and served a term for, a felony under the Deadly Weapons Act. At the trial, although offered the services of the public defender, defendant insisted on representing himself, but the trial court directed the public defender to remain at the trial as an observer. The jury found defendant guilty of second degree burglary. He appeals from the judgment entered on the verdict. On this appeal, at his request, he is represented by court appointed counsel.

The record shows the following: At about 10 p. m. on September 8, 1952, A. D. Peck parked his automobile on Golden Gate Avenue near Leavenworth in San Francisco. The two doors of the automobile were locked. He returned to the car the next morning at 7 a. m. He found one of the wing windows broken and both doors unlocked. He also discovered that a Clarus camera, the serial number of which he knew, a gadget bag made for him in Australia containing miscellaneous camera equipment, and with his name printed on it, a Fada radio, easily identified because of the color of the case and because of two holes drilled therein, and a screwdriver, were missing. He reported the theft to the police and gave them a description of the stolen property.

On the morning of the same day, September 9, 1952, Inspectors Lang and Short of the pawn shop detail observed a camera and a gadget bag in the window of a pawn shop on Sixth Street, in San Francisco. Investigation disclosed that the camera had the serial number of the camera reported stolen by Peck, and the gadget bag had Peck's name printed on it. The proprietor stated that he had purchased the articles that morning about 9:30 from defendant for $5, and that defendant had given him the false name of Jack Hines and a false address, but that he knew defendant's real name and address, which he gave to the officers. There is evidence that the camera and attachments were worth over $100.

The officers went to the address given them by the pawn shop proprietor, which was that of a hotel located in the same block as the pawn shop. The defendant was not there, but the officers were admitted to defendant's room by the manager. Among some 87 articles in the room they found a screwdriver similar to the one reported stolen, and a Fada radio. The radio was later positively identified by Peck as the one stolen from his automobile. The screwdriver was similar to the one taken from Peck's car. While the officers were stil in the room defendant returned. He then readily admitted, and he testified at the trial, that he had sold the camera and gadget bag to the pawn shop proprietor, but he denied having stolen them. He told the officers that on that very morning around 9 a. m.[1] he was standing near the pawn shop when a friend, whom he did not then further identify, drove up in a green Oldsmobile, gave him the camera and gadget bag, and, after assuring defendant that they were not "hot," asked him to sell them for him. This he did, but gave a fictitious name because he was suspicious of the transaction. At the trial he told the same story, adding to it that this friend had suggested the fictitious name and address of Jack Hines, and further identified this friend as one Robert Romo, who was not produced, whose absence was not explained, and whose address or whereabouts were not given.

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[1] The officers also testified that while questioning the defendant at the time of his arrest he at one time changed the time from 9 a.m. to between 4 and 6 a.m.

The defendant testified at the trial that one of the officers had taken $10 from him, paid a taxi driver who was waiting for defendant, and kept the change. The officer testified that he took $1 from defendant which he paid to the taxi driver. Defendant also charged during the trial that many other articles besides the radio and screwdriver here involved had been removed from his room by the officers, and broadly implied something was wrong about this because neither he nor the hotel manager had been given a list of the removed articles.

The two officers testified that they made a list of the 87 pieces of property in defendant's room. In addition to the Fada radio and screwdriver, already mentioned, there were three cameras, another radio, seven wallets, ten other screwdrivers, two files, three pairs of pliers, three electric irons, four suitcases, ten pairs of slacks, five jackets or sport coats, two topcoats, a key ring with 75 or more miscellaneous keys on it, and other items. All of these, in defendant's presence, were removed from the room. The officers made an official list of the removed property and delivered the articles to the police property clerk.

There is also evidence that defendant, before being taken to jail, offered to "do business" with one of the officers, and told the other that he was going to beat the charge "even if I have to pay you off."

At the trial defendant testified that the Fada radio was not found in his room, implying that it had been planted there by the officers. In addition to explaining how he had come into possession of the camera and gadget bag, he offered an alibi. He produced a witness, then under arrest, James Parker by name. Parker testified that about 5 p. m. of September 8, 1952, he had picked up defendant in a borrowed automobile and, at defendant's request, driven him to Stockton; that both men spent the night in Stockton unsuccessfully looking for a girl friend of defendant, and then returned to San Francisco, arriving shortly after 9 a. m. on September 9, 1952. On cross-examination Parker admitted two prior felony convictions of burglary. Parker's testimony was corroborated by defendant. Admittedly this Stockton alibi was not told to the officers at the time of arrest or later, first making its appearance at the trial.

[1] The evidence supports the judgment. Appellant contends that the only evidence against him is the possession of the recently stolen property, and correctly contends that such fact alone will not support a conviction of burglary. But it is equally true that possession of recently stolen property plus corroborating circumstances such as acts, conduct or declarations of the accused tending to show guilt, will support such a conviction. People v. Russell, 34 Cal.App.2d 665, 94 P.2d 400; People v. Carroll, 79 Cal.App.2d 146, 179 P.2d 75; People v. Owens, 79 Cal.App.2d 290, 179 P.2d 401; People v. Smith, 98 Cal.App.2d 723, 221 P.2d 140. Of course, what must be shown in addition to the fact of possession of recently stolen property varies with the circumstances of each case, and the weight to be given to such circumstances is generally for the jury. Here defendant about 9:30 a. m. on September 9, 1952, sold two articles that had been stolen sometime after 10 p. m. the night before. These articles, although worth over $100, were sold for $5. Defendant, in making the sale, gave a false name and address. When arrested his explanation that some unidentified friend, first identified at the trial but who was not then or ever further identified or produced, gave him the articles to sell, together with the alibi of the Stockton trip, first told at the trial by defendant and a twice convicted felon, are also suspicious circumstances. The conflicting times given as to when this friend delivered the articles is another suspicious circumstance. The offer to "do business" with the officers and to buy them off were matters that could be considered by the jury as indicating a consciousness of

guilt. The corroborating circumstances, together with the admitted fact of possession of recently stolen property, are amply sufficient to sustain the conviction.

The trial court, however, failed to instruct the jury that the unexplained possession of recently stolen property would not alone support a finding that the possessor was guilty of burglary. While defendant made no such request for such an instruction, his counsel now contends that the court should have given it *sua sponte*, and that the failure to do so was prejudicial error. Among other cases cited to support his contention is People v. Smith, 98 Cal.App.2d 723, 221 P.2d 140. That case undoubtedly held that the failure of the trial court to give such an instruction *sua sponte* was error. Based on that case the Attorney General concedes error in this respect, but contends that such error was not prejudicial.

[2] People v. Smith, supra, supports the contention of the Attorney General that the admitted error was not prejudicial. In that case a typewriter was stolen from a county building. The day after the theft, defendant sold the typewriter to the proprietor of a tavern, executing a receipt in the name of one Eggert. When arrested, defendant stated that the typewriter was owned by Eggert, but the officers were unable then or later to locate such a person. Defendant gave several conflicting stories to the police. Pencils similar to those used in the county office from which the typewriter was stolen were found in defendant's possession. There was evidence defendant had knowledge of the means of access to the room from which the typewriter was stolen. It was held that this evidence, 98 Cal.App.2d at page 727, 221 P.2d at page 143, "amply supports the verdict." Although the court held that the instruction here involved should have been given *sua sponte*, it also held that the failure to give it was not, under the facts, prejudicial. If the error was not prejudicial in that case it could not be so in the instant case.

The next contention of counsel is that it was prejudicial error to admit into evidence the list of 87 articles found in defendant's room.

Before discussing this contention, the circumstances under which the list was admitted should be reviewed. The list was first mentioned during the recross examination of Officer Lang by defendant. The defendant asked the inspector if he had made a list of the property removed from the room, to which the officer stated that he had, and that the list was on file in the police department, and the removed property deposited with the property clerk. Defendant then asked if a copy of the list was then given to him or to the proprietor of the hotel, to which the officer replied that it had not, because defendant was present, saw the articles removed, and the articles were brought to the jail in the company of defendant.

The list was not mentioned again until the cross-examination of Officer Short, when defendant asked him questions similar to those asked of Officer Lang, and received substantially the same answers. The court then asked defendant if he was asking for a copy of the list, and when the defendant stated that he was, the court, upon being assured by the prosecuting attorney that such a list was available, asked defendant if he wanted to look at it. Defendant replied that he would look at it later, but that what he wanted to bring out was that no copies of the list were given to defendant or to the manager of the hotel.

On the redirect examination of Inspector Short, the prosecuting attorney produced the list, showed it to defendant and asked him if he wanted it introduced into evidence. The defendant replied: "That? I don't see why, it has nothing to do with this. You can, I will submit it in evidence." Thereupon, the list was identified by Inspector Short and he was asked to read it into evidence. The following then occurred:

> "Mr. Clark [the defendant]: I object to that.
>
> "Mr. Hanley [the prosecuting attorney]: I thought that—
>
> "The Defendant: It has no relevancy to this case.
>
> "The Court: Didn't you raise the question of why they didn't make a list of the items taken from your apartment? Well—

"The Defendant: Well, I will submit it, let him read it.

"The Court: I think that maybe the fact that the defendant does not have counsel, I suggest you do not.

"Mr. Hanley: Well, possibly not, then, your Honor. Thank you, Mr. Short.

"The Court: In other words, if Mr. Dresow were representing him, he possibly would not have opened up that subject.

"Mr. Hanley: Thank you, Mr. Short.

"The Court: For the sake of the record, you might offer that for identification.

"Mr. Hanley: Very well, then, may it be—go in as People's No. 5 for identification?"

The list was next mentioned during the cross-examination of defendant. He first admitted, without objection, that there were eleven screwdrivers and three cameras in the room, and was then asked if the list correctly enumerated what was in the room at the time of the arrest. He replied:

"A. Yes, as far as I am concerned, I have never been able to go back to the room and check what is left * *.

"Q. Would you read that list to the jury?

"The Court: Do you want to do it?

"The Witness: Well, I see no reason why—you asking me?

"The Court: Well, let Mr. Hanley do it, then; do you want to do it?"

The list was then introduced into evidence and read into evidence by the prosecuting attorney.

The parties discuss at some length the question as to whether such list would have been admissible if proper objection had been made to it. This is an interesting question. There are authorities that hold, at least by way of dicta, that it is error, not necessarily prejudicial, to admit into evidence, over objection, articles in the possession of the defendant at the time of his arrest that are not connected with the offense charged. See People v. Le Roy, 192 Cal. 498, 221 P. 353; People v. Vertrees, 169 Cal. 404, 146 P. 890; People v. Glass, 158 Cal. 650, 112 P. 281; People v. Richardson, 74 Cal.App.2d 528, 169 P.2d 44. On the other hand, at least where the defendant first mentions the subject, or produces any evidence that makes such articles reasonably relevant to rebut such evidence, such articles have been held to be admissible over objection. People v. Downs, 114 Cal.App.2d 758, 251 P.2d 369.

[3] In the present case it was defendant who first mentioned the list in his cross-examination of the two police officers. He was trying to show that many articles of property had been taken from his room by the officers without an accounting to him. The implication was that defendant was trying to attack the credibility of the officers by showing that they had kept some of his property. Under such circumstances, under the rule of the Downs case, it became relevant for the prosecution to show what had been removed, and that all of the property had been delivered to the police department.

Moreover, as the excerpts quoted from the record demonstrate, although when the list was first offered defendant objected on the grounds of relevancy, immediately thereafter, in express language, he consented to its introduction. At that point the court intervened, and later, when the list was offered, no objection of any kind was made, and again defendant expressly consented that it be read.

[4] It is, of course, normally the rule that failure to object to the introduction of evidence amounts to a waiver. Here, there was not only a failure to object, but two consents to the admission of the list. Appellant's counsel argues that his client elected to represent himself at the trial, which he had a constitutional right to do, and that appellate courts should not impair that right by imposing on such a person rigid standards or technical rules. That may be a sound generalization. But by electing to appear *in propria persona* a defendant cannot secure material advantages denied to other litigants. Certainly one appearing in *propria persona* cannot consent at the trial to the introduction of evidence, after first introducing the subject matter

himself, and thus invite the introduction of evidence to rebut the inference he was trying to create, and then be permitted on appeal to complain that his invitation was accepted.

The other points raised do not require discussion.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

122 Cal.App.2d 484

PEOPLE v. HECK.

Cr. 2455.

District Court of Appeal, Third District, California.

Jan. 8, 1954.

Defendant was convicted of escape from state prison and attempted robbery, with four prior felony convictions. The Superior Court, El Dorado County, Maul, J., entered judgment, and defendant appealed. The District Court of Appeal, Schottky, J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Criminal Law 🔑1159(1)

If circumstances reasonably justify verdict, opinion of reviewing court that such circumstances might also reasonably be reconciled with defendant's innocence will not warrant interference with jury's determination.

2. Criminal Law 🔑1166½(12)

Where, in criminal proceeding, request was made, after some of defendants' witnesses had testified, that defendants' witnesses be excluded from the courtroom, court's chiding of defendants, prior to granting of such request, for not having made the request sooner did not constitute prejudicial error.

3. Criminal Law 🔑1170(1)

In prosecution for escape from state prison, and attempted robbery, with four prior felony convictions, refusal to permit defendant's counsel to examine alleged accomplice, who had pleaded guilty to attempted robbery, concerning his intent to commit robbery was not prejudicial.

4. Criminal Law 🔑1166½(12)

Where, in criminal proceeding, defendant was given ample opportunity to fully examine and cross-examine witnesses, remarks of trial judge, which indicated impatience and which were occasioned by a commendable desire to expedite the trial, did not constitute prejudicial error.

5. Criminal Law 🔑633(1)

Trial judge has duty to see that trial is conducted in an orderly and expeditious manner.

Edward S. Muktarian, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

On January 7, 1952, the District Attorney of El Dorado County filed an information against appellant, and against George Theodore Poulter and Roland Wayne Wright, charging them with escape from the State prison at Folsom (Count I) and attempted robbery (Count II). Appellant was also charged with four prior felony convictions, and Poulter and Wright were each also charged with prior felony convictions. At the arraignment Poulter pleaded guilty to the first count and not guilty to the second. He admitted the prior felony convictions. Appellant and Wright each pleaded not guilty to both counts, and each also admitted the prior felony convictions. The case was set for trial and prior to the date of the trial Poulter withdrew his plea of not guilty and pleaded guilty to both counts. Appellant and Wright were tried and found guilty by the jury. Appellant made a motion for a new trial, which was denied, and following the pronouncement of judgment, appellant filed a notice of appeal from the judgment.

As grounds for a reversal of the judgment appellant contends (1) that the trial court committed prejudicial error in (a) commenting on a defense request that defendants' witnesses be excluded from the courtroom, (b) its refusal to permit defendants' counsel to question Poulter with regard to his intent as to Count II, (c) its comments that the case must be speedily concluded, and (d) the questions directed by it to the materiality of questions propounded by defendants' counsel to the witness Sam Alexander; and (2) that the evidence is not sufficient to support the verdict on the second count (attempted robbery). Before discussing these contentions we shall give a brief summary of the evidence as shown by the record.

On September 30, 1952, appellant, Poulter and Wright, who were inmates in the State prison at Folsom, escaped from the prison by concealing themselves in a truck. When the truck was outside the prison walls, but still on the prison grounds, the three prisoners jumped from the truck and made their way to the highway where they obtained a ride into Placerville. Poulter testified that the driver of the car gave appellant a ten dollar bill which Poulter used to buy hamburgers, whiskey and cigarettes when they arrived in Placerville. After eating and drinking, they started to walk out of town, toward the highway. As the three prisoners were walking out of Placerville, they approached the parking lot of a Safeway store on the eastern edge of town. This was between 8:30 and 9:00 o'clock in the evening of September 30th, and the lights in the parking lot had just been turned out, preparatory to closing the store. At that time Robert Hord was sitting in his car, a two-door Chevrolet Club Coupe, which was parked in the parking lot. His wife was in the store purchasing groceries, and he was waiting for her. He was sitting on the driver's side of the front seat, holding his eleven-months-old daughter in his lap. He testified that Poulter came up to the driver's side of the car, leaned in and put something against his (Hord's) neck and said, "this is a knife. Be quiet and you won't get hurt." Hord stated that he had no money, whereupon Wright, who was at the other side of the car and stuck his head through the window, asked how much gas Hord had. Hord replied that he had only a quarter or half a tank. According to Hord, Poulter then said, "You guys get in the back and lay down," and Hord heard the right door of the car open, the seat on that side went forward, and someone climbed into the car and went to the back seat. This happened twice. Hord stated that Poulter still had the knife at his (Hord's) throat, so that he did not turn to see what was happening. About this time Mrs. Hord came out of the store, followed by George Schwartz who was pushing a cart of groceries. Schwartz was a sixteen-year-old boy who was employed at the store to box grocery purchases. Hord testified that Poulter then said to him, "Just be quiet and don't get her excited. We don't want her to get hysterical," and "Just act like I am a friend and nobody will get hurt." Hord then called to his wife that he had a friend with him, and when she asked who it was he said that it was just a friend and that she did not know him. When Mrs. Hord opened the car door on the passenger's side, Hord jumped from the car, carrying the baby, and shouted to his wife, "Get out of here; he has a knife," or words to that effect. Mrs. Hord started to scream and the Hords ran toward the store. Hord testified that he saw Poulter run around the front of the car and head for the back of a lot. He also saw another man running down the lane back of the car, but he did not see a third man. Mrs. Hord testified that as she ran toward the store she looked back and saw three men running from the car, two of them running toward the back of the store and the other toward an orchard. Schwartz, the grocery boy, testified that he saw two men running and thought that they were chasing him as he ran back to the store. One of them was the man who was at Hord's side of the car when Mrs. Hord and the boy came out of the store with the groceries. Neither Mrs. Hord nor Schwartz was able to identify the men they saw running.

All three prisoners were apprehended the following morning. Poulter and Wright were together, hiding in the brush east of the city limits, when they were caught. Appellant was alone, but he was also east of the city limits, hiding in the brush. When apprehended, both Poulter and Wright had paring knives on their persons. These knives were the same kind as were used in the prison cannery.

Poulter was called as a defense witness and testified at length regarding the escape and the assault. There are some glaring contradictions in his testimony, but in substance it is that he planned the escape by himself and for himself, alone. Appellant and Wright came over to the truck when he was preparing it for his escape. They appeared to be sick or intoxicated and he took them with him because he was afraid that they would talk and prevent his escape if he let them go. He also testified that he asked them to leave, but they would not go, so he asked them whether they wanted to take a ride around the institution. He stated that he helped them get onto the truck, under the platform, and that when they got off the truck he helped them off. On their way to the highway they passed a reservoir in some hills. This was four to six miles from the place where they left the truck and it was not on the prison grounds. At Poulter's insistence, appellant and Wright went into the water and it sort of sobered them. They then continued on to the highway and got a ride into Placerville.

Both appellant and Wright testified that they had drunk alcohol derived from shellac, and eaten benzedrine taken from nose inhalators, during the afternoon of September 29th, the day before the escape. They did this to get "high", and each testified in effect that the combination of alcohol and benzedrine had put him in a dazed condition and that he did not remember anything that happened on the day of the escape until he found himself in the water in the reservoir. There is a conflict in the evidence regarding appellant's and Wright's condition during the evening of September 29th and the morning of the 30th. Inmate witnesses testified that appellant and Wright appeared to be sick or "high"; prison officials testified to the contrary. Appellant admitted that when he regained his senses, in the water in the reservoir, he knew that he was off the prison grounds. He testified that he did not return to the prison then because it would have been suicide. Warden Heinz talked with appellant on the day the latter was recaptured and appellant told the warden that they (the prisoners) got out of the prison on a Department of Public Works' truck. Appellant explained this recollection on his part by stating that he had seen newspaper clippings stating what happened.

Regarding the attempted robbery, appellant testified that he was not with Poulter and Wright when the latter two approached Hord at the car, but that he was sick and that he sat down to rest, about a block and a half from the store. Poulter and Wright both testified that appellant was not with them when they were at the car.

Appellant does not attack the sufficiency of the evidence to support his conviction under Count I, but does attack the sufficiency of the evidence to support Count II, the attempted robbery count. He argues that the evidence is insufficient to show that he was at the scene of the crime and that none of the complaining witnesses was able to identify him as one of the persons there.

[1] However, as pointed out by respondent, there is strong circumstantial evidence which points to appellant's participation in the attempted robbery. The three men were making an escape and they admitted that they were together, on their way out of town, just before they reached the Safeway store. Appellant admitted that they had not split up yet, and that their plans did not call for splitting up until after they got out of town or got a ride. Poulter admitted that he was looking

for transportation, and Wright said that he started to get into the car because he thought the man was going to give them a ride. Wright had also asked Hord how much gas he had in the car. During the attempted robbery, Hord heard Poulter say to someone, "You guys get in the back," or words to that effect, and Hord then heard the car door open and the car seat was moved forward and someone scrambled around in the back seat. This happened twice, as though two persons got into the car. Poulter was standing outside the car at the time. Finally, Mrs. Hord saw three men running away from the car. We are satisfied that there is sufficient evidence to support appellant's conviction on Count II. The reasonable inference is that these men were attempting to take, by force, an automobile in which to make a get-away. Otherwise why would Poulter have threatened Hord with the knife? We are required to review the evidence in the light most favorable to respondent. People v. Hammel, 101 Cal.App.2d 168, 170, 225 P.2d 8. Stated another way, if the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

[2] Appellant next contends that he was prejudiced by the court's comment on his request that defendants' witnesses be excluded from the courtroom. The request was made after some of defendants' witnesses had testified and the court chided defendants' counsel for not having made the request sooner, and then the court granted the request and excluded the witnesses. There is no merit in appellant's contention that the remarks of the court constituted prejudicial error.

[3] Likewise, there is no merit in appellant's contention that the court erred in refusing to permit appellant's counsel to examine Poulter as to the latter's intent to commit robbery. The record shows that Poulter had pleaded guilty to the second count, and in view of this, evidence of his intent would hardly be material or relevant and it is difficult to understand how appellant could have been prejudiced by its exclusion. People v. Monson, 102 Cal.App.2d 308, 313, 227 P.2d 521.

Appellant also complains that the trial judge expressed impatience with the manner in which appellant's counsel was conducting the defense, and complains particularly of the statement of the court during appellant's counsel's examination of Poulter when the court told counsel to proceed, that "we are wasting too much time," and later said, "I want this case finished Friday, no question about it. It must be," and then, turning to the sheriff, said, "Mr. Morris, this case must finish on Friday."

Appellant complains also that during direct examination of Sam Alexander, a general carpenter employed at Folsom prison and one of appellant's witnesses, the trial court expressed impatience at the number of preliminary questions asked the witness, saying, "Why is that material? Get at the meat of it and don't waste so much time with the preliminary questions." Counsel continued with the examination and asked the witness whether he had ever known of appellant drinking on the job. The prosecuting attorney objected to the question as being incompetent, irrelevant and immaterial, whereupon the court said, "I don't see how it is material. Why don't you get at the meat of the subject?"

[4, 5] We do not believe that there was any prejudicial error in these remarks of the court. The record shows that the appellant was given ample opportunity to fully examine and cross-examine witnesses, and while the trial judge appeared to grow a little impatient at what he was undoubtedly justified in believing was a waste of time, his remarks were no doubt occasioned by a commendable desire to expedite the trial. It is the duty of the trial judge to see that the trial is conducted in an orderly and expeditious manner. People

v. Corlett, 67 Cal.App.2d 33, 57, 153 P.2d 595, 964.

In view of the foregoing we conclude that the evidence fully supports the judgment of conviction and that no prejudicial error was committed.

The judgment is affirmed.

PEEK, J., and PAULSEN, J., pro tem., concur.

122 Cal.App.2d 438

NELSON v. MAYER.

Civ. 4751.

District Court of Appeal, Fourth District, California.

Jan. 5, 1954.

Rehearing Denied Jan. 21, 1954.

Hearing Denied March 3, 1954.

In action for real estate broker's commission, the Superior Court, Riverside County, O. K. Morton, J., directed a verdict for defendant, and from the consequent judgment plaintiff appealed. The District Court of Appeal, Mussell, J., held that evidence on issue as to whether broker had been procuring cause of sale was insufficient for submission of case to jury.

Affirmed.

1. Trial 🔑142

The right of a court to direct a verdict is the same as the right of a court to grant a nonsuit, and the verdict can be directed only when, disregarding conflicting evidence and giving plaintiffs' evidence all value to which it is legally entitled, including every legitimate inference which may be drawn therefrom, result is a determination that there is no evidence of sufficient substantiality to support verdict for plaintiff if such verdict were given.

2. Brokers 🔑46, 55(1)

Where real estate broker's authority to sell property was not exclusive, property owner had right to sell property by his own unaided efforts or through another agent without becoming liable to broker for commission.

3. Brokers 🔑54, 57(2)

In order to recover real estate broker's commission, broker was required to produce a purchaser ready, willing and able to purchase at price and on terms specifically expressed in broker's contract of employment, and while change made by vendor when consummating sale in price of land or terms of sale from those specified in the contract could not of itself affect or impair right of broker to his commission, broker could not claim commission unless his efforts were procuring cause of the sale.

4. Brokers 🔑53

In order for real estate broker to recover commission on sale of property, evidence must show that broker's efforts were procuring cause of sale, and not merely one in a chain of causes.

5. Brokers 🔑53

To constitute himself the predominating effective cause resulting in sale of realty so as to entitle broker to commission, it is not enough that broker contributes indirectly or incidentally to sale by imparting information which tends to arouse interest, but he must set in motion a chain of events, which, without break in their continuity, cause vendor and purchaser to come to terms.

6. Brokers 🔑88(3)

In action by real estate broker for commission on sale of realty, evidence on issue as to whether broker had been procuring cause of sale was insufficient for submission of case to jury.

Frank E. Carleton, Riverside, for appellant.

Neil S. McCarthy, Los Angeles, and Thompson & Colegate, Riverside, for respondent.

MUSSELL, Justice.

This is an appeal from a judgment in favor of defendant entered pursuant to a directed verdict, the action being one to recover a real estate broker's commission. The evidence presented by plaintiff is substantially the same as that in a former trial of the action in which a jury returned a verdict in favor of plaintiff H. Frank Nelson. A new trial was granted in that action and on appeal the order granting it was affirmed by this court. Nelson v. Mayer, 101 Cal.App.2d 733, 226 P.2d 20.

Plaintiff's Evidence

Defendant Lewis B. Mayer, owner of a stock farm in Riverside county, authorized his business manager, Myron S. Fox, to sign and deliver to Nelson, a licensed real estate broker, the following letter:

> "Mayer Stock Farm
> Perris, California
> "September 30, 1947
>
> "Mr. H. Frank Nelson
> Perris
> California
>
> "Dear Frank:
>
> "The price on the Mayer Stock Farm is $600,000. It consists of 504½ acres of irrigated land together with buildings, improvements and attendant equipment.
>
> "We will pay you a realty commission of 5 per cent if you can effect a sale.
>
> "Yours very truly,
> /s/ M. S. Fox
> Myron S. Fox
> Business Manager for Mr. Mayer."

H. Frank Nelson died on April 15, 1952, and from his testimony at the former trial of this action it appears that he first discussed the Mayer farm with Ben Mathews (to whom he had previously sold a ranch); that the first conversation with Mathews was at the Mathews ranch in September or early October, 1948, and was as follows:

> "I told Mr. Mathews on this particular day that I had just been advised by Myron Fox, Louis B. Mayer's manager, that the Mayer farm, stock farm, could be had in two parcels, and I said, 'Why don't you and Mr. Statler then come down and take a look at this ranch, and let me show you the property, and take it over?' And he said, 'What would I do with it?' I said, 'You can do the same thing that Mr. Mayer has been doing with it: raise horses and cattle. You can bring over some registered Brahman cattle from Arizona that you were going to bring over to this ranch that I have previously sold you.' He said 'Now I have got a pretty big program here, Frank. I don't think I am interested.'"

That the next conversation with Mathews took place (apparently on or about November 9, 1948) at the Nelson home, where Mathews went to obtain Nelson's signature in connection with a right of way through Mathews' farm; that Mathews asked for the "story" and the best price on the Mayer ranch and was informed that he, Nelson, was authorized to sell it for $600,000; that he asked Mathews why he didn't take the property over and suggested that he view the premises; that Mathews stated he was "in too big a hurry today to do anything", and left; that on December 4, 1948, plaintiff learned that the ranch had been sold and phoned Mathews about it; that he told Mathews he thought Mathews was the one who had bought the farm; that Mathews said "Mr. Nelson, you are just one hundred per cent wrong. I am in no way interested in the purchase of the Mayer farm with my money, with my equipment or in any other manner, but I will tell you one thing, I do have a friend who is interested and who is negotiating for the purchase of the Mayer farm"; that he told Mathews he had tried to interest him and Mr. Statler in taking the ranch and if it were sold, he expected his five per cent commission; that he then had a conversation with Mr. Fox in which he was informed by Fox that they had a deal on the ranch but that he would rather not discuss it or disclose the names of the principals until the deal was closed and that he had never met Mathews.

Mrs. Nelson testified that she was present at a conversation between her husband and Mathews during the latter part of September or the early part of October, 1948; that her husband asked Mathews if he would be interested in buying the Mayer ranch and Mathews said "No, he was not interested. What would he do with it?"; that her husband said "Well, you can raise your Brahman steers and I think it is a very good proposition for you and Mr. Statler" and that Mr. Mathews said "No, Mr. Nelson, I don't think I would be interested", or something like that; that Mr. Mathews said he was not interested in buying any part of the ranch; that she was also present at the conversation between her husband and Mathews at her home on or about November 9, 1948.

On December 6, 1948, escrow instructions were signed by Mathews as attorney in fact for Mr. Statler, and a Mrs. Harless, formerly Miss Howard, and by defendant Louis B. Mayer. A grant deed to the Mayer farm, dated January 19, 1949, was received in evidence showing Louis B. Mayer as grantor and Ellsworth M. Statler and Meredith Howard Harless as grantees. A trust deed was executed by Ellsworth M. Statler by Ben F. Mathews, his attorney in fact, and a chattel mortgage on the property was also executed by Statler in the same form. A general power of attorney from Statler to Mathews was executed on June 12, 1937, and again on December 20, 1948, and in August, 1949, Mrs. Harless deeded her undivided one-half interest in the property to Statler.

Defendant's Evidence

Louis B. Mayer testified that Mrs. Harless had been in his employ for a number of years; that in October, 1947, in Washington, D. C., he told her he was going to sell his farm and employed her to sell it for him; that he told her he would pay her five per cent commission and expenses, if she was required to do any traveling; that between October, 1947, and until September 1, 1948, he had communications with her in connection with what she was doing about the sale of the ranch; that she said Mr. Harless, to whom she was engaged, was attorney for Mr. Statler and that she believed she could sell the farm to Statler; that Mr. Harless could; that he said "go ahead"; that about November 15, 1948, he met her in Perris, California; that she was then with Mr. Mathews, whom he had never seen before; that Mathews stated that Statler wanted to do something for Harless so he could make some money; that the terms of the deal were then agreed upon with Mrs. Harless; that he had never met the plaintiff, Mr. Nelson, until after this action was filed; that Mr. Nelson never communicated with him personally; that he had not interested anybody in the sale of the ranch; that he had never met Mr. Statler and that he paid Mrs. Harless $20,000 and expenses for her services in selling the farm.

Mrs. Harless testified that in 1947 she had a conversation with Mr. Mayer in Washington, D. C., and at that time he told her to "go ahead" and look for a buyer for the ranch; that she discussed the sale of the property with Harless in Washington in the spring of 1948 and asked him if Mr. Statler would be interested in buying it; that she first met Mr. Mathews in Phoenix, Arizona, and four or five days later she told both he and Mr. Harless about the ranch and the terms of sale; that she asked Mathews if he could influence Mr. Statler in the purchase of the ranch and Mr. Mathews said "Well, you are with his attorney, Mr. Harless, talking with him"; that a few days later she again discussed the property with Mr. Harless and Mr. Mathews; that in October Mr. Mayer stated that he would accept $400,000 for the property and throw in the equipment; that on November 21, 1948, she drove to the ranch with Mr. Mayer and they met Mathews on the ranch; that she introduced him to Mr. Mayer and informed Mathews of the price of the ranch; that she had never heard the name of Frank Nelson before the transaction was closed; that Mr. Mathews did not at any time mention Mr. Nelson or any other real estate agent.

Richard F. Harless testified that he became attorney for Ellsworth Statler in January, 1948, and was his attorney through that year and into the latter part of 1949; that he knew in 1947 and 1948 that Miss Howard had a listing on the Mayer ranch and was trying to sell it; that she asked him if Statler might be interested in buying the property; that about September 7, 1948, he discussed the ranch with Statler; that he called Miss Howard and she came to Phoenix and discussed the matter with him and with Mr. Mathews; that Mathews had been Mr. Statler's attorney for many years and he, Harless, wanted to discuss the matter with him; that when he and Statler discussed the ranch, Statler stated that he would like to know more about it; that he had a great deal of respect for Mr. Mathews and on some occasion might discuss it with him. He then suggested that Harless also discuss the matter with Mathews; that thereafter he talked to Mr. Statler several times and told him that he had discussed the ranch with Mathews and that Mathews indicated that it was worthwhile; that Statler stated that he would like to see the ranch; he was definitely interested and would inspect it at the earliest possible date; that Statler later stated that he had seen the ranch, that he thought it was a wonderful property and he hoped things could be worked out because he would like to buy it.

Mr. Mathews testified that previous to January, 1948, he had been attorney for Statler for about eleven years; that in January, 1948, he began to turn over his business in Arizona to Harless; that on or about September 6, 1948, in Phoenix, Arizona, he first learned that the Mayer ranch was for sale; that he had met Mr. Harless and Miss Howard on that date and Miss Howard advised him that she was authorized by Mr. Mayer to sell the property; that she asked if Mr. Statler would be interested in it to which he replied "Why don't you ask his attorney, he is sitting right at the table", pointing to Harless; that he informed Miss Howard that personally he did not like the idea and that, after all, it was Statler's affair and not his; that at the request of Miss Howard he went to the ranch and looked around it; that on October 8th or 10th, 1948, Nelson told him that he had the Mayer ranch for sale and asked him if he was interested in it; that he said "No, it was out of his class"; that he did not mention Mr. Statler at all nor did he say anything about Brahman cattle; that he next saw Mr. Nelson at his home on November 9, 1948, at which time Nelson again asked if he would be interested in the Mayer farm; that he told Nelson it was out of his class; that he did not have that kind of money and that he had much more ranch than he needed; that he was in a hurry and didn't have time to discuss anything; that he did not ask Nelson for the "story" on the Mayer ranch, ask the price of it, or inquire as to the condition of the water on the ranch; that from November 9, 1948, until the 4th day of December, 1948, Nelson never communicated with him with reference to the ranch; that he and Statler went over the ranch about November 7, 1948; that later he had a conversation with Statler in which he told him to "go ahead" with the deal; that he informed Statler of the terms of the transaction, went to the title company on November 30, 1948, and signed the escrow instructions under his power of attorney; and that Nelson at no time took him to the ranch.

The sole question on this appeal is whether the trial court invaded the province of the jury in directing a verdict for the defendant.

[1] The rules relative to the authority of a trial court to direct a verdict are discussed in Gish v. Los Angeles Ry. Corp., 13 Cal.2d 570, 573, 90 P.2d 792, 794, and it is there said:

> "The right of a court to direct a verdict is the same as the right of a court to grant a nonsuit. This can be done only when, disregarding conflicting evidence and giving plaintiffs' evidence all the value to which it is legally entitled, including every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such verdict was given. Newson v. Hawley, 205 Cal. 188, 270 P. 364."

[2] In the instant case Nelson's authority to sell the property involved was not exclusive. Defendant therefore reserved the right to sell his farm by his own unaided efforts without becoming liable to Nelson for a broker's commission. Snook v. Page, 29 Cal.App. 246, 247, 155 P. 107; Wright v. Vernon, 81 Cal.App.2d 346, 347, 183 P.2d 908. He also reserved the right

to sell through another agent or broker if he so desired. Hill v. Knight, 209 Cal. 14, 21, 285 P. 691.

[3–5] Nelson, in order to recover commission, was required to produce before Mayer a purchaser ready, willing and able to purchase at the price and on the terms specifically expressed in the contract of employment (in this case the letter of September 30, 1947) and while a change made by Mayer when consummating the sale in the price of the land or the terms of the sale from those specified in the contract could not of itself affect or impair in any way the right of Nelson to his commission, the latter could not claim a commission unless his efforts were the procuring cause of the sale. In order for plaintiff to recover, the evidence must show that Nelson's efforts were the procuring cause of the sale and not merely one in a chain of causes. Nelson v. Mayer, supra, 101 Cal.App.2d at page 738, 226 P.2d at page 23. As was said in Sessions v. Pacific Improvement Co., 57 Cal.App. 1, 17, 206 P. 653, 660:

> "To constitute himself the *causa causans*, the predominating effective cause, it is not enough that the broker contributes indirectly or incidentally to the sale by imparting information which tends to arouse interest. He must set in motion a chain of events, which, without break in their continuity cause the buyer and seller to come to terms as the proximate result of his peculiar activities."

In Hill v. Knight, supra, 209 Cal. at page 20, 285 P. at page 693, the court said, quoting from Naylor v. Ashton, 20 Cal. App. 544, 130 P. 181:

> "'It must further appear that the broker performed the duty assumed by him within the time limited in his contract, or within such extension of time as may have been granted by his employer. If he failed to do that, he is not entitled to the commissions, even though he made efforts to sell property, and first called to it the attention of the party who subsequently made the purchase, unless the delay was caused by the negligence, fault or fraud of the owner.'" (Citing cases.)

The court then quoted from Cone v. Keil, 18 Cal.App. 675, 124 P. 548, as follows:

> "'Merely putting a prospective purchaser on the track of property which is on the market will not suffice to entitle the broker to the commission contracted for, and even though a broker opens negotiations for the sale of the property, he will not be entitled to a commission if he finally fails in his efforts, without fault or interference of the owner, to induce a prospective purchaser to buy or make an offer to buy, notwithstanding that the owner may subsequently, either personally or through the instrumentality of other brokers, sell the same property to the same individual at the price and upon the terms which the property was originally offered for sale.'"

[6] Plaintiff's evidence, in the light of the rule stated in the foregoing cases, is not, in our opinion, sufficient to support a verdict in his favor. Nelson did not effect a sale of the property. He did not put the buyer and the seller together or cause a meeting of minds upon the sale or the terms thereof. The conversations which took place between Nelson and Mathews do not show that Mathews was a prospective purchaser. He stated definitely that he was not interested in buying the property. In this connection it may be noted that after the conversation with Mathews on November 9, 1948, Nelson talked with Mr. Fox and obtained a reduction in the price of the farm but did not go back to Mathews and tell him he had better terms or make an effort to contact him and open negotiations for the sale of the property.

Appellant argues that plaintiff's direct evidence and reasonable inference therefrom was strengthened by defendant's evidence. We find no merit in this contention. Defendant's evidence shows that the sale of the property was effected through the efforts of Meredith Howard Harless and her husband, Richard Harless. Where as here, the evidence is of such a conclusive character that the trial court in the exercise of a sound judicial discretion would be compelled to set aside a verdict returned in opposition to it, the jury was properly instructed to return a verdict for the defendant. Washer v. Bank of America, 87 Cal.App.2d 501, 506, 197 P.2d 202.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER, J., dissenting.

122 Cal.App.2d 417

NETZLEY et al. v. HILLSTROM et al.

Civ. 4727.

District Court of Appeal, Fourth District, California.

Jan. 4, 1954.

Malpractice action was brought to recover damages for injuries. The Superior Court of San Bernardino County, Martin J. Coughlin, J., entered judgment of dismissal under statute providing that trial court may in its discretion dismiss any action for want of prosecution whenever plaintiff has failed for two years after action is filed to bring action to trial, and plaintiffs appealed. The District Court of Appeal, Mussell, J., held that Superior Court did not abuse its discretion in granting judgment of dismissal.

Judgment affirmed.

1. Dismissal and Nonsuit 🔑60(1)

Power of trial court to dismiss action for failure on part of plaintiff to prosecute it with diligence is an inherent power, which exists independent of statutory provisions. Code Civ.Proc. § 583.

2. Dismissal and Nonsuit 🔑60(1)

Statute providing that court may in its discretion dismiss any action for want of prosecution whenever plaintiff has failed for two years after action is filed to bring such action to trial and other related statutes must be read in light of existence of inherent power of trial court to dismiss action for failure on part of plaintiff to prosecute it with diligence. Code Civ.Proc. § 583.

3. Appeal and Error 🔑948, 962

Action of trial court in dismissing action for failure to prosecute diligently should not be disturbed on appeal except on showing of a clear abuse of discretion, and it is incumbent on appellant to show that there has been such an abuse. Code Civ.Proc. § 583.

4. Appeal and Error 🔑962

The "discretion" mentioned in statute providing that court may in its "discretion" dismiss any action for want of prosecution whenever plaintiff has failed for two years after action is filed to bring such action to trial is the discretion of the trial court and not the discretion of a reviewing court. Code Civ.Proc. § 583.

See publication Words and Phrases, for other judicial constructions and definitions of "Discretion".

5. Dismissal and Nonsuit 🔑60(2)

Duty rested on plaintiffs at every stage of proceedings to use due diligence to expedite malpractice action to final determination, in order to prevent application of statute providing that court may in its discretion dismiss any action for want of prosecution whenever plaintiff has failed for two years after action is filed to bring such action to trial. Code Civ.Proc. § 583.

6. Dismissal and Nonsuit 🔑60(3)

Where malpractice action was filed January 26, 1948, and motion to dismiss for want of prosecution was not filed until November 20, 1952, and no excuse was shown by plaintiffs for the delay, except statements in affidavit of counsel for plaintiffs that he was unable to contact plaintiffs and their statement to him that they had not received letters which he had written to them, trial court did not abuse its discretion in dismissing the action for want of prosecution. Code Civ.Proc. § 583.

7. Dismissal and Nonsuit ⚷60(3)

Fact that defendants did not protest delay of plaintiffs in bringing malpractice action to trial before defendants moved for dismissal under statute providing that trial court may in its discretion dismiss any action for want of prosecution whenever plaintiff has failed for two years after action is filed to bring such action to trial was no excuse for failure of plaintiffs to prosecute action with diligence. Code Civ. Proc. § 583.

8. Dismissal and Nonsuit ⚷50

The right of a defendant to move for dismissal of action under statute providing that trial court may in its discretion dismiss any action for want of prosecution whenever plaintiff has failed for two years after action is filed to bring such action to trial is not waived by filing of a demurrer or answer by defendant. Code Civ.Proc. § 583.

9. Dismissal and Nonsuit ⚷50

Defendants were not estopped to claim the benefit of statutes providing that court may in its discretion dismiss any action for want of prosecution whenever plaintiff has failed for two years after action is filed to bring such action to trial, merely because defendants failed to object to the delay until long after the two-year period had expired and took affirmative steps looking to a trial on the merits, such as filing and arguing a demurrer, filing an answer and a demand for security for costs. Code Civ.Proc. § 583.

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William G. Bergman, Jr., Claremont, for appellants.

Swing & Gillespie, San Bernardino, for respondents.

MUSSELL, Justice.

The complaint in this malpractice action was filed on January 26, 1948. On November 20, 1952, defendants E. N. Hillstrom and C. A. Herrmann filed and served a notice of motion to dismiss the action on the ground that there had been an inexcusable delay of more than two years after the filing of said action in prosecuting the same. This motion was granted on December 5, 1952, and a judgment of dismissal was thereupon entered. Plaintiffs appeal from the judgment and the principal question involved is whether the trial court abused its discretion in dismissing the action.

It appears from the affidavit of counsel for defendants, filed in support of the motion, that this is an action to recover damages for personal injuries alleged to have been caused by the wrongful acts of defendants arising out of and in the course of medical care and treatment and in the performance of a surgical operation upon the plaintiff Lois Gwendolyn Netzley; that the wrongful acts are alleged to have occurred between the 26th day of September, 1946 and the 20th day of April, 1947; that the complaint was filed on January 26, 1948; that a first amended and supplemental complaint was filed on May 7, 1948, a second amended and supplemental complaint was filed on June 19, 1948, a third amended complaint on July 28, 1948, a fourth amended complaint on October 15, 1948, and a fifth amended complaint on April 1, 1949; that on April 7, 1949, defendants demurred to the fifth amended complaint; that said demurrer was never brought on for hearing and no proceedings of any kind were had in said action from that date until February 29, 1952, when plaintiffs were granted permission to file a sixth amended complaint, to which defendants demurred and said demurrer was overruled; that on April 24, 1952, defendants filed their answer and said action became at issue, nearly four years and four months after the complaint was filed; that on or about October 6, 1952, defendants filed a notice for security for costs and an undertaking was thereafter filed and served upon defendants on or about November 3, 1952; that on November 10, 1952, the plaintiffs filed a motion for an order advancing said case for trial upon the stated ground that the five-year period within which said action must be brought to trial would expire on or about January 24, 1953; that said motion has not yet been heard, ruled upon or otherwise disposed of; that defendants stated to affiant the facts and circumstances of the case and that affiant believes that defendants have a good and valid defense to said cause of action upon the merits; that at all times since the filing of said action the defendants have been ready and willing to try it; that plaintiffs' delay in bringing said cause to trial is wholly inexcusable and is not caused by any acts or omissions of the defendants; that since said action was filed memories of witnesses have become dim with the passage of time, witnesses have disappeared and defendant E. N. Hillstrom has moved from the state of California and evidence has been lost which, had said action been prosecuted to trial with reasonable diligence, would have been available to said defendants, and without which defendants will be prejudiced and placed under an undue hardship if said action is now permitted to proceed to trial after such long and inexcusable delay in the prosecution thereof.

In opposition to the motion and in answer to the affidavit of counsel for defendants, counsel for plaintiffs filed a counter affidavit in which he stated that on or about March 1, 1949, he forwarded to the plaintiffs at their last address known to affiant at Dayton, Ohio, a copy of the fifth amended complaint with a request that they verify the same and return it to him; that on March 30th, not having received said complaint so verified, affiant verified and filed a fifth amended complaint; that he did not again hear from the plaintiffs and learned that they had not received said complaint until some time between the first and fifth days of February, 1952, at which time plaintiffs came to California and advised affiant that they had never heard from him and had written two letters to him regarding this case, neither of which was ever received by affiant; that thereupon affiant prepared and filed a sixth amended complaint to which a demurrer was filed and argued on the 21st day of March, 1952; that defendants did not then make any objection to the delay in said action; that affiant then placed the matter on the civil active list for trial and took the deposition of one of the defendants on August 22, 1952; that no objection was then made by the defendants to the delay in bringing the case to trial; that on October 6, 1952, defendants demanded security for costs and on or about October 28, 1952, a surety bond was filed.

The motion to dismiss for want of prosecution was based on the records and files in said action and on said affidavits.

[1, 2] The rule is well settled that the power of a trial court to dismiss an action for failure on the part of the plaintiff to prosecute it with diligence is an inherent power which exists independent of statutory provisions and that the provisions of section 583 of the Code of Civil Procedure and other related sections must be read in the light of the existence of such inherent power. Simonini v. Jay Dee Leather Products Co., 85 Cal.App.2d 265, 268, 193 P.2d 53; Steen v. City of Los Angeles, 31 Cal.2d 542, 546, 190 P.2d 937.

[3] Section 583 of the Code of Civil Procedure provides that the court may in its discretion dismiss any action for want of prosecution whenever plaintiff has failed for two years after action is filed to bring such action to trial. It is also the rule that the action of the trial court in dismissing an action for failure to prosecute diligently should not be disturbed except upon a showing of a clear abuse of discretion and it is incumbent upon the appellant to show that there has been such an abuse. Simonini v. Jay Dee Leather Products Co., supra, 85 Cal.App.2d 268, 193 P.2d 54, 55; Gurst v. San Diego Transit System, 119 Cal.App.2d 51, 258 P.2d 1109.

[4] As was said in Hillsdale Builders Supply Co. v. Eichler, 109 Cal.App.2d 117, 118, 240 P.2d 343, 344:

> "The cases are uniform in holding that when the trial court dismisses an action under this section (Code Civ. Proc., sec. 583) the 'discretion' mentioned therein is the discretion of that court, and not that of a reviewing court. It is equally true that the action of a trial court will not be disturbed except on a showing of a manifest abuse of such discretion." (Citing cases.)

[5–7] In the instant case the action was filed January 26, 1948, and the motion to dismiss for want of prosecution was not filed until November 20, 1952. No excuse is shown for the delay of four years, nine months and twenty-four days, except the statements in the affidavit of counsel for plaintiffs that he was unable to contact his clients and their statement to him that they had not received letters which he had written to them and the further excuse that the defendants had made no objection to the delay in bringing the case to trial. However, the duty rested upon the plaintiffs at every state of the proceedings to use due diligence to expedite the case to a final determination. Raggio v. Southern Pac. Co., 181 Cal. 472, 475, 185 P. 171. The evidence is amply sufficient to support the trial court's conclusion and plaintiffs have failed to show a clear abuse of discretion on the part of the trial court under the rules stated herein. The fact that the defendants did not protest the delay before moving for a dismissal is no excuse for plaintiffs' failure to prosecute the action with diligence. Jackson v. De Benedetti, 39 Cal.App.2d 574, 103 P.2d 990.

[8, 9] It is argued by the plaintiffs that the defendants are estopped to claim the benefit of the provisions of section 583 of the Code of Civil Procedure. Apparently this contention is based upon the failure of defendants to object to the delay and that defendants took affirmative steps looking to a trial on the merits such as filing and arguing a demurrer, filing an answer and a demand for security for costs. This argument is without merit. The right to move for a dismissal is not waived by the filing of a demurrer or answer, Hibernia Savings & Loan Soc. v. Lauffer, 41 Cal.App.2d 725, 107 P.2d 494, and neither the failure to object nor acquiesce in delay long after the two-year period expired is an excuse for failure to diligently prosecute the action to trial within the two-year period. Barry v. Learner, 113 Cal.App. 651, 655, 299 P. 82.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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122 Cal.App.2d 350

WILLIAMS et al. v. HALLEY et al.

SANCHEZ v. HALLEY et al.

DUTRA v. HALLEY et al.

Civ. 8298.

District Court of Appeal, Third District, California.

Dec. 30, 1953.

Actions by bus passengers for personal injuries sustained when bus was struck by train at street intersection. From a judgment of the Superior Court, San Joaquin County, R. M. Dunne, J., in favor of the defendant railroad, the plaintiffs appealed. The Court of Appeal, Van Dyke, P. J., held that there was no error in exclusion of a map and city ordinance, offered to show that franchise giving right to operate railroad in city had expired, where that fact was admitted, and that instructions on that issue were properly refused where they failed to contain any statement of legal effect of expiration of franchise.

Judgment affirmed.

1. Railroads 🔑345(3), 347(1)

In actions for injuries sustained by passengers in bus struck by train at street intersection, refusal to admit in evidence a map and city ordinance to show that right of railroad to use city streets had expired was not error, where no such issue was raised by pleadings and counsel for railroad admitted that franchise for use of streets had not been renewed.

2. Appeal and Error 🔑1057(2)

Error cannot be predicated upon the exclusion of evidence as to a fact admitted.

3. Railroads 🔑351(4)

In actions for injuries sustained by passengers in bus struck by train at street intersection, refusal of instructions that right of railroad to run trains over the crossing had expired and that such prior right did not give railroad an exclusive right to travel over that portion of street was not error, where instructions contained no statement of the legal effect flowing from that situation and would not have altered effect of other instructions fixing ordinary care as the proper standard.

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Mazzera, Snyder & De Martini, Stockton, for appellants.

Jones, Lane, Weaver & Daley, Stockton, for respondent.

VAN DYKE, Presiding Justice.

The appellants suffered personal injuries when a bus in which they were riding as passengers for hire collided with one of respondent's trains at a street intersection in the City of Stockton. Their several actions against the driver and the owner of the bus and against the respondent, Southern Pacific Company, were consolidated for trial. The jury returned verdicts in favor of appellants and against the driver and the owner of the bus; but the verdicts in all cases were in favor of respondent. This appeal is from the judgment entered upon the jury's verdicts.

Appellants assign as error the exclusion of certain evidence consisting of a map and Ordinance 294 of the City of Stockton, and further assign as error the refusal of the trial court to give to the jury three instructions requested by plaintiffs. No question is raised as to the sufficiency of the evidence to sustain the jury's implied finding that at the time of the accident the respondent and its agents were free from negligence in respect to the manner and method of operating the train.

The charging portion of each complaint alleged that the respondent had "so carelessly and negligently operated its train as to cause the same to collide with the bus in which said plaintiff was riding."

The ordinance which appellant sought to introduce in evidence granted to respondent's predecessors in interest a 50-year franchise authorizing the construction, maintenance and operation of certain railroad tracks within the city. The train which collided with the bus was being operated along one of the tracks constructed and maintained by respondent under the franchise in question. Appellants called to the stand the city engineer of Stockton who testified concerning a map taken from the public records of that city and purporting to show the route of the tracks authorized under the franchise. But the map added nothing save visually to the provisions of the ordinance itself. Thereupon appellants offered the ordinance and the map in evidence and when the same was objected to by counsel for the respondent the jury was excused and the matter of admissibility was argued to the court. During that argument and when the court had indicated that it would refuse to admit the offered evidence the following occurred:

Counsel for appellants: "We'll offer at this time * * * Ordinance 294 of the City of Stockton. We also offer to prove that * * * [it] is a proper ordinance which controls the traffic to cross this particular track at this particular intersection on August the 2nd, 1951, and that * * * [it] had expired and that there was no ordinance of the City of Stockton, nor did the Southern Pacific Company have the right to use the street here in question granted to it by a two-thirds vote of the governing body of the City of Stockton which is, of course, the City Council. The Court: There isn't any dispute about the facts? [Counsel for appellants]: I don't think there is. [Counsel for respondent]: No. The Court: That is, there hasn't been any renewal of the franchise? [Counsel for respondent]: Well, at the present time it's under negotiations. [Counsel for appellants]: It hasn't been renewed. You will concede that? [Counsel for respondent]: Well, Mr. Dunlap [the engineer] testified to that. [Counsel for appellants]: That it hadn't been renewed. [Counsel for respondent]: That the application is pending. [Counsel for appellants]: All right. The Court: You may recall the jury."

Thereafter, and at the request of appellants, the trial court instructed the jury in substance that the defendant, Southern Pacific Company, a corporation, was operating a train across the intersection at the time and place of the accident in question and that any negligence on the part of the crew or agents, servants and employees thereof in the operation, care, or maintenance of said train or crossing would be imputed to the defendant. The court further instructed the jury at the request of the appellants concerning liability of each of two agencies whose joint negligence was the proximate cause of injury without regard to whether one was more or less negligent than the other and further said: "You are instructed that the duty to exercise reasonable or ordinary care is imposed upon the operator of a railroad at public highway crossings with respect to persons traveling upon the highway and over the crossing, both as to the manner of operating the train and the maintenance of the crossing. The standard of care is that of the man of ordinary prudence knowing what the train crew knew, or should have known, and called upon to act in the same or similar circumstances."

Specifically, upon the matter of the expired franchise the appellants requested only the following instructions, and these instructions the court refused to give:

> "Public highways are for the use of the traveling public, and the right of the defendant railroad company is only to use it in common with the public. The fact that the defendant Southern Pacific Company may have been granted at one time the right to lay tracks and operate a train across South Center Street which right has expired gives it *no exclusive right to travel over that portion of South Center Street covered by its tracks.*" (Emphasis ours.)

> "The public highways of San Joaquin County, such as the place of the accident here involved, are for the use of the traveling public, and the right of the defendant railroad company to use it in common with the public depends upon their being granted such right by a two-thirds vote of the governing body of the city. The fact that the defendant Southern Pacific Company had been granted the right to lay tracks and operate trains across the highway, *gave it no exclusive right to travel over that portion of the highway covered by said tracks*; and while the defendant, Southern Pacific Company, a corporation, at one time had the right to run its trains over and upon the public crossing at the place in question, *such right had expired.*" (Emphasis ours.)

> "You are instructed that insofar as applicable to the facts of this case, Section 7555 of the Public Utilities Code of the State of California, provides as follows: 'No railroad corporation may use any street, alley, or highway * * * owned by the municipality within any city, unless the right to do so is granted by a two-thirds vote of the governing body of the city.'"

[1, 2] As stated, appellants complain of the refusal of the court to receive the offered evidence concerning the map and the ordinance. But it is obvious that no error can be predicated thereon for the reason that there was no issue raised by the pleadings nor at the trial concerning the fact of the granting of the franchise nor the fact of its expiration. We have shown that these matters were admitted by counsel of which fact the court previous to its ruling of exclusion took notice. It was not necessary, therefore, to introduce proof of these admitted facts. Whatever legal effect, therefore, appellants might claim followed from the expiration of the franchise was available for urging by the appellants by appropriate instructions requested of the court for that purpose. De Arellanes v. Arellanes, 151 Cal. 443, 449, 90 P. 1059; Cutting v. Oliphant, 27 Cal.App. 120, 124, 148 P. 940; Malter v. National Fire Ins. Co., 54 Cal.App. 198, 200, 201 P. 605; Stickel v. San Diego Elec. Ry. Co., 32 Cal.2d 157, 165–166, 195 P.2d 416. These cases and many others that might be cited lay down the rule that error cannot be predicated upon the exclusion of evidence as to a fact admitted.

[3] Assuming that the expiration of the franchise was material to their case, appellants complain of the refusal of the court to give the instructions requested and

heretofore set out. They argue that the "jury was in no manner advised that the violation of the ordinance by the Southern Pacific made it a trespasser, created a nuisance, and constituted negligence per se." The trouble with this argument is that, even assuming the materiality of the situation concerning the expired franchise, the appellants did not request the court to advise the jury that the operation of the train constituted the respondent a trespasser or that it created a nuisance or that it constituted negligence per se. They argue further that the expiration of the franchise and the legal effects they contend for on appeal cast upon the respondent a duty to exercise a higher degree of care to avoid injuring the plaintiffs than the ordinary care which is the usual obligation of a railroad in the operation of its trains so far as nonpassengers are concerned. But they requested no instruction to that effect and on the contrary requested, and the court gave, as we have noted, instructions fixing the standard of care as that of ordinary care. If we scan the instructions requested and refused we note that they would have informed the jury that the right of a railroad company to use public highways is one which must be exercised in common with the right of the public to use them and that the right to such use at one time granted the respondent gave it no exclusive right to travel over that portion of the streets covered by its tracks. Had these instructions been given, the jury would have had nothing to guide it which it did not receive. The requested instructions, though stating that the right of the respondent to use the streets in common with the public depended upon the existence of a franchise and that this right to run its trains over the crossing at the place in question had expired; but it contained no statement of the legal effect flowing therefrom.

Upon this record, if the expiration of the franchise cast upon the respondent a liability without regard to negligence, or burdened it with the duty of exercising a higher degree of care in the operation of its trains than the duty to exercise ordinary care the instructions requested and refused would not have so informed the jury. Had these instructions been given, therefore, they still would have left to the jury the duty, under the instructions requested by appellants and given, of applying to the conduct of the respondent the test of ordinary care. Under the instructions so requested and given, the jury and apply that test and so applying it found that the respondent had exercised such care. Upon this record, therefore, it would be idle to follow defendants into their discussion of the legal effects flowing from the operation of respondent's train after the expiration of its franchise rights.

The judgment is affirmed.

SCHOTTKY and PEEK, JJ., concur.

RANSOM
v.
PENN MUT. LIFE INS. CO.[*]

Civ. No. 15464.

District Court of Appeal, First District,
Division 2, California.
Dec. 31, 1953.

Hearing Granted Feb. 24, 1954.

Action by beneficiary to recover on alleged policy of life insurance. The Superior Court, Santa Clara County, Leonard R. Avilla, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Nourse, P. J., held that where insurance company had expressed its dissatisfaction with applicant's acceptability because of his history of hypertension, and had requested applicant to submit to further medical tests in accordance with clause of application for policy, and applicant had failed to do so, mere fact that application had been executed and first premium paid did not put insurance policy in force, and beneficiary was not entitled to recover on policy where applicant was killed prior to company's acceptance.

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[*] Subsequent opinion 274 P.2d 633.

Reversed with directions.

1. Insurance ⚷146(1)

Insurance contracts should be considered as a whole and different parts thereof read together, and all given effect. Civ. Code, § 1635.

2. Insurance ⚷146(2)

Terms of contract constitute measure of insurer's liability, and contract should be construed according to language used to arrive at true meaning of contract. Civ.Code, § 1635.

3. Insurance ⚷130(1)

Insurer, to determine acceptability of applicant, has right and is under necessity of making careful investigation of all relevant conditions and circumstances.

4. Insurance ⚷130(2)

Where insurance company had expressed its dissatisfaction with applicant's acceptability because of his history of hypertension, and had requested applicant to submit to further medical tests as provided for in application for policy, and applicant failed to do so, mere fact that application had been executed and first premium had been paid did not put insurance policy in force, and beneficiary was not entitled to recover on policy where applicant was killed prior to acceptance by company.

◆

Keesling & Keesling, Henry C. Clausen, San Francisco, for appellant.

James F. Boccardo, San Jose, Edward J. Niland, Santa Clara, of counsel, for respondent.

NOURSE, Presiding Justice.

In an action on an alleged agreement of life insurance the beneficiary Lois Ransom, widow of the insured, received a verdict for $40,000. Judgment was entered accordingly, a motion for judgment notwithstanding the verdict having been denied. The defendant insurance company, herein further called the company, appeals from the judgment and from the denial of its motion.

On September 16, 1949, Ralph W. Ransom, after having applied for life insurance, submitted to an examination by Dr. Pace, a medical examiner for the company. The examination showed no abnormality except that Ramsom, who was 28 years old, 5 feet 10½ inches high, and who weighed 200 pounds, was somewhat overweight (not sufficient in itself to prevent his insurability). For the filling out of the medical questionaire by Dr. Pace he answered "no" to the questions whether he had had a special heart study or an electrocardiogram and whether there had been a suspicion of or treatment for palpitation of heart, shortness of breath, pain in chest, abnormal pulse, any disease of the heart or blood vessels or a high blood pressure. As to earlier illnesses and treatments he only mentioned an appendectomy and that in 1948 he had consulted Dr. Long in San Jose for a physical examination. Ramsom wished to change the character of the insurance for which he applied to one for $20,000 with double indemnity in case of accidental death and signed the first (nonmedical) part of the application to that effect on September 22, 1949. Part one contained among others the following clauses above applicant's signature:

"I also understand and agree that:

"1. If the first premium is paid in full in exchange for the attached receipt signed by the Company's agent when this application is signed the insurance shall be in force, subject to the terms and conditions of the policy applied for, from the date of Part I or Part II of this application, whichever is the later, provided the Company shall be satisfied that the Proposed Insured was at that date acceptable under the Company's rules for insurance upon the plan, at the rate of premium and for the amount applied for, but that if such first premium is not so paid or if the Company is not satisfied as to such acceptability, no insurance shall be in force until both the first premium is paid in full and the policy is delivered while the health, habits, occupation and other facts relating to the Proposed Insured are the same as described in Part I and Part II of this application and in any amendments thereto.

"2. Notice to or knowledge of an agent or a medical examiner is not notice to or knowledge of the Company, and that no agent or medical examiner is authorized to accept risks, to pass upon acceptability for insurance, or to modify, alter or enlarge any contract of insurance."

Ransom wanted to pay the first premium when he signed Part I of the application, as he wished the insurance to be in force from that time, but as a matter of convenience it was agreed that Hathaway, the agent of company who solicited the insurance, would add his check for the first month's premium ($25.80) to the application and would be paid back the next day. This was done. It is doubtful whether the receipt attached to the application was given in return. Hathaway first testified that he had done so, but when the receipt carrying the same number as the application proved to be in the possession of the company, he retracted and testified that he might have sent a receipt with another number, but that he was not sure. Ransom's widow, the plaintiff, could not find such a receipt. On the 23rd of September when she repaid the $25.80 she was given an informal receipt only. There was evidence that according to instructions and custom the printed receipt attached to the application should be given if payment was made at the signing of the application. The receipt so attached contained a clause similar to the above clause 1 of the application.

The application reached the home office of company in Philadelphia on September 28, 1949. In accordance with its rules and on authorization by Ransom, the company in a letter of September 29 asked Dr. Long for a statement of his findings at the visit Ransom had mentioned in his application. By letter of October 11, Dr. Long answered that Ransom came for a complete checkup on October 17, 1947, complaining of a heavy feeling in the chest. At the beginning of the examination his blood pressure was 150/100, but taken again under less tension 130/98. Except for a moderate obesity the results of examination and tests, among which was an electrocardiogram, were essentially normal. The patient was advised to reduce and reassured as to his physical status. Dr. Long testified at the trial that the diastolic (lower) pressure was too high also at the second reading. His diagnosis was hypertension; Ransom was so informed. Hypertension is the same as high blood pressure.

In a letter of October 13 the company reported Dr. Long's statement to Dr. Pace and asked him to arrange for two afternoon blood pressure observations on two different days, with special attention to the diastolic, to inquire as to any subsequent heavy feeling in the chest and if necessary to make additional examinations to clear up the case. On October 17th Dr. Pace sent Ransom a letter requesting him to come to the office for further tests, but Ransom did not react. Hathaway who had also been informed of the necessity of further blood pressure readings arranged with Dr. Pace that the readings would be taken any evening when Hathaway would bring Ransom over after work. When Hathaway visited Ransom for that purpose Ransom told him that he could not go because he had a cold. Hathaway went back a couple of days later, but that evening, October 27, 1949, Ransom was killed in an auto accident.

About November 8, 1949, the company tendered Mrs. Ransom a check for $25.80 and informed her of the rejection of the application. The check was returned and this suit followed.

From the evidence at the trial the following must be mentioned: Robert L. Weaver, medical director of the company, testified that, in view of the report from Dr. Long, Ransom, in accordance with the company's rules, was not acceptable upon the plan at the rate and for the amount applied for because of his history of heavy feeling in chest and finding of high blood pressure. With respect to the processing of applications that indicate high blood pressure, rule 346 of the company's printed manual requires that two or more blood pressures will be obtained and that the staff will consider the highest systolic the applicant has been determined to have had in the past five years. No new readings were obtained but even if they had been normal, no insurance at standard rate or with double indemnity would have been given. The further blood pressures were asked for the possibility of insurance at substandard rates. Asked why Ransom was not informed that he was not acceptable on the plan applied for if the company knew this on receipt of Dr. Long's report, witness testified that this was not the custom of the company.

Dr. Dennis, the autopsy surgeon who performed the autopsy on Ransom's body, testified that the cause of his death was rupture of the aorta by external violence. There were no remarkable findings as to the heart or other named organs. He could not say that there were no circumstances or conditions to indicate any abnormality whatever, but he found no other lesions that would bring about the death, determination of the cause of which was the purpose of the autopsy performed.

Appellant's main contention is that as a matter of law the conditions which the application contains for the insurance to be in force from the date of the application were not fulfilled, so that there was no contract of insurance and the motion for judgment notwithstanding the verdict should have been granted. As we have concluded that this contention is correct, appellant's further grievances need not be mentioned. Respondent contends that the verdict can be sustained either on the theory that there was an immediate contract of temporary insurance subject to termination by the company if the application had been found unacceptable, which condition subsequent had not happened, or on the theory that the insurance would be in force from the application unless the company reasonably and in good faith was not satisfied as to its acceptability, whereas the jury could hold that there was no reasonable ground for dissatisfaction in good faith.

No case in this jurisdiction has been cited by the parties or found by us which construes a clause in any way similar to the one here involved, although in other jurisdictions there is a great number of decisions on this subject. See Annotations 81 A.L.R. 332, 107 A.L.R. 194, 2 A.L.R.2d 943. However, as shown by these annotations, the cases in other jurisdictions are strongly conflicting. Although the conflict is partly attributable to differences in the formulation of the clauses regarding the force of the insurance prior to the delivery of a formal policy the main cause of disagreement is the difference of attitude of the courts as to the principles which should be applied in the construction of such clauses. The majority accepts that the general principles of construction of contracts are applicable to such insurance contracts and that when the contractural documents are clear the court will not rewrite the contract. They do not accept the existence of a temporary contract of insurance with condition subsequent if such construction does not accord with the language of the provision involved and require performance of conditions expressed as prerequisite of the taking effect of the insurance from a date prior to the delivery of a formal policy. Examples of such majority decisions are: Mofrad v. New York Life Ins. Co., 10 Cir., 206 F.2d 491; Maddox v. Life & Casualty Ins. Co. of Tennessee, 79 Ga.App. 164, 53 S.E.2d 235; Bearup v. Equitable Life Assur. Soc. of the U. S., 351 Mo. 326, 172 S.W.2d 942; Gerrib v. Northwestern Mut. Life Ins. Co., 256 Ill.App. 506; Raymond v. National Life Ins. Co., 40 Wyo. 1, 273 P. 667; Gonsoulin v. Equitable Life Assurance Society, 152 La. 865, 94 So. 424. There is however a sizable minority which is influenced by the consideration that the applicant pays the first premium at the time of the application for the purpose of receiving immediate coverage and who consider the conditions restricting the right to early coverage as "tricks" by which the insurance companies obtain premiums for coverage which they do not provide, although it is sometimes conceded that the applicant by the provisions attacked may obtain other advantages. Such courts tend to find ambiguities in the clauses in question for the purpose of construing them against the insurance companies so as to provide for a temporary insurance with condition subsequent, or such temporary insurance is even read into the contract without resort to the ambiguity technique. See Annotations 2 A.L.R.2d 943, 1019 et seq. Examples of this minority view are Gaunt v. John Hancock Mut. Life Ins. Co., 2 Cir., 160 F.2d 599; Duncan v. John Hancock Mut. Life Ins. Co., 137 Ohio

St. 441, 31 N.E.2d 88; Colorado Life Co. v. Teague, Tex.Civ.App., 117 S.W.2d 849; Stonsz v. Equitable Life Assur. Soc., 324 Pa. 97, 187 A. 403, 107 A.L.R. 178.

[1, 2] We are of the opinion that in this state the majority view giving such clauses their normal construction should be followed. Insurance contracts are construed according to the same rules as other contracts, § 1635, Civil Code. They should be considered as a whole and the different parts read together and all given effect. The terms of the contract constitute the measure of the insurer's liability, and it should be construed according to the language used to arrive at the true meaning. 14 Cal.Jur. 440, Insurance, § 22 and cases there cited. The general rule of construction is stated as follows in Vierra v. Shaffer, 113 Cal.App.2d 768, 772, 248 P.2d 992, 994, quoting from 12 Am.Jur. 749:

> "'Interpretation of an agreement does not include its modification or the creation of a new or different one. A court is not at liberty to revise an agreement while professing to construe it. Nor does it have the right to make a contract for the parties—that is, a contract different from that actually entered into by them. Neither abstract justice nor the rule of liberal construction justifies the creation of a contract for the parties which they did not make themselves or the imposition upon one party to a contract of an obligation not assumed.'"

The quoted language of the first clause of the application, on which the plaintiff must rely for the contention that the insurance was in force, is inconsistent with an agreement for temporary insurance existing until a condition subsequent is fulfilled. Especially the last part of said clause "but that * * * if the Company is not satisfied as to such acceptability, no insurance shall be in force until both the first premium is paid in full and the policy is delivered * * *" precludes such construction. The only construction of the clause which gives its language its normal meaning is that the existence of insurance prior to the delivery of the policy is dependent on the fulfillment of the express conditions stipulated in the proviso. There is a further reason why we do not feel justified in trying to circumvent these conditions. On similar conditions, although still less favorable than those in this application, sec. 10115, Insurance Code, predicates the right of a beneficiary to recover prior to actual delivery of the policy, if the first premium has been paid at the time of the application. When the legislature thinks it worth while to institute such right by a special provision of our code independent of contract we can hardly say that a somewhat more liberal provision in a contract is a trick which we should thwart by all means available to us.

The essential question then is whether there is any evidence from which the jury could conclude that the conditions contained in the proviso were met. We do not find any evidence indicating that the company was "satisfied that the Proposed Insured was at that date acceptable under the Company's rules for insurance upon the plan, at the rate of premium and for the amount applied for." To the contrary, the evidence is without conflict that the company being apprised of Ransom's history of high blood pressure, which did not appear from the information given by him to Dr. Pace, in accordance with its rules required him to submit to further blood pressure readings with which demand Ransom did not comply. Said demand communicated to Ransom undisputably shows company's lack of satisfaction; neither can there be any doubt that the readings demanded were required by the rules to which the quoted condition refers. This requirement was not satisfied and could not be satisfied because of Ransom's accidental death. The further testimony of Dr. Weaver that even if the new readings would have been normal Ransom because of his history would only have been acceptable at an extra premium rate and on an amended plan, although uncontradicted, need not be considered. So long as the required readings had not taken place the condition of the company's satisfaction of Ransom's acceptability under the company's rules had not been fulfilled.

In Corn v. United American Life Ins. Co., D.C., 104 F.Supp. 612, 615, the applicant had paid the first premium in the amount of

$437.10 when he signed the first part of his application but was killed in an accident before he had submitted to medical examination or filled out the second (medical) part of his application. The court held there was no insurance stating, among other things: "Diligent search has failed to reveal a single authority which recognizes the existence of interim insurance where the alleged insured himself had failed to take steps upon which the agreement of the parties conditioned liability." Although the commencement of the coverage in the case before us is not expressly conditioned on the completion of the medical examination, we think that the same principle must govern here. The company's rules, to which the proviso refers, require the taking of the further blood pressure readings before the company makes its decision as to the acceptability of the applicant. For the taking of the readings the cooperation of the applicant himself is necessary. We see no essential difference between not submitting to required supplementary medical examinations and not submitting to any medical examination at all.

[3] Respondent urges that in considering the applicant's acceptability the insurer must act in good faith and reasonably, not arbitrarily. Although there is authority to the contrary with respect to the requirement of reasonableness, we concede the correctness of the rule. Occidental Life Ins. Co. of Cal. v. Lame Elk White Horse, D.C. Mun.App., 74 A.2d 435, 437; Western & Southern Life Ins. Co. v. Vale, 213 Ind. 601, 12 N.E.2d 350, 353; and compare Restatement, Contracts, § 265. But the rule is in no way decisive here because there is in the evidence nothing from which it could be concluded that the company's attitude was not reasonable and in good faith. To determine the acceptability of the applicant, an insurer has the right and is under the necessity of making a careful investigation of all relevant conditions and circumstances. Reese v. American National Ins. Co., 5 Cir., 175 F.2d 793, 794; Gerrib v. Northwestern Mut. Life Ins. Co., 256 Ill.App. 506, 517; Raymond v. National Life Ins. Co., 40 Wyo. 1, 273 P. 667, 673. Evidently high blood pressure readings and chest complications are relevant conditions to be investigated and the demand for further medical examinations was made without any relation to the applicant's subsequent accidental death. That the completion of the medical examination was thus protracted was not caused by any fault of the company but solely by the incompleteness of the information given by Ransom and by his failure to respond to the demand for this examination. Good faith could not require the company to consider a post mortem held for the sole purpose of determining the cause of death and not decisive as to high blood pressure instead of the blood pressure readings its rules required. There is no evidence whatever indicating that a reasonable insurer in the company's position would have been satisfied as to Ransom's acceptability under its rules without a completed medical investigation.

[4] Appellant urges that also the conditions that the first premium was paid in full in exchange for the attached receipt signed by the company's agent when the application was signed, had not been fulfilled and that misrepresentations by Ransom in the medical part of his application constituted a defense to any action on the alleged contract of insurance. By these contentions we are not impressed. The check provided by Hathaway may well be considered as payment by Ransom with borrowed money. It is doubtful whether the giving of the attached receipt in exchange for such payment is a separate condition, as the second part of the proviso does not mention the failure to do so as preventing coverage prior to the delivery of the policy; the doubt is to be solved against the insurer. Neither does the matter of the alleged misrepresentation seem decisive where the company after having been apprised of the true facts did not reject the application but demanded further medical examination to clear up the point. However, the lack of satisfaction of the company as to Ransom's acceptability under its rules necessarily leads to the conclusion that the insurance applied for was not in force at the time of Ransom's death and that therefore the motion for a judgment notwithstanding the verdict should have been granted.

The judgment is reversed with directions to enter judgment for defendant notwithstanding the verdict.

GOODELL, J., concurs.

DOOLING, Justice.

I concur. I am in full agreement with those courts which hold that a trick clause such as that in the application here in question should be strictly construed against the company, because of the false appearance of coverage that it would create if not strictly construed. However Ransom was not in fact tricked in this case. When he was actually notified by the company that it required a further physical examination he was put on notice that the company was not satisfied and that the insurance for that reason was not yet in force. On this ground alone I concur in the reversal.

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122 Cal.App.2d 281

PEOPLE v. GORGOL

Cr. 2921.

District Court of Appeal, First District, Division 1, California.

Dec. 28, 1953.

Hearing Denied Jan. 27, 1954.

Defendant was convicted in the Superior Court, City and County of San Francisco, Eustace Cullinan, J., of robbery and assault with a deadly weapon, and he appealed. The District Court of Appeal, Bray, J., held that hospital records relative to defendant's treatment were admissible under the Uniform Business Records as Evidence Act as bearing on defense of mental incapacity at time of commission of the crime.

Judgment and order denying new trial affirmed.

1. Criminal Law 🔑1137(6)

A party cannot complain of the exclusion of evidence offered by himself, where he has successfully objected to the admission of evidence of the same character offered by the adverse party.

2. Criminal Law 🔑1137(5)

Where court, in robbery and assault with a deadly weapon prosecution wherein defense was related to defendant's alleged mental condition, ruled in accordance with defendant's theory on admission of hospital records offered by him relating to such defense, defendant was not entitled to complain of the admission on the same theory of additional hospital records offered by state.

3. Criminal Law 🔑436

The Uniform Business Records as Evidence Act, giving discretion to courts to determine whether admission of a record is justified by the circumstances under which it was made, is based on the recognition that records made and relied upon in the regular course of business may be regarded as trustworthy without verification by all persons who contribute to them. Code Civ. Proc. §§ 1953e–1953h, 1953f.

4. Criminal Law 🔑436

Under the Uniform Business Records as Evidence Act, hospital records are generally deemed admissible, if a proper foundation is laid, regardless of fact that records are hearsay and that the particular nurse, doctor or person making the record has not been called, and notwithstanding fact that they may contain inadmissible matter, since such matter may be omitted or proper instructions can be given concerning it. Code Civ.Proc. §§ 1953e–1953h, 1953f.

5. Criminal Law 🔑436

Under the Uniform Business Records as Evidence Act, the portions of a hospital record which are admissible are those portions customarily contained in a hospital record and which would be admissible were the person who made the record to be presented in court. Code Civ.Proc. §§ 1953e–1953h, 1953f.

6. Criminal Law 🔑444

In prosecution of defendant on charge of robbery, wherein defense was related to defendant's state of mind which allegedly prevented existence of a specific intent, and records of army hospital in which defendant had been treated were sought to be introduced, testimony of army doctors concerning the records and the circumstances connected with them, and the assumption of all parties that the records were properly prepared, coupled with use of the records by defendant, constituted sufficient foundation for their admission in evidence under the Uniform Business Records as Evidence Act. Code Civ.Proc. § 1953f.

7. Criminal Law 🔑436

In prosecution for robbery, wherein defense was the alleged mental state of defendant at time of commission of the crime, and it appeared that defendant had been examined at army hospital after offense, admission of portion of hospital record referring to defendant's financial condition, and containing statement of doctor that he believed patient was attempting to enter hospital in order to strengthen his defense, was not erroneous, when report indicated that admission had been sought by defendant because of alleged mental condition due to battle fatigue and financial and other worries. Code Civ.Proc. §§ 1953e–1953h, 1953f.

8. Criminal Law 🔑1036(1)

A defendant is not entitled to raise on appeal a question concerning admission of evidence to which no objection was made at trial.

9. Criminal Law 🔑371(8)

In prosecution of defendant for robbery, wherein defense was related to his mental state at time of commission of the crime, and defendant asserted that taxicab driver voluntarily gave him his money at time when defendant had no intent to deprive driver of it, testimony concerning defendant's financial condition and fact that he had stolen his roommate's wallet, was admissible.

10. Criminal Law 🔑370, 371(1, 12)

Evidence of another unlawful act is admissible in a criminal case to establish motive, knowledge or intent.

11. Robbery 🔑23(1)

Although lack of money by a defendant is not admissible in a robbery prosecution because of relative disadvantage under which it might place a poor person, financial condition prior to date of the alleged crime may be shown when it discloses that defendant was without money before offense and that immediately after offense he had a large amount of money.

12. Robbery 🔑23(1)

Motive constitutes no element of the crime of robbery, but where circumstantial evidence is largely relied upon for conviction, motive may be inquired into.

13. Criminal Law 🔑338(1), 369(2)

The general tests of admissibility of evidence in a criminal case are whether it tends logically, naturally, and by reasonable inference to establish any fact material for the state, or to overcome any material matter sought to be proved by the defense, and if these tests are met, the evidence is admissible, even though it may embrace the commission of another crime, regardless of whether that crime is similar in kind or not, or whether it be part of a single design or not.

14. Criminal Law 🔑448(3)

In prosecution of defendant for robbery and assault with a deadly weapon, wherein defense was the alleged mental state of defendant at time of commission of crime, purportedly precluding him from forming the necessary specific intent, testimony, concerning statements made by defendant at army provost marshal's office the day after the shooting of robbery victim, that defendant had no indication that he knew that he had deliberately pulled the trigger of the gun, was a mere conclusion of the witness, and was properly stricken.

15. Criminal Law 🔑1170½(2)

In prosecution for robbery and assault with intent to murder, wherein defendant introduced character witnesses, questions propounded to witnesses, inquiring whether they would have changed their opinion as to defendant's reputation as to truth, honesty and veracity if they had known that defendant had stolen a fellow army officer's wallet, were not prejudicially erroneous in view of testimony of witnesses that such knowledge would not have changed their belief as to defendant's character. Pen. Code, §§ 211, 217.

16. Criminal Law ⚷730(16)

In prosecution of defendant on charge of robbery and assault with intent to murder, wherein defense was the alleged mental state of defendant at time of commission of the crime, precluding the existence of necessary specific intent, argument of district attorney, in response to argument of defense counsel reviewing medical testimony and asking for an acquittal so that defendant might get medical care, wherein district attorney called defendant's claim of "blackout" due to epilepsy a sham, and stated that if defendant's sickness had not reached the point of insanity it would not be a defense, was not prejudicial error in view of court's instructions that defendant must be acquitted if he acted while unconscious or without intent. Pen.Code, §§ 211, 217.

17. Criminal Law ⚷713, 1171(1)

In prosecution of defendant for robbery and assault with intent to murder, wherein defense was defendant's alleged mental state at time of commission of crime, and it appeared that defendant had allegedly suffered an epileptic blackout while attempting to board a streetcar, and that he had been taken to the hospital, argument of district attorney referring to such incident and stating that defendant had been rushed to the emergency hospital through the press room, though improper, did not constitute prejudicial error. Pen.Code, §§ 211, 217.

18. Criminal Law ⚷1171(3)

In prosecution of defendant for robbery and assault with intent to murder, wherein defense was defendant's alleged mental condition resulting from epileptic spell at time of commission of the crime, statement of prosecutor that defendant could not have been suffering on night in question from epileptic spell because he had been taking an anti-convulsive drug, was not prejudicial misconduct, even though there was no evidence that defendant had taken such drug at any particular time other than that he had been given pills on certain date for use, when discussion which ensued after defendant's objection fully cleared up the misquotation of the evidence. Pen.Code, §§ 211, 217.

19. Criminal Law ⚷814(8)

In prosecution of defendant on charge of robbery and assault with intent to murder, wherein defendant contended that he did not commit the acts, or that if he committed them he lacked the requisite intent, or that he was not legally capable of committing criminal acts because of his mental state, evidence did not warrant giving of instruction on law of misfortune, and refusal of such an instruction was not error. Pen. Code, §§ 26, subd. 6, 211, 217.

20. Criminal Law ⚷31

"Misfortune" when applied to a criminal act is analogous with the word "misadventure" and bears the connotation of accident while doing a lawful act. Pen. Code, § 26, subd. 6.

See publication Words and Phrases, for other judicial constructions and definitions of "Misadventure" and "Misfortune".

Marvin E. Lewis, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Charles E. McClung, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendant was charged with (count I) violation of section 211, Penal Code, robbery, and (count II) violation of section 217, Penal Code, assault with intent to commit murder. A jury found him guilty of the robbery charge, determined to be first degree, and of assault with a deadly weapon, an offense included within the count II charge. Defendant appeals from the judgment of conviction and from an order denying a new trial.

Questions Presented.

1. Were plaintiff's exhibits 8 and 9 (certain portions of the hospital records) admissible under sections 1953e to 1953h, Code of Civil Procedure (Uniform Business Records as Evidence Act)?

2. Was evidence of defendant's financial condition admissible?

3. Alleged error in striking answer of witness Quigg.

4. Alleged improper cross-examination of defendant's character witnesses.

5. Alleged misconduct of the district attorney.

6. Refusal of instruction on misfortune.

7. Alleged abuse of discretion in denying new trial.

Evidence.

Defendant originally pleaded not guilty and not guilty by reason of insanity. Prior to trial the court appointed two alienists to examine defendant as to "his insanity." Their report found him sane. After conviction defendant withdrew his plea of not guilty by reason of insanity. At the trial the main issue was defendant's mental state at the time of the alleged crimes, defendant attempting to prove a mental state covering complete blackout, irresistible impulse, and lack of specific intent. While, of course, we must take the evidence and the reasonable inferences therefrom most favorable to the verdicts, it is advisable, to get the feel of the case, to set forth the factual evidence as it came to the jury. Most of the evidence concerned defendant's mental state. The reporter's transcript contains 1475 pages, of which 98 pages covered plaintiff's case in chief.

Joseph H. Falkowich, a taxi driver, testified that he was hailed by defendant in the San Francisco Presidio at the bus station at approximately 11:45 p. m. Defendant was wearing his United States Army captain's uniform on which there were rows of ribbons. Defendant asked to be taken to the 2500 block on Webster Street on top of the hill. Defendant got into the front seat. There was no conversation. When the cab neared the designated block defendant said to pull in. The driver did so and on reaching over to clear the meter noticed defendant holding a revolver on his lap in his right hand, pointed at the driver. Defendant then stated, "I hate to do this," but that he wanted some money. The driver gave defendant all the money he had, $25. Defendant took the money in his left hand, still holding the gun in his right. Defendant appeared to not want to get out of the cab so the driver asked either that defendant get out or let him get out. Defendant then said, "You won't get hurt, just go to the corner and turn right." Defendant said that probably the radio was on and the taxicab people would know that the driver was being held up. The driver assured him there was no radio in the car. The driver started up the car and from then on kept begging defendant not to harm him but let him "take off" as he had a wife and two children. Defendant said nothing except to tell the driver to turn to the right when they got to the corner and then to pull in to the curb when they neared Fillmore Street. The cab stopped. Defendant just sat looking at the driver who was trying to convince defendant to let him go. Finally defendant stated, "I am sorry. I will have to put you to sleep." All this time the gun was held by defendant in his lap. The gun then went off. The driver, thinking himself shot, opened the door and ran. He saw a car coming. He ran in front of it. When it stopped he told its driver he had been shot and asked to be taken to a hospital. While getting in this car, he noticed that defendant was now on the driver's side outside the cab opening the door to get into the driver's seat. At the hospital it was found that the bullet pierced the driver's sweater and shirt pocket but had lodged in a cigarette lighter in his shirt pocket. Other than a bruise, he was not hurt.

Plaintiff's next witness was John Quigg, an agent of the Sixth Army, Criminal Investigation Division. The next morning after the shooting he found a revolver hidden under the cover in a drainage ditch located about 10 feet from defendant's room at Letterman General Hospital. It contained five live bullets and an empty cartridge. That afternoon defendant was placed in a line-up with four other captains, all dressed in the same manner as defendant (defendant had taken all his ribbons off his coat that morning). Falkowich identified defendant as the one who had shot him. Lieutenant Lee of the San Francisco Police Department questioned defendant in Quigg's presence. Defendant denied committing the crimes, stating that the evening before he had been to a show, returned to his room, then went out for a cup of coffee and returned. Defendant knew nothing whatever about the incident in question. He stated he owned a revolver which was in his clothing locker at the hospital. When Lee informed him his gun had been found and that his story appeared to have certain loopholes, defendant changed his story. He stated that he had hailed the cab, got in and told the driver he wanted to go to the 2500 Webster Street block; that "he pulled a gun from beneath his coat and asked the cabbie for his money, and that the cabbie kept whimpering and whining about the situation; that finally he told the cabbie he was going to have to put him to sleep. He said that the next thing he knew he had shot the cabbie, and that he got out of the cab and ran, so did the cabbie * * * and decided that he had better get out of there as fast as he could," so he got into the cab, drove towards the Presidio and left it. On the way to his room he hid the gun in what he called a culvert.

Lieutenant Lee then testified substantially as did Quigg. In more detail, he gave what defendant stated were his movements the preceding night. Even after Lee told defendant of evidence against him he still insisted his statement was correct; also he had not seen his gun for some time but believed it to be in his locker. When told that Lee had the gun and would have a ballistics test made to see if a test shot would compare with the bullet recovered from the driver, defendant then said, "Yes, I robbed him and I shot him." He further stated that after he had gotten the money from the driver, the latter was doing a lot of whining, pleading and crying, and "I said to him, 'I will have to put you to sleep' * * * then I shot him."

Plaintiff then called a police stenographer who read a statement taken from defendant the afternoon following the shooting at the office of the robbery detail. Defendant stated that about 11:30 p. m. he dressed and left his room to get a cup of coffee. He met some M. P.s, talked to them, "got restless and went back and got the gun" from a culvert in back of the ward. He flagged a taxi, telling the driver to drive him to the top of the hill on Webster Street, the 2500 block. When they stopped there, was when he drew the gun. The driver "surrendered" the money. Defendant made no demands. The driver saw the gun when he leaned over to switch off the meter. Defendant had the gun pointing at the driver. The latter was pleading, requesting defendant to let him go. He had a wife and family. Defendant told him to start driving again, then to turn right. The driver was afraid defendant was going to do him bodily harm. Defendant told him to pull in to the curb. The driver continued his plea. "To gain sufficient time to get him out of there, I told him I was going to put him to sleep for a little while * * * I meant to hit him. He turned to the right and backed into the corner of the seat * * * I don't know whether he moved or whether I moved or what, but I shot." The driver went out the left door, defendant out the right. The driver ran to the rear, calling for the police. Defendant ran to the front. As he reached the corner a car came towards him. He ran back to the taxi, pushed it to the corner, got in and drove it to about a block from the hospital. On his way to his room, defendant ditched the gun in the culvert. When asked how much money the driver gave him defendant said "He handed me a wad. I counted it later. It consisted of two fives, and fifteen one dollar bills." Ten one dollar bills defendant put in his shaving kit. The other bills he put in his pocket. The gun would not work on double action but would on single action. He concealed it in the culvert because it was contrary to hospital regulations to have it. "Q. Why did you come back and get the gun? A. I don't know. The same reason why I couldn't stay in the ward in the first place. Worried and couldn't sleep. Worried about money matters. Q. What was your motive in getting the gun from the culvert? A. To go out and get money. Q. By robbery? A. If necessary, yes." Plaintiff rested.

Defendant was his own first witness. He testified at length about physical injuries, particularly to his head, which he had received during and since childhood, his fondness for guns and hunting, his army service and experience, particularly his work as a night fighter during hostilities, the circumstances under which he received his many medals, the many times he had suddenly become unconscious (blacked out), the wounds he had received, and the number of hospitals he had been in. Although he had a severe headache condition for many years, it was in March, 1951, that he first started getting hospitalization for it. He was in the neuro-psychiatric ward at Letterman from May, 1951, to March, 1952. (The shooting occurred January 11, 1952.) His headaches got worse at night and he disliked being confined at night. Hence he was in the habit of leaving his room and going into some quiet neighborhood where he could see the city, just sit and sometimes go to sleep. His favorite place was a park at the top of the hill. He would have a feeling of frustration knowing that he had to do something, but not what. When he got up on a hill where he could see he felt better. Occasionally he would take a cab to get there. The 2500 block on Webster was one of the places he went to. In August, 1951, a friend in Kennewick, Washington, gave him the gun and a box of ammunition for it and asked him to have the gun fixed. He took it to gunsmiths in San Francisco but they could not fix it. He kept it in the wall locker of the ward, but because of his roommate he put it outside in the culvert. When he had the irresistible impulse to go to the top of the hill he always carried the gun with him, as it was not safe to leave it behind with "a bunch of psychos" and "secondly it was more or less habit." He kept bullets in it because "my ideas are that the gun should always be loaded." Because of the condition of the gun, usually he would have to pull the trigger eight to ten times before the cylinder would line up with the bullet and the gun would fire. On the night in question defendant had the usual headache. He went to a movie with his roommate. They got back about 10 or 10:30. They went to bed. Defendant could not sleep, got up, dressed, and went out for a cup of coffee. The coffee shop was closed. He talked to some M. P.'s for a while, then, because he was scheduled to leave the hospital the next day for Texas for general duty and could not very well take the gun out of the culvert in daylight, and because it was dirty and needed cleaning, he picked up the gun. He started up the stairs to his ward but still did not feel like going in, so he walked up where the M. P.'s were, went beyond them about a block and saw the taxi coming. He was restless and knew he had to get out of there. He told the driver he wanted to go up on the hill, the 2500 block on Webster. He got into the front seat, where he usually rides. He had never mentioned this particular address to a cab driver before. When he got in the cab, he had the gun inside of the jacket and trousers, at the top of the latter. The gun started to gouge. After a block or two he took the gun out, unbuttoning his coat and then buttoning it again. He held the gun in his lap. At no time did he intend shooting. At the 2500 block he told the driver to pull in to the curb. The driver did so and leaned over to turn off the meter. He saw the gun, straightened up as if bitten by a snake. He started making loud statements. He reached in his pocket and pulled out his money, holding it out in both hands. Defendant did not ask him for any money. Defendant did not recall saying "I hate to do this." Defendant did not take any money from him. Defendant did not know what the driver did with the money, except that later defendant saw it on the cab floor. Defendant was befuddled. He realized he just could not sit there, so he told the driver to drive. When they neared the corner he told the driver to turn right because that was back toward the hospital. The driver was talking continuously in a loud, urgent, whining voice. Defendant thinks the driver was crying, pleading, telling about his wife and children. This made defendant wish he would shut up. It was giving defendant a headache and his head was like a bell ringing "and the vibration works in." The cab was crawling. Defendant told the driver to pull over and stop. Defendant sat for a while and did not know what to do.

He wanted to get back to the hospital. He decided he was going to have to shut the driver up and the best way would be to put him to sleep. Defendant was going to render him unconscious by hitting him over the head with the gun so that defendant could get back to the ward undetected, but he was not going to shoot him. While defendant has no recollection of pulling the trigger, "I recall hearing that gun go off." He remembered no outstanding thing a split second before he heard the gun go off. "It was just he [the driver] was talking." Defendant thought he was more frightened than the driver was. Defendant opened the right door and ran. At the corner a car was coming towards him. He stopped and watched it go. The driver was standing a block away, standing in the path of the other car. The car stopped and the driver got in. Defendant went back to the cab, got in and sat there. The motor stalled, so defendant pushed it to the grade at the corner, put it in gear and drove it to a block from the Presidio. There he saw the money on the floor, picked it up, put it in his pocket, hid the gun in the culvert and went to bed, taking medication to make him sleep. The next morning he took all the ribbons off his jacket as he did not intend to wear the jacket. Defendant admitted telling Quigg and Lee that he intended to rob the cab driver. Defendant admitted that in all his hospital experience prior to the shooting he never told any Army medical officer anything about his alleged periods of unconsciousness. Defendant related that one morning after his arrest while driving his car he became unconscious and the car struck a pole.

On cross-examination, when asked if at any time during the incidents the night of the shooting he was unconscious at all, he replied "I didn't have one of the regular." He was then asked "I mean, you knew everything that was going on that night, didn't you? A. More or less, yes." He recalled in detail practically everything that occurred during the cab ride. While he recalled intending to put the driver to sleep because of his whining by hitting him with the gun, and recalled hearing the shot, the only thing he claimed not to recall was pulling the trigger and in a rather indefinite way he claimed not to remember asking for the driver's money. When asked about his statements to Quigg and Lee he stated "I refused to make any statement until they produced the evidence." There was evidence that one day on his way to the trial defendant had blacked out while getting on a bus.

Mrs. Gorgol corroborated defendant as to certain of the incidents when he became unconscious and the development of his headaches, change of personality and other matters bearing upon his state of mind.

Two Army captains likewise testified to matters bearing on defendant's mental state. A gunsmith testified to the defective condition of the gun. Two psychiatrists and neurologists testified to the effect that defendant suffered from wanderlust epilepsy or epilepsy equivalent. This type of epilepsy is one in which it is very common for the subject to have an urge to leave his home or place of business. He is driven by the subconscious mind to do certain things and perform certain acts and is an automaton governed entirely by the subconscious mind. A common symptom of this epilepsy is the commission of robbery and other major crimes. In their opinion defendant was unable to and did not form an intention either to rob the driver or do him harm. An epileptic of this type could lose consciousness for a split second and yet remember everything which occurred except what happened in that split second. He would not even know that he had had the unconsciousness. In effect defendant's actions the night of the shooting were characteristic of defendant's epilepsy. Experts called by plaintiff gave opinions contrary to those of defendant's experts.

1. Hospital Records.

Defendant contends that plaintiff's exhibits 8 and 9 were erroneously admitted into evidence, first, because no proper foundation was laid for them, and secondly, because they contained hearsay and conclusions. These two exhibits were a part of the Letterman Hospital records. Defendant had subpoenaed the Letterman Hospital records. Defendant interrupted the cross-examination of defendant stating that he had just noticed the custodian of those records to be present. Without calling the custodian defendant asked that they be marked for identification. They were marked defendant's exhibit B for identification. Thereafter they were first considered on the cross-examination of Dr. Tuchler, defendant's alienist, who had testified he had examined the Letterman records before making his diagnosis. The plaintiff asked him if he was familiar with the report (later admitted as plaintiff's exhibit 8) of December 31, 1951, by Captain Prest of the Medical Corps, and offered to show it to the witness. Defendant objected on the ground that it was not a part of the medical record because it went beyond the question of medical examination. He also stated that he was sure it was not part of the official file from Letterman which he had introduced for identification, and wanted an opportunity to examine the file to see if it was. The matter was dropped when the doctor testified he had not seen the report.

The next mention of the hospital records came when defendant showed the witness an electro-encephalographic report of June 8, 1951, which defendant stated was part of the Letterman records, and started reading from it. Plaintiff objected on the ground the record was not in evidence. Defendant stated he proposed showing the witness parts of these records. The court asked if the records were going to be admitted. Plaintiff said it wanted to examine them first. Defendant again stated he wanted to examine the witness on his interpretation of the records upon which he relied. Thereupon the court said that if the doctor relied upon certain portions of the records, the records should be in evidence. Defendant said he only wanted portions of them and if the prosecution wanted other portions, it could offer them if legally admissible. Defendant then read to the doctor the record of an electro-encephalographic examination and the conclusion therefrom, by whom made does not appear, and asked the witness to interpret it. Thereafter, defendant read into evidence the final summary, Ward 26, dated January 4, 1952, after asking the witness if he had seen it and used it. This report covers about three pages of the transcript, and gives defendant's history of injuries, complaints and treatment since admission to Letterman May 11, 1951.

The next use of any of the hospital records was by defendant in examining plaintiff's witness Colonel Clausen, a medical doctor and senior resident physician at Letterman. Defendant, after asking the witness if it was a record of Letterman, read into evidence a final summary made by Captain Hood, the doctor to whom Colonel Clausen had referred defendant for treatment. Defendant asked Colonel Clausen if he had seen the records subpoenaed by defendant and if they were all of the Letterman records in defendant's case. The witness stated they did not include the outpatient clinic records. Defendant then showed him the clinical outpatient record of defendant and asked if the witness recognized it as the official record of the hospital. The witness replied that it was. Plaintiff objected to its introduction, contending that all the records should go in or none. Considerable argument took place then and later, plaintiff contending that all the records should go in, defendant contending only portions of them were admissible. At one time plaintiff offered them all. Defendant did not object on the ground of lack of foundation but on the ground that portions of them were inadmissible because he contended they were either hearsay or conclusions. For some reason not apparent the court did not rule on the offer of all of the records.

[1, 2] Defendant over plaintiff's objection read into evidence a report and diagnosis by Dr. Feeney, after first asking Colonel Clausen if it was an official record of Letterman, also a report dated February 28, 1952, to which plaintiff objected on the ground that it was only in for identification. Defendant then asked if it was "a portion of the medical record from Letterman Hospital under your supervision?" The witness stated it was. Plaintiff further ob-

jected on the ground that it was identically the same type of record as the Captain Prest report (later exhibit 8) to which defendant had previously objected, making the same objections defendant had made. Considerable discussion followed and the court said, "I will allow this [referring to the record defendant wanted in], but if I do, then I am going to allow the other one, too * * *" (referring to the Captain Prest report, later exhibit 8). Defendant insisted upon the report going in. The court admitted it and defendant read it into evidence. Defendant also read into evidence the record of several electro-encephalograms and the diagnoses therefrom, after asking Colonel Clausen if they were official Letterman records. Defendant asked Colonel Clausen if the medical records in court were the official records of Letterman and he replied that they were. On redirect examination of Colonel Clausen plaintiff asked him if the documents, plaintiff's exhibits 8 and 9, were official records of Letterman. These two records were not in those included in defendant's exhibit B for identification. They were separately identified. He stated they were. Defendant objected to their introduction on the ground that they contained hearsay, conclusions and improper statements. The court admitted them. An examination of the transcript shows that throughout the trial both sides and the court assumed that the Letterman records had been sufficiently identified and were available to either party to use, except that plaintiff kept insisting that the whole record should be introduced and the defendant kept insisting that he only was required to offer such portions as he desired, and that many portions of the record were inadmissible because hearsay, improper and conclusions. In Hunton v. California Portland Cement Co., 50 Cal. App.2d 684, 696, 123 P.2d 947, it was held that a party cannot complain of the exclusion of evidence offered by himself, where he has successfully objected to the admission of evidence of the same character offered by the adverse party. Here the converse of that occurred. The court ruled in accordance with defendant's theory on the admission of records offered by him. Therefore he cannot complain of the admission on the same theory of records offered by plaintiff.

Exhibit 8 is certified as a true copy by one Gess, Captain, Medical Service Corps, Commanding. It is a report dated December 10, 1951, signed by Captain Prest, Medical Corps. It states: "This 29 year old officer was seen at the request of the Commanding Officer, Medical Holding Detachment, for evaluation prior to proposed action under AR605-200 for alleged failure to properly meet personal financial obligations. According to the information the individual offered both myself and the social worker, his debts would appear to be concerned with the purchase of an automobile, household furnishings, and indebtedness necessitated by change of situation which did not authorize movement of family and household effects. According to the patient's statements these outstanding debts are now being met according to prior agreement and his present administrative difficulties stem from his being on leave during which time payment fell due and his inability to meet this payment until his return from leave. This individual has no psychiatric complaints. He is at present hospitalized on the Neurological Service with the diagnosis of migraine headaches, improved, and it is felt that he is ready for return to duty. He is a youthful appearing individual who is friendly and outgoing in his manner relating well in the interviews situation. Affect is appropriate to content. Speech is logical, relevant, and coherent. There is no abnormal content elicited nor are there any evidences of gross disturbance of mentation. Past history taken from the patient's statements indicate no clear evidences of psychological disturbance, either in his family history, work record, or in the area of his marriage and other inter-personal relationships. While there is considerable evidence of immature attitudes and poor judgment concerning his financial affairs, this by itself does not constitute psychological illness and psychiatric clearance is given."

Exhibit 9 is a copy certified by Tiffany, a Major, Medical Corps, Assistant Chief, Neurology Section, of a report by Arthur J. Levens, Lieutenant Colonel, Medical Corps, with whom Colonel Clausen had made an appointment for defendant. Colonel Clausen identified it as an official hospital record. It reads: "7 Oct. 52: This 30 year old white male comes to Neurology Clinic without any specific consultation request, but it is understood that the patient had some type of episode in which he had a car accident. He was seen in Out-Patient Clinic where the possibility of pneumoencephalography was considered. At that time it was understood that the physician considering this procedure was not aware that a pneumoencephalogram had been done in the past. This patient, it is understood, is still being investigated in connection with an assault upon a taxi cab driver. Neurological examination reveals no significant neurological abnormality. The patient is found to be somewhat tense and sufficient abdominal relaxation is unobtainable so that the abdominal reflexes could not be elicited. Impression: Patient makes some vague reference to headaches which start in the posterior cervical area, and in view of the general picture of tension believe that the patient has a mild tension state which could be well founded on his present predicament. He has been told by a civilian neurologist that he might have a fugue state of which I am personally very skeptical. I believe that the patient may be endeavoring to manipulate his way into the hospital in order to strengthen his defense. I think this patient should be kept out of the hospital. Pneumoencephalography at this point, in view of negative neurological findings and previous pneumoencephalogram, should not be done."

[3] The Uniform Business Records as Evidence Act, Code Civ. Proc. §§ 1953e–1953h, in section 1953e defines the term "business" as used in the act in such manner as would include the Letterman General Hospital. Section 1953f provides: "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

Formerly, the rule concerning business records was very strict. However, it was found that under modern business methods such rule had become archaic. In 1927 a committee sponsored by the Commonwealth Fund of New York published a model act for "Proof of Business Transactions." 5 Wigmore, Evidence, 3d Ed., § 1520, p. 361. This act was designed to permit the admission in evidence of any record or memorandum of any act, event, transaction or occurrence, provided only that the record was made at or near the time of the event, and that the making of such a record was in the regular course of business. This act was adopted by New York and six other states as well as in the U. S. Code. Then, in 1933, the Committee on Evidence Acts of the National Conference of Commissioners on Uniform State Laws drew up a Uniform Act on Business Records which after revision was adopted in 1936 by the Conference. This act has been adopted in 13 states including California and in Hawaii in preference to the first mentioned act. The principal difference between the two acts is that the later act expressly gives discretion to the courts to determine whether admission of the record is justified by the circumstances under which it is made. It is based on the recognition that records made and relied upon in the regular course of business may be regarded as trustworthy without verification by all the persons who contribute to them. See 48 Columbia Law Rev. 922. While in other states the act in its relation to hospital records has been variously applied, in California cases it has uniformly been given a liberal interpretation. In Loper v. Morrison, 23 Cal.2d 600, 145 P.2d 1, the trial court had excluded from the evidence a portion of a hospital chart called a "nurses' record" which contained entries by nurses relative to the plaintiff's condition while in the hospital. It was offered to refute the plaintiff's evidence that the plaintiff while there suffered from headaches, bruises and sore spots, was nervous and hysterical and was given pills to help her sleep. Concerning the Uniform Business Records as Evidence Act the court said, 23 Cal.2d at page 608, 145 P.2d at page 5: "The purpose of this act is to enlarge the operation of the business records exception to the hearsay evidence rule. * * * The business entry statutes are not limited to entries in commercial enterprises, and hospital records are properly included within their operation. [Citations.] There is no reason to believe that a hospital record is not as truthful as a record kept by a commercial firm. It is a record upon which treatment of the patient is based, and experience has shown it to be reliable and trustworthy. [Citation.] It is the object of the business records statutes to eliminate the necessity of calling each witness, and to substitute the record of the transaction or event. It is not necessary that the person making the entry have personal knowledge of the transaction." However, the court declined to determine whether the proper foundation for the admission of the record had been laid for the reason that, because the record supported rather than refuted the plaintiff's evidence, it held that no prejudice resulted if the exclusion were error.

In Gunter v. Claggett, 65 Cal.App.2d 636, 151 P.2d 271, an official naval form signed by the officer in charge of the San Francisco Navy Recruiting Station stating that the plaintiff had been discharged from the U. S. Naval Reserve and was not recommended for re-enlistment by reason of certain "disqualifying defects", 65 Cal.App.2d at page 643, 151 P.2d 271, consisting of enumerated physical infirmities, was admitted over the objection that it was hearsay. In holding there was no merit to this objection the court said the certificate was admissible under the act.

In McDowd v. Pig'n Whistle Corp., 26 Cal.2d 696, 160 P.2d 797, it was contended that the hospital record covering the plaintiff's stay was improper for use in showing the diagnosis of the plaintiff's condition and the nature and extent of her injuries. After holding that a proper foundation had been laid the court said its admission was proper as "It was made in the regular course of business of the hospital and contained matters customarily contained in such records.", 26 Cal.2d at page 700, 160 P.2d at page 799. Concerning the Loper case, supra, 23 Cal.2d 600, 145 P.2d 1, the court said, 26 Cal.2d at page 701, 160 P.2d at page 799: "In the instant case a proper foundation was laid and the Loper case clearly held the records admissible in such event. The Loper case has since been followed. Gunter v. Claggett, 65 Cal.App.2d 636, 151 P.2d 271. See, also, Ulm v. Moore-McCormack Lines, 2 Cir., 115 F.2d 492. Rehearing denied 2 Cir., 117 F.2d 222; Reed v. Order of United Commercial Travelers, 2 Cir., 123 F.2d 252; and Gile v. Hudnutt, 279 Mich. 358, 272 N.W. 706."

In Pruett v. Burr, 118 Cal.App.2d 188, 257 P.2d 690, the court was not considering hospital records. There the defendants were charged with spraying the plaintiff's cotton with a spray containing certain deleterious chemicals. Letters indicating that certain tests were made by the State Department of Agriculture and Bureau of Chemistry showing the presence in the spray of these chemicals, were admitted. The court held that these letters were not public records or official documents and were not shown to be records which a public officer was required to keep or make, nor, if official documents, were they shown to be kept as part of the regular function of the particular office. The court further stated, 118 Cal.App.2d 202, 257 P.2d 699: "We do not believe that it was the intent of the act to make all correspondence received by a businessman admissible in evidence merely because it might pertain to his business." Obviously this case is not in point concerning hospital records. Nor is Harrigan v. Chaperon, 118 Cal.App.2d 167, 257 P.2d 716, concerning rumors set forth in a fire department record.

In McGowan v. City of Los Angeles, 100 Cal.App.2d 386, 223 P.2d 862, 863, 21 A.L.R.2d 1206, in upholding the rejection of a "blood alcohol determination" on the ground that there was no showing that the blood tested was that of the person in question, the court pointed out that under section 1953f, Code of Civil Procedure, "Patently the court had discretion to determine whether the paper was relevant and whether 'the sources of information, method and time of preparation were such as to justify' the admission of the coroner's record."

In Nichols v. McCoy, 38 Cal.2d 447, 240 P.2d 569, the court upheld the introduction into evidence of the coroner's record of a test made of the decedent for alcohol. It distinguished the McGowan case, supra, on the ground that there, 38 Cal.2d at page 449, 240 P.2d at page 570, "it was the opinion of the trial court that the sources of information, method and time of preparation of the record in question were not such as to justify its admission." In the Nichols case the court held that even the identity of the source of the blood could be proved by the record, and that the result of the tests could be proved by the record even though the person making the tests did not appear. Two of the Supreme Court justices dissented.

Professor Hale in 14 Southern Cal.Law Rev. 99, discusses the admissibility of hospital records under the act. He points out that while throughout the country there is a definite cleavage of judicial opinion on the question of the admissibility of hospital records, some jurisdictions holding them to be inadmissible because hearsay, while others hold them admissible as exceptions to the hearsay rule, the general tendency is towards liberality in holding them admissible. In determining what constitutes hospital records he sets forth the following from the Manual of Hospital Standardization adopted by the American College of Surgeons and the American Medical Association: "That accurate and complete medical records be written for all patients and filed in an accessible manner in the hospital, a complete medical record being one which includes identification data; complaint; personal and family history; history of present illness; physical examination; special examinations, such as consultations, clinical laboratory, x-ray and other examinations; provisional or working diagnosis; medical or surgical treatments; gross and microscopical pathological findings, progress notes; final diagnosis; condition on discharge; follow-up and, in case of death, autopsy findings." He analyzes many cases on the subject (most of which, however, are prior to the preparation of the Uniform Act) and concludes: "It seems entirely fair to say that the use of hospital records to prove all of the matters regularly entered and which are within the personal knowledge of persons engaged in carrying on the hospital service involves no radical departure from established precedent in the field of regular business entries. Such precedents cover a wide range. It is no far cry from repairs made in a garage to repairs made in a hospital. The practice should be liberal in dispensing with the calling of the various persons engaged in the chain of services and recording. In the authentication of the records, it normally should suffice to call the chief registrar or the superintendent of the hospital. Even if numerous individuals are called, our chief reliance is upon the records and the force of the system which produces them, not upon independent recollection of nurses, internes and doctors. Though statutes may speed development, the way of progress lies open within the framework of the common law."

"The medical records of patients at a hospital, organized on the usual modern plan, deserve to be placed under the present principle [exception to the hearsay rule]. They should be admissible, either on identification of the original by the keeper, or on offer of a certified or sworn copy. There is a Necessity (ante, § 1421); the calling of all the individual attendant physicians and nurses who have cooperated to make the record even of a single patient would be a serious interference with convenience of hospital management. There is a Circumstantial Guarantee of Trustworthiness (ante, § 1422); for the records are made and relied upon in affairs of life and death. Moreover, amidst the day-to-day details of scores of hospital cases, the physicians and nurses can ordinarily recall from actual memory few or none of the specific data entered; they themselves rely upon the record of their own action; hence, to call them to the stand would ordinarily add little or nothing to the information furnished by the record alone. The occasional errors and omissions, occurring in the routine work of a large staff, are no more an obstacle to the general trustworthiness of such records than are the errors of witnesses on the stand. And the power of the Court to summon for examination the members of the recording staff is a sufficient corrective, where it seems to be needed and a bona fide dispute exists." 6 Wigmore on Evidence, 3d Ed., § 1707, p. 36.

In People v. King, 104 Cal.App.2d 298, at page 309, 231 P.2d 156 at page 162, the court stated: "It clearly appears from the record that all of the records were made in the regular course of the business of the hospital and that they were made at or near the times of the various acts recorded. While it may be that there frequently are some things recorded on a hospital chart that in a strict sense may not be admissible, such items can be excluded therefrom upon the making of a proper objection, or appropriate instructions may be offered covering such items. Here the only objection was that the records were secondary evidence, which was not a good objection in view of the 'Uniform Business Records as Evidence Act'."

Vol. 48, Columbia Law Rev. 920, 929, states: "The vast majority of courts readily admit not only routine observations by medical personnel in a hospital record but also diagnoses of a patient's physical or mental condition."

[4, 5] Summing up the conclusions of the courts, including our own, which have adopted the more liberal view of the act (incidentally those courts are in the majority), the ruling as to the admissibility of hospital records seems to be that if a proper foundation is laid, the fact that the records are hearsay and that the particular nurse, doctor or person making the record has not been called, does not preclude their admission. Nor does the fact that they contain inadmissible matter prevent their admission. Such parts should be omitted or proper instruction of the court given concerning them. Admissible matter seems to be such matter as is customarily contained in a hospital record, for example, the data required by the above mentioned Hospital Manual, and such matter as would be admissible were the person making the record present in court. The foundation is properly laid "if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." Code Civ.Proc. § 1953f.

[6] This brings us to the records in question. As to foundation, while there was no detailed testimony as to the mode of preparation, which in Luthringer v. Moore, 31 Cal.2d 489, 190 P.2d 1, caused rejection of hospital records, the assumption by all concerned that they were properly prepared, the use of them by the defendant, the testimony of the Army doctors concerning them, and all of the circumstances connected with them, supported the court's determination that their sources of information, method and time of preparation were such as to justify their admission.

[7] The most serious question that arises concerns the admissibility of certain statements in them. All of the data in exhibit 8, including the diagnoses, except the references to defendant's debts and financial condition, obviously comes within the recognized records of a hospital. In the above mentioned rules governing standardized hospitals appears the following:

"2. Complaint. The patient's statement of reasons, signs and symptoms for seeking medical aid. * * *

"4. Past history. A summary of the patient's life in relation to pathology, illness, with or without complications, operations and injuries, *habits, social condition, environment, and any data which may be related to the present illness.*" (Emphasis added.)

This report gives as the reason defendant was in the hospital, "alleged failure to properly meet personal financial obligations." This fact plus the information which he himself gave concerning his debts are all data required by the above rules 2 and 4. Moreover, they bear on the diagnosis given that although defendant had an immature attitude towards his financial affairs, it did not constitute psychological illness. Moreover, Colonel Clausen, when read this very clause, testified that defendant's financial situation which the doctor obtained both from the record and from the defendant himself, was one of the things considered by him in arriving at his opinion of defendant's mental condition. Defendant contended he was in the hospital because of his mental condition due to battle fatigue and other causes associated with his Army service. This opened the door to expert opinion as to whether he was psychologically ill or only worried about his debts. Had Captain Prest, the doctor who made the diagnosis in exhibit 8, been on the stand, he could have testified as did Colonel Clausen to the latter situation. Exhibit 9 gives as the reason for defendant being in the hospital a car accident. Except for the statement "I believe that the patient may be endeavoring to manipulate his way into the hospital in order to strengthen his defense," all the other data is that customarily found in hospital records. Had Colonel Levens, the doctor who made this record, been on the stand he could have been asked if in his opinion defendant was feigning or malingering. See Gray, Attorneys' Textbook of Medicine, 2d Ed., ch. 12, p. 303; also cases collected, Campanale v. Metropolitan Life Insurance Co., 290 Mass. 149, 194 N.E. 831, 97 A.L.R. 1284, and 20 Am.Jur. 735. If defendant was malingering while in the hospital during the pendency of this case, the jury would have no option but to determine it was "in order to strengthen his defense." While the doctor would not have been permitted to use this particular language in describing defendant as malingering, we can see no prejudice under the circumstances in the language used.

2. Defendant's Financial Condition.

[8] As we have heretofore shown, defendant's financial condition as testified to by Colonel Clausen and as shown by the hospital records was admissible as part of the basis for the medical diagnosis. Colonel Clausen testified that in arriving at his opinion he considered that defendant was having financial difficulties, and that he had cosigned a note for defendant. Defendant did not ask that the fact of cosigning the note be stricken from the record; he merely objected to Colonel Clausen's conclusion as to defendant's financial difficulties. Defendant now assigns error as to the statement about the note. As defendant did not object, he cannot raise the point now. As to the objection he did make the record shows that Colonel Clausen was stating what he had been told by defendant, and hence would have been an admission. The district attorney asked defendant concerning his financial condition, bringing out that defendant owed $1500, and that he needed money to take his family to Fort Bliss to which he had been transferred (no objection was made to this line of questioning, although later defendant made a motion to strike it) and that apparently the day after the robbery he did not have any money other than the $25 he had taken from the driver, $15 of which was concealed in defendant's hat band and $10 in his shaving kit. The district attorney also produced evidence that two days before defendant had stolen his roommate's wallet. This wallet was found hidden in the culvert with defendant's gun. Defendant contends that this evidence was inadmissible.

[9–11] Dr. Brown, the Clinical Director of Psychiatry at the San Francisco City and County Hospital, testified that he examined defendant in January, 1952 (defendant was sent there for examination as to his sanity by a judge of the municipal court), and that when he asked defendant why he shot the driver defendant replied: "I don't know. I can see some reason for holding him up. I was in financial difficulties." In his statement to the police the day after the shooting, when asked why when he left his room to get coffee he came back and got his gun, he replied: "A. I don't know. The same reason why I couldn't stay in the ward in the first place. Worried and couldn't sleep. *Worried about money matters.* Q. What was your motive in getting the gun from the culvert? A. To go out and get money. Q. By robbery? A. If necessary, yes." (Emphasis added.) On the stand defendant stated that he doubted that he asked the driver for money. "I didn't want it, *I had no use for it*." (Emphasis added.) He was then asked if he was not in financial difficulties at the time. He replied "Yes, and no," and then admitted that he was $1,500 in debt. Defendant then claimed that the next day he was to receive his pay of $500 and that accordingly he would not have any use for such a small sum of money as he would be likely to get from a cab driver. His defense additionally was that he did not have the requisite intent to commit robbery and that the driver had handed over the money voluntarily under the mistaken belief that defendant was attempting to rob him. In view of the foregoing, defendant's financial condition and the fact that he had actually stolen his roommate's wallet were relevant as bearing on his story that the driver voluntarily gave him the money and that defendant had no intent to deprive the driver of it. Evidence of another unlawful act is admissible to establish motive, knowledge or intent. People v. Peete, 28 Cal.2d 306, 169 P.2d 924; People v. Burns, 109 Cal.App.2d 524, 241 P.2d 308, 242 P.2d 9. Ordinarily the lack of money by a defendant is not admissible in a robbery charge, for the reason that the practical result of permitting proof of it would be to put a poor person under a relative disadvantage. 2 Wigmore, Evidence, 3d Ed., § 392, p. 341; People v. Kelly, 132 Cal. 430, 64 P. 563. Wigmore weakens this rule by saying: "Nevertheless in cases of merely peculative crime (such as larceny or embezzlement) * * the fact that he was in need of it [money] at the time is decidedly relevant to show a probable desire to obtain it and therefore a probable * * * purloining; and there is here not the same objection from the standpoint of possible Unfair Prejudice." 2 Wigmore, Evidence, 3d Ed., § 392, p. 342.

There are, however, exceptions to that rule. For example, it may be shown that prior to the date of the alleged crime the defendant was without money and immediately thereafter he had a large amount of money. People v. Kelly, supra, 132 Cal. 430, 64 P. 563; People v. Orloff, 65 Cal. App.2d 614, 151 P.2d 288. Another exception appears in People v. Richards, 74 Cal. App.2d 279, 168 P.2d 435, where evidence was held admissible to show that prior to the robbery the defendant had made a down payment on an automobile and was required to make subsequent payments on it, that he was not working and had no finances with which to meet the obligation. "* * * it was for the jury to determine whether his pecuniary situation tended to directly connect him with the commission of the crime or to disclose a motive for its commission." 74 Cal.App. 2d at page 290, 168 P.2d at page 442. The court stated further, 74 Cal.App.2d at page 289, 168 P.2d at page 441: "As stated by the trial court, 'if it has a tendency to prove that on the 28th day of February (the date of the robbery) the defendant is in need of money, and it is a circumstance which may or may not have any weight or may or may not have any particular significance. But I think it is admissible as a circumstance.'"

[12, 13] In robbery motive constitutes no element of the crime itself; still where circumstantial evidence is largely relied upon for conviction, motive may be inquired into. As to the assault, motive becomes important. While it is true that in our case defendant on direct examination gave no testimony as to his financial condition, it was proper cross-examination to ask him concerning his intent and concerning any matters which would refute his claim that he had not asked the driver for money. Here defendant admits that he held a gun in his lap, that he ended up with the driver's money, but contends among other things that he could not have demanded the money because he did not have any need for money. Clearly evidence from which the jury could reasonably infer that he did have such need was, at least, a circumstance refuting his claim. The evidence concerning defendant's financial

condition and the theft of the wallet meets the test set forth in People v. Burns, supra, 109 Cal.App.2d 524, 241 P.2d 308, 242 P.2d 9, quoting from People v. Peete, supra, 28 Cal.2d 306, 169 P.2d 924: "As to the test: '"The general tests of the admissibility of evidence in a criminal case are: * * * does it tend logically, naturally, and by reasonable inference to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense? If it does, then it is admissible, whether it embraces the commission of another crime or does not, whether the other crime be similar in kind or not, whether it be part of a single design or not."' 28 Cal.2d at page 315, 169 P.2d at page 929." 109 Cal.App.2d at page 535, 241 P.2d at page 315. The court in its instructions fully limited the application of this evidence.

3. Answer of Witness Quigg.

[14] Quigg testified to statements made by defendant at the Army Provost Marshal's office the day after the shooting. On cross-examination defendant tried to get Quigg to say that defendant had said he had no remembrance of shooting the gun. Quigg refused to do so. On redirect the following occurred: Question by Mr. Mayer for plaintiff: "Q. You say that he told you that the next thing he knew the gun had gone off? A. Well, his actual words, I believe, were: the next thing he knew he had shot the man. Q. The next thing he knew he had shot the man? A. In other words, he had no indication that he knew he had deliberately pulled the trigger or anything like that." Plaintiff immediately moved that this answer be stricken as the conclusion of the witness. The motion was granted. Defendant assigns this ruling as error. There was no error. It is obvious from the witness' answers both to the plaintiff and defendant thereafter that the stricken answer was the conclusion of the witness and not the statement of defendant. In defendant's recross defendant succeeded in getting the witness to state that defendant said "the next thing that he knew the gun had been fired" and that defendant never stated he remembered shooting the gun. So if there were any error it was nonprejudicial.

4. Cross-Examination of Character Witnesses.

[15] On cross-examination of certain of defendant's character witnesses plaintiff asked if they would have changed their opinion as to defendant's reputation as to truth, honesty and veracity had they known defendant had stolen a fellow officer's wallet. One witness was asked if he had heard of the charges of robbery and assault brought against defendant. The witnesses all said that this knowledge would not have changed their belief that defendant's reputation was good. As said in People v. Beltran, 94 Cal.App.2d 197, 210 P.2d 238, "The cross-examination should not have been extended to include inquiries as to what the witnesses personally might have thought of his reputation if they had had additional information." 94 Cal.App.2d at page 210, 210 P.2d at page 245. However, it was there held that the error was not prejudicial as "none of the witnesses changed his testimony, each of them maintaining respondent's reputation in the community was good." 94 Cal.App.2d at page 210, 210 P.2d at page 245. Nor was the error prejudicial here, particularly as the witnesses maintained that defendant's reputation was good in spite of the matters referred to.

5. Alleged Misconduct.

In his argument to the jury the district attorney, after calling defendant's claim that defendant blacked out due to epilepsy a sham, stated, suppose that a juror was sitting next to defendant on a street car and suddenly defendant for no reason had one of his spells and killed the juror, and then came into court claiming that he had a license to kill as he could not be held responsible for his action. He then stated that it was the jury's duty to determine whether this sickness had reached the point of insanity, if it had defendant would nevertheless be guilty, as the question of not guilty by reason of insanity was yet to be tried. Defendant made no objection to this argument, although he now assigns it as misconduct. Later, the district attorney asked the jury if, assuming his claim of blackout to be true and that, as he testified, in one blackout he had killed an Italian soldier, in another he had tried to kill his baby but was prevented by his wife from so doing, and in the third the only reason he had not killed the driver was because of the cigarette lighter, "Now, if that is the state of this man, what are you going to do? Are you going to acquit him?" Defendant then assigned this statement as misconduct, contending that if the defense of unconsciousness were proved the jury must acquit and asked that the jury be so instructed. The judge denied the motion for a mistrial and informed the jury he would later instruct them on the subject, which he did.

[16] As to the first assignment, the district attorney was answering defendant's argument in which he reviewed the medical testimony and asked the jury to acquit defendant so that he could get medical care. The district attorney was trying to say that insanity was no defense to the action at this time. While the matters contained in the second assignment would have been better left unsaid, we can find no prejudice in view of the court's plain, repeated and forcible instructions to the effect that if defendant acted while unconscious or without intent or was unaware of committing the acts he would have to be acquitted. A reading of the record, the many arguments between counsel, the statements of the court on rulings and particularly its clear instructions, can leave no doubt that the jury understood that if they found that defendant acted in a blackout, because of an irresistible impulse, or lacked intent, they must acquit.

[17] During the trial and on his way to court defendant fell while trying to board a street car in what defendant contends was an epileptic blackout. Defendant appeared in court with a cut head. Trial recessed and he was taken to the emergency hospital. While there press photographers took his picture while being treated. In argument the district attorney referred to the incident of the recess and stated that counsel had rushed defendant to the emergency hospital "through the press room." Defendant cited this as misconduct. The court called attention to the fact that the emergency hospital doctor testified that the first notice he got of the injury was from somebody in the press room. While the court should have admonished the jury to disregard the statement, its failure to do so was not prejudicial.

[18] Defendant assigns as misconduct the statement of the district attorney that defendant could not have been suffering on the night in question from an epileptic spell because he had been taking dilantin, which is an anti-convulsive drug, and had taken it the day before the shooting. Defendant objected. Considerable discussion ensued in which it was pointed out that dilantin does not positively prevent spells and that there was no evidence that defendant had taken dilantin at any particular time other than that on January 6th he had been given 100 pills for use. The misquotation of the evidence in the district attorney's argument was fully cleared up by this discussion.

6. Instruction on Misfortune.

[19] The court refused to instruct on the law of misfortune, Penal Code § 26(6), which gives as persons incapable of committing crimes "Persons who committed the act or made the omission charged through misfortune * * * when it appears that there was no evil design, intention, or culpable negligence." There is no evidence to support such an instruction. Defendant did not contend that he committed criminal acts through misfortune. He contended (1) that he did not commit the acts or (2) that if committed he lacked the requisite intent, or (3) he was not legally capable of committing criminal acts because he was unconscious.

It should be pointed out that defendant's story on the stand of what happened at the time of the robbery was directly contrary to that of the driver and to defendant's own stories given to the Army and police officers. So far as the assault is concerned, under his own statement that he threatened to put the cab driver asleep by hitting him with the gun, the assault was complete before the gun went off. Defendant does not claim to have blacked out at any time until after that. The jury by its verdict gave him the benefit of his claim that he did not intend to pull the trigger. His claim of irresistible impulse and no intent to rob are not consistent with the driver's story that he demanded money and actually did rob him, and with defendant's admission that he needed money and intended to get it by robbing the driver if necessary.

[20] "Misfortune" when applied to a criminal act is analogous with the word "misadventure" and bears the connotation of accident while doing a lawful act. See definitions in 27 Words and Phrases, p. 346. Actually, except for the lack of the single word "misfortune," the court fully instructed the jury favorably to the defendant on all matters which defendant contends the word "misfortune" meant in this case.

7. Denial of New Trial.

On the motion for new trial, the affidavit of Attorney Lewis was presented stating that after the jury had presented its verdict and the judge had left the courtroom, defendant fell to the floor with an epileptic seizure. Defendant at the judge's suggestion was taken by ambulance to the Letterman Hospital. Defendant urges that the court abused its discretion in denying a new trial in view of this seizure. "The rule is established that the determination of the question whether newly discovered evidence which is cumulative evidence is of such a nature as to have produced a different result if it had been presented on the trial, rests largely in the sound discretion of the trial court, whose determination will not be disturbed on appeal in the absence of a showing of an abuse of discretion." People v. Colletta, 100 Cal.App. 2d 1, 5, 222 P.2d 922, 924. This was merely cumulative evidence as during the trial defendant produced evidence of many such seizures, including one during the trial. Apparently the judge felt that the evidence of one more seizure would not change the result. We cannot find that he abused his discretion in this respect.

The judgment and order denying new trial are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; EDMONDS, J., not participating.

122 Cal.App.2d 361

HAGY et al.

v.

ALLIED CHEMICAL & DYE CORP. et al.

Civ. 15094.

District Court of Appeal, First District, Division 2, California.

Dec. 31, 1953.

Rehearing Denied Jan. 29, 1954.

Hearing Denied Feb. 24, 1954.

Action by husband and wife against a manufacturer of sulphuric acid for injuries allegedly resulting from inhalation of smog from defendant's plant. The Superior Court of Contra Costa County, Harold Jacoby, J., rendered a judgment on a verdict for plaintiffs, and defendant appealed. The District Court of Appeal, Goodell, J., held that the evidence sustained findings that the wife's previously dormant cancerous condition was aggravated by the smog.

Affirmed.

1. Negligence 🔑136(25)

Courts are reluctant to determine question of proximate cause as matter of law.

2. Damages 🔑163(1), 185(3), 208(2)

In action against manufacturer of sulphuric acid for injuries resulting from inhaling "smog" from manufacturer's plant, plaintiffs had burden of proving that sulphurous fumes aggravated preexisting cancer, but whether such burden was sustained was for jury, and finding for plaintiffs was sustained by ample expert testimony and other evidence.

3. Damages ⚷185(3)

Whether sulphurous fumes will aggravate a pre-existing, dormant cancer is a question for expert, not lay, evidence.

4. Damages ⚷163(1)

In action for injuries resulting from inhaling smog from defendant's sulphuric acid plant, plaintiffs did not have burden of proving that removal of plaintiff's larynx would not have been necessary but for her exposure to smog, but defendants had burden of convincing jury that operation would have been necessary in any event, even though cancerous larynx had not been traumatized.

5. Negligence ⚷19

Manufacturer of sulphuric acid could not avoid liability for aggravation of dormant cancerous condition by inhalation of smog from manufacturer's plant on theory that physicians should have diagnosed the cancer earlier and that the irritation caused by smog was beneficial in causing plaintiff to consult physician earlier and putting physician on inquiry as to cancerous condition.

6. Evidence ⚷78

In action against manufacturer of sulphuric acid for injuries caused by inhalation of smog, where defendant's log book of plant showing concentrations of sulphur dioxide was not produced at trial, it would be presumed that the log book would not have helped defendants' case. Code Civ.Proc. § 1963, subds. 5, 6; § 2061, subds. 6, 7.

7. Evidence ⚷571(1)

Expert evidence of a medical possibility taken with other nonexpert evidence may support an inference of medical probability.

8. Evidence ⚷574

Even regular scientific expert testimony is not entitled to preference over testimony as to the facts, and their relative weight must be decided by trier of facts.

9. Appeal and Error ⚷1002

The California rule that true deduction from conflicting testimony is a problem for jury and not reviewing court applies to conflict between witnesses for the same party.

10. Damages ⚷185(3)

Evidence sustained award of damages for aggravation of heart condition resulting from inhalation of smog from sulphuric acid manufacturing plant.

11. Damages ⚷133

Award of $5,000 to husband for loss of wife's services and society resulting from her inhalation of smog which necessitated removal of her larynx was not excessive, even if evidence of aggravation of husband's heart condition by inhaling smog was insufficient.

Weinmann, Rode, Burnhill & Moffitt, Oakland, Cyril Viadro, San Francisco, for appellants.

Bernheim & Sugarman, Richmond, for respondents.

GOODELL, Justice.

This appeal was taken from a judgment in favor of Katherine Hagy for $25,000, and her husband Russell Hagy for $5,000, after a new trial was denied.

Appellant Allied Chemical & Dye Corporation owns and operates a plant in Richmond, California, wherein it manufactures sulphuric acid. Appellants Compton and Hicken were joined as its employees.

Respondents sued for personal injuries claimed to have been sustained by both of them because of the negligent operation of Allied's plant on December 21, 1949. Respondents' theory is that Mrs. Hagy then had a cancer of the larynx, and her husband had a serious heart condition, and because of such negligent operation of the plant a penetrating and irritating "smog"[1] resulted which seriously aggravated the pre-existing condition of each of them.

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[1] "Smog" is a word in such general use these days that it is difficult to give it a specific and exact meaning. Webster's New International Dictionary, Unabridged, 2nd ed., under "smog" says: "[A blend of *smoke* and *fog*]. A fog

The plant is situated on Castro Street in the industrial area of Richmond. Neighboring plants are those of California Spray Chemical Corporation, Standard Chemical Corporation, American Radiator & Sanitary Corporation, and Standard Oil Company. The plant is also in the vicinity of the Santa Fe's railroad yards and the Southern Pacific's industrial tracks.

The following is lifted bodily from appellants' statement of the case:

"Allied produces sulphuric acid from raw sulphur or from hydrogen sulphide gas piped into the Allied plant from the neighboring plant of Standard Oil Company. The process calls for the burning of the sulphur or the hydrogen sulphide into sulphur dioxide. The sulphur dioxide (SO_2) is then converted into sulphur trioxide (SO_3) and eventually into sulphuric acid. Sulphur dioxide is a gas and so is is sulphur trioxide. Suphuric acid is of course a liquid. In the course of production, some waste gases are eliminated into the atmosphere through three stacks approximately one hundred feet high.

"On December 21, 1949, the plant had been shut down most of the day for maintenance work. Operations started again at 6:25 p. m. By 8:25 p. m., it had to be shut down again because of an atmospheric condition known as an inversion. Briefly described, an inversion is a condition in which, instead of being warm near the ground and cold at a higher altitude, the air is cold near the ground and warm at a higher altitude. Since the cold air cannot and does not rise, as warm air would, the impurities which find themselves in the atmosphere are not carried away and a so-called smog results. Moreover, when there is a descending motion in the atmosphere, as there was on the evening of December 21, 1949, the impurities are actually brought down to ground level.

* * *

"At approximately 8 p. m., Mr. and Mrs. Hagy, who were on their way home after visiting a friend, drove past the Allied plant and through the smog. It made them cough, their eyes started smarting and Mrs. Hagy even fainted. Later in the evening, they went to Herrick Memorial Hospital in Berkeley where they were given oxygen inhalations and then sent home. Both went to work as usual the next day."

Appellants do not contend that there is insufficient evidence of negligence in the operation of their plant on that evening. At the opening of the discussion they say: "For the purpose of argument, we may assume that Allied should have discovered the inversion and stopped operating sooner than it did and that accordingly it did not act as a reasonably prudent producer of sulphuric acid would have acted under the circumstances."

This brings us to the situation prevailing between 6:25 and 8:25 p. m. on December 21, about which there is no substantial conflict.

When the plant was started up at 6:25 p. m. there were three employees on duty, namely, defendant Hicken, who was the plant chemist, and two operators, Wilson and Whitman.

The trouble started about 7 p. m. The fumes passing up through the stacks were heavy, like a moist fog, and were drifting toward town. Wilson testified that the moisture discharged through the stacks was "sulphuric acid in the gas or liquid form, or vapor form" and that it caused him to cough and sneeze, and caused his eyes to burn, smart and run. It got worse—thicker. At one time, he testified, he could not see the full length of the hall within the plant. Between 7:15 and 7:30

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made heavier and darker by the smoke of a city. U. S." In the briefs the word is used freely by both sides, and when we use it herein (for brevity and for lack of a better term) it must of course be taken to mean the particular kind or variety of smog shown by this record to have been in the air at Richmond on the evening in question, produced by the operation of Allied's sulphuric acid plant between 6:25 and 8:25 p. m., and composed of fumes emitted by the plant under atmospheric conditions which kept them from rising and being entirely carried off and blown away, but caused them, instead, to hang low, close to the ground.

he suggested to Hicken that the plant be closed down but Hicken replied "We'll get straightened around in a little while." When Wilson told Hicken that it was getting pretty bad, and expressed the opinion that they should shut down, Hicken replied that he "had to get the heats up in the converters" to which Wilson responded that if they didn't shut down "he would probably get heat, but it wouldn't be in the converters." The way the stacks were acting was characterized as an "inversion", already defined, where the fumes normally emitted from the stacks come downward because of atmospheric conditions, instead of going upward.

About 7 p. m. telephone complaints began to come into the plant. Railroad men working in the yards close by wanted to know what was wrong and complained that the smog was bothering their eyes and lungs. After several such calls Hicken told Wilson not to answer the telephone; Wilson obeyed but it continued to ring.

About 7:45 the fumes within the plant were so dense that Hicken and Whitman had to put on their gas masks (which generate their own supply of oxygen). Wilson had no mask and had to go outside to the back of the plant and then to the front repeatedly so as to breathe. The longer the plant operated, the heavier became the smog, and at 8:25 p. m. the plant was shut down as an emergency measure.

A Standard Oil employee working at the Standard plant close by Allied, noticed what appeared to be a fog bank coming in, low, near the ground, which burned his nose and throat, so that he put on a gas mask. Others did likewise.

A Southern Pacific employee working about three-quarters of a mile away was affected by the fumes which he said came from Allied, and which he characterized as "acid fumes".

Between 8 and 9 p. m. a housewife living several blocks from the plant noticed that her throat burned and her eyes smarted; her husband and daughter had the same sensations. She opened the door, saw the smog, and at once closed it, since her throat and eyes burned. All three persons stayed in the back part of the house until the smog was gone, but all of them continued to cough for 3 or 4 days or a week.

A police officer testified that a man residing on Commercial Street, a number of blocks from the Allied plant, reported "a thick fog, accompanied by a strong irritating odor, that smelled like sulphur fumes. This odor caused some of the occupants to become sick at their stomachs." Several other witnesses testified in a similar vein.

It has been said above that there was no substantial conflict in the evidence respecting the smog conditions in and around the Allied plant at the time in question. In fairness it should be said that appellants claim there was no satisfactory evidence respecting the liquid or moist character of the smog, and they criticize Wilson's testimony in this respect. However viewed, it cannot be gainsaid that a very serious smog situation existed (moisture or no moisture) and appellants frankly admit that it was close to the ground when they say: "When there is a descending motion in the atmosphere, as there was on the evening of December 21, 1949 *the impurities are actually brought down to ground level*". (Emphasis added.) It was at *ground level* that the respondents ran into the smog as they drove along Castro Street immediately in front of the plant. This was at the time when the smog was so dense within the plant that two of its employees had to put on gas masks in order to stay at their posts and when, according to Wilson, the "pocket" was at ground level *outside* the plant.

Russell Hagy was driving home with his wife after they had called on a friend near San Pablo Yacht Harbor, and their route took them along Castro Street immediately in front of the plant at about 8 o'clock. He testified that at first he took the low-lying cloud to be merely a bank of fog, but as he drove on slowly he and his wife commenced to cough and their eyes smarted and presently she ceased to speak and he saw she had lost consciousness. They were then about 150 to 200 feet from Allied's south fence. He drove out of the smog bank and revived his wife. He then observed that the fumes came from the Allied stacks.

After reaching their home a friend drove them to the Herrick Hospital. They were still coughing and short of breath and their condition was recorded at the hospital as a burning of the lungs. They were given oxygen there.

Katherine Hagy's case:

At the outset of appellants' opening brief the admission is made that "For some time before December 21, 1949, Katherine Hagy had cancer of the larynx". However, her case was not diagnosed as cancer until after a biopsy had been taken in March, 1950.

Mrs. Hagy testified that she had suffered from an attack of laryngitis during July, 1949, but had recovered, and prior to December 21, 1949 was working every day in San Francisco in a position which she had occupied for three years. One of plaintiffs' doctors testified that he had talked with her before the smog incident and that her voice was then a perfectly normal feminine voice. After the exposure to the smog on December 21, she lost her voice and her condition became progressively worse. She went to Dr. Barbosa, who referred her to Dr. Capus, an ear, nose and throat specialist, who noted a lesion in her larynx. After testing for tuberculosis he ruled that out and after the biopsy was taken her condition was diagnosed as carcinoma of the larynx. It was after this diagnosis that the laryngectomy was performed on April 30, 1950.

As already indicated, the theory of plaintiffs' case is (1) that Mrs. Hagy had a cancer of the larynx before her exposure to the smog but it had not been diagnosed as such, and her condition was such that she did not know it; (2) that her exposure to the smog and the irritation therefrom "lighted up" the dormant cancer; (3) that immediately following the exposure she lost her voice; (4) that her doctors then pressed their examinations, ruled out tuberculosis, took a biopsy of the larynx, and determined therefrom that she had a cancer of the larynx; (5) that a complete laryngectomy was then performed, and (6) *that such operation might have been averted had she not been exposed to the smog and the irritation therefrom.*

The legal concept of a case such as this appears in the Restatement of the Law of Torts as follows:

"§ 461. Harm Increased In Extent By Other's Unknown Physical Condition.

"The negligent actor may be liable for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct.

"Comment:

"a. The rule stated in this Section applies not only where the peculiar physical condition which makes the other's injuries greater than the actor expected is not known to him, but also where the actor could not have discovered it by the exercise of reasonable care, or, indeed even where it is unknown to the person suffering it or to anyone else until after the harm is sustained. A negligent actor takes the risk that his liability will be increased by reason of the actual physical condition of the other towards whom his act is negligent.

"Illustrations:

"1. Through the motorman's negligent management of the A Company's trolley car the control lever strikes the breast of B, a passenger. The injury is apparently slight, but it causes a cancerous tendency to 'light up' and localizes itself in the injured point, requiring the amputation of B's breast. A is answerable for the harm caused by the cancer and the amputation.

"2. A, a schoolboy, during school hours, inflicts a slight kick upon the shin of B, a fellow student. Ordinarily the kick would have caused only a slight sensation of pain, but because of a latent infection it has serious consequences. A is liable to B for the full extent of his injuries."

Illustration number 1 seems to be an almost perfect example of the present situation.

Appellants do not challenge the rule of § 461 but they assert that "The evidence is insufficient to sustain the implied finding of a causal connection between the smog and the condition of * * * Mrs. Hagy." It is their contention "that there was no causal connection between the smog and Mrs. Hagy's cancer and that, *as a matter of law*, the testimony of the three physicians who testified for her was insufficient to support the implied finding of the jury that there was such a causal connection * * *." (Emphasis added.) This is the principal point in this case, and the language which we have emphasized calls upon this court, on appeal, to declare *as a matter of law* that the jury's implied finding of a causal connection cannot stand, on this record.

[1-3] Courts are reluctant "to determine the question of proximate cause as a matter of law". See Bethlehem Shipbuilding Corp. v. Industrial Accident Commission, 181 Cal. 500, 504, 185 P. 179, 181, 7 A.L.R. 1180. We agree with appellants that the burden rested on respondents to prove that the sulphurous fumes generated by appellants' plant aggravated the pre-existing cancer, but we are satisfied that whether or not this burden was sustained was for the jury alone to say, and that its finding in plaintiffs' favor was sustained by ample evidence. We also agree with appellants that the question whether sulphurous fumes such as those shown by this record will aggravate or "light up" a pre-existing, dormant cancer, is a question for expert, not lay, evidence. However, in this case there was ample expert testimony and the weight to be given such evidence was, as in any other case, within the province of the jury.

Before discussing the medical testimony it seems proper to examine the authorities wherein similar problems of causation have arisen.

In Shaw v. Owl Drug Co., 4 Cal.App.2d 191, 40 P.2d 588, the plaintiff sued for personal injuries sustained when the metal door (lying flatwise) of a sidewalk elevator over which she was walking, arose suddenly, throwing her violently to the pavement. About four years before this accident she had been operated on for a cancer of the breast. Eight months after the sidewalk accident she suffered a collapse (spontaneous fracture) of the injured leg at the very spot of the earlier trauma. The question presented in the trial court was whether the sidewalk accident was the proximate cause of the collapse of the leg eight months later. It was claimed that the diseased condition of the femur was neither precipitated nor aggravated by the injuries received in the sidewalk accident but the natural sequence of the cancerous condition of the breast with which plaintiff had been afflicted four or five years before. The defense moved the court to strike out all evidence relating to the fracture of the femur, which motion was denied. Later the court refused to instruct the jury, as requested by the defendants, to disregard all such evidence. On appeal it was contended that these rulings were erroneous.

The court said, 4 Cal.App.2d at page 194, 40 P.2d at page 589: "The sole question presented for determination by the appeal is, therefore, whether there are any circumstances established by the evidence which reasonably construed may be said to support the implied finding of the jury and the conclusion reached by the trial court in ruling upon the motion for new trial that there was a causal connection between the two injuries. In our opinion there are."

At page 195 of 4 Cal.App.2d, at page 590, of 40 P.2d, in speaking of the testimony of one of plaintiff's doctors, the court said: "While he gave no definite, absolute opinion that the diseased condition of the femur at the point of fracture was precipitated by the injuries plaintiff received to the leg in the sidewalk accident, his entire testimony was such as to warrant such conclusion. Therefore, when it is considered with all the other circumstances established by the evidence, it is legally sufficient, in our opinion, to support the verdict. Ensign v. Southern Pacific Co., 193 Cal. 311, 223 P. 953; White v. Red Mountain Fruit Co., 186 Cal. 335, 199 P. 318; Averdieck v. Barris, 87 Cal.App. 626, 262 P. 423. As said in Bethlehem Shipbuilding Corp. v. Industrial Accident Comm., 181 Cal. 500, 185 P. 179, 181, 7 A.L.R. 1180: '*The reluctance of the courts to determine the question of proximate cause as a matter of law* in cases similar to the instant case is illustrated by Baltimore City Passenger Ry. Co. v. Kemp, 61 Md. 619, 48 Am.Rep. 134, wherein it was held that it was properly left to the jury to determine whether or not a supervening cancerous growth was caused by injuries sustained by plaintiff as a result of defendant's negligence. The evidence in this behalf was to the effect that the personal injury might have superinduced and contributed to the production and development of the cancer. The court quoted with approval from Beauchamp v. Saginaw Mining Co., 50 Mich. 163, 15 N.W. 65, 45 Am.Rep. 30, wherein it was held that it was for the jury to determine whether or not a blow on the head was a proximate cause of death from pneumonia, the evidence being to the effect that the personal injury had so reduced the vitality of the deceased as to render him more susceptible to disease and less able to resist it. (Citing a number of authorities.)'" (Emphasis added.)

Appellants' contention that the removal by surgery of plaintiff's larynx would have been necessary anyway and in any event, *without regard to the smog irritation,* parallels the contention unsuccessfully urged by the defense in the Shaw case that the collapse of the leg eight months after the sidewalk accident would have occurred in any event, due to metastisis from the breast cancer, *without regard to the sidewalk accident.*

[4] The burden did not rest upon respondents to prove that the removal of respondent's larynx would not have been necessary but for her exposure to the smog; the burden was rather upon appellants to convince the jury that the operation would have been ultimately necessary in any event, even though the cancerous larynx had not been traumatized by the irritation of the smog. Brown v. Beck, 63 Cal.App. 686, 695, 220 P. 14.

The Brown case, like Bethlehem Shipbuilding Corp. v. Industrial Accident Comm., supra, follows the Beauchamp case. There Brown was negligently struck down and injured by Beck's truck, and while on crutches in the hospital convalescing from those injuries he fell, breaking his neck, was immobilized, developed pneumonia, and died. The court said, 63 Cal. App. at page 695, 220 P. at page 18: "Counsel for defendant concedes that decedent 'might not have died (when he did) if he had not been injured and required to move about on crutches.' But he endeavors to escape responsibility, arguing that 'it was not likely, nor was it proved, that death would not have come had he not been injured by the fall and thereby confined to his bed.' Such position is untenable. The party causing the injury cannot escape full liability without showing death must have resulted if the injury had not been done." (Citing the Beauchamp case.) A hearing was denied by the Supreme Court.

In the Beauchamp case, which Brown v. Beck follows, the court, 50 Mich. 163, 15 N.W. 68–69, adopted the following statement from Baltimore & P. R. Co. v. Reaney, 42 Md. 117: "But it is equally true that no wrong-doer ought to be allowed to apportion or qualify his own wrong; and that, as a loss has actually happened while his own wrongful act was in force and operation, he ought not to be permitted to set up as a defense that there was a more immediate cause of the loss, if that cause was put in operation by his own wrongful act. To entitle such party to exemption he must show not only that the same loss *might* have happened, but that it *must* have happened if the act complained of had not been done. Davis v. Garrett, 6 Bing. 716. * * *"

[5] Appellants argue that "On the basis of Dr. Capus' testimony, the conclusion is therefore inescapable that Mrs. Hagy had a total laryngectomy, not because of her exposure to the smog, but because it took more than two months for her attending physicians to diagnose her condition properly. In fact, it may well be that, because of the exposure to the smog, Mrs. Hagy consulted a physician earlier than she otherwise would have and the tragedy of the case simply is that her physicians did not discover that she needed x-ray treatment until it was too late to give her such treatment." This is simply an attempt to shift responsibility onto a delay in properly

diagnosing Mrs. Hagy's case and to give credit to the exposure to the smog for the diagnosis when it ultimately was made. It is another way of asserting that although the smog did not aggravate the pre-existing cancer its effects were at least bad enough to put the doctors on inquiry as to a suspected cancerous condition. The reasoning of the authorities last cited, Beauchamp case and Brown v. Beck, are an answer to this argument.

[6] Several doctors testified on behalf of the plaintiffs, and several on behalf of the defense. In the course of their testimony and of that of at least one other defense witness (a layman) the questions of "concentration" and the ratio of pure, clean air to air polluted by sulphurous fumes were gone into. The defense argues that the fumes emitted were so negligible as to be incapable of doing the damage claimed by plaintiffs to have been done. It was brought out by the cross-examination of appellant Compton that the log book of the plant for December 21, 1949 containing figures showing "concentrations" of sulphur dioxide at points of "exit" from the plant had been sent 6 or 7 months before the trial to Allied's San Francisco office where, presumably, it reposed at the time of the trial. At any rate it was not produced, and hence it is to be presumed that (to put it mildly) it would not have helped appellants' case. § 1963, subds. 5 and 6 Code Civ.Proc.; Dierman v. Providence Hospital, 31 Cal.2d 290, 293, 188 P.2d 12; Dahl v. Spotts, 128 Cal.App. 133, 137, 16 P.2d 774, and cases cited; see, also, § 2061, subds. 6 and 7, Code Civ.Proc. In its absence it would seem that any testimony based on the supposed strength or weakness of the "concentration" at 8 p. m. or thereabouts on December 21 would be highly speculative and of little, if any, probative weight or value.

The medical witnesses testified in part in answer to hypothetical questions, but the jurors had before them all the circumstances surrounding the plant at the time in question, circumstances which showed, among other things, that persons at *a considerable distance* from the plant were seriously affected whereas the plaintiffs were *immediately in front of the plant* and enveloped in a bank of supposed "fog" which was impregnated with sulphurous fumes. The testimony of the medical witnesses had to be taken in connection with all the other evidence.

In Baltimore City Passenger Ry. Co. v. Kemp, 61 Md. 74, 80[2] the court asks the the question: "* * * upon what principle could the court properly withhold the matter from the jury * * *" and answers it by saying: "It was for the jury to determine, as matter of fact, whether the cancer did result from the injury received. And in determining this question *they were required to consider all the circumstances and coincidences of the case, in connection with the testimony given by the professional witnesses.* If therefore the subject was proper to be considered by the jury at all, we are clearly of opinion that there was evidence sufficient to be considered by them." (Emphasis added.)

It is interesting to compare that with language found in Shaw v. Owl Drug Co. supra, 4 Cal.App.2d at page 196, 40 P.2d at page 590: "In other words, the question of whether the subsequent injury was such or should be regarded as having its origin in an independent, intervening cause was a question of fact for the fact-finding body to decide *from all the circumstances;* and its conclusion must be sustained whenever there is, as here, any reasonable theory evidenced by the record on which its conclusion can be sustained. Bethlehem

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[2] Baltimore etc. Co. v. Kemp is cited in Bethlehem Shipbuilding Corp. v. Industrial Accident Comm., supra, and in Shaw v. Owl Drug Co., supra, as being reported in 61 Md. 619, 48 Am.Rep. 134. However, the original decision in the Kemp case is reported at 61 Md. at page 74. After that decision was filed a petition for reargument was made. In the meantime the Beauchamp case, supra, which the Kemp case cites, was published, see 61 Md. at page 621 and the second decision in the Kemp case was filed overruling the motion for re-argument, 61 Md. at page 619.

Shipbuilding Corp. v. Industrial Accident Comm., supra." (Emphasis added.)

Dr. Alfred Berkove testified for the plaintiffs. He is a graduate of the Medical School of the University of California, did post-graduate work in eye, ear, nose and throat at Washington University, St. Louis, and is a member of the American Otolaryngological Society. He practices his profession in Oakland.

On July 9, 1949 Mrs. Hagy consulted him complaining of a cold, sore throat and hoarseness. He made a routine examination, and examined her larynx, using a mirror. Her throat showed redness likewise the epiglottis, the cords and the rhetnoids. He found no evidence of cancer of the larynx at that time. His diagnosis was that she was then suffering from acute inflammation of the nose and throat and acute inflammation of the larynx. He treated her and directed her to return if she did not improve; she did not return. He next saw her in October, 1950 after her larynx had been removed. He testified that in a total laryngectomy, which this was, "the entire voice box, the larynx is removed", including the "Adam's Apple"—the whole thing, and after such an operation the patient can no longer speak. They can no longer breathe through the mouth or nose, but breathe through the tracheal opening. He testified that plaintiff now breathes through this opening (made by surgery) in her neck.

He testified that an intrinsic squamous cell carcinoma grade 2, which this was, develops rather slowly.

In answer to a hypothetical question by plaintiffs' counsel which concluded "Do you have an opinion as to whether or not there was any connection between exposure to the fumes that I have described, and the removal of Mrs. Hagy's larynx?" Dr. Berkove answered: "My opinion is that she had an intense burn of her larynx, either by sulphur dioxide or sulphur trioxide, because we know that either agent are very irritating to the normal tissues of the nose and throat. In sulphur dioxide, which is a reducing agent, the form of inflammation is usually that of a granulation type inflammation. In the sulphur trioxide, the form of inflammation is that of corrosion, because the action of sulphur trioxide in water gives you sulphuric acid, which *of course tissue juices, plus sulphur trioxide will also form a sulphuric acid,* and the corrosive action would have caused a marked scarring of that larynx, and perhaps in a susceptible patient, could have either instituted the malignancy, or certainly hastened its growth." (Emphasis added.)

He testified further that if the cancerous growth is hastened the treatment must be radical in its nature and he believed "that the rapidity of the growth of this tumor made it necessary for radical surgery * * * that the only chance of saving her life was to do a total laryngectomy"; that, in his opinion, had Mrs. Hagy not been exposed to the smog it would have made a difference in the treatment. That difference was that "she would not have required an operation whereby she would have lost her voice"; and had the operation been averted she would still have a normal air passage. On cross-examination he gave this testimony:

> "Q. Your theory is anybody breathing any gas, SO_2, the moisture in your mouth would form an acid? A. Yes.
>
> "Q. And there is moisture in your mouth as well as your throat, isn't that so? A. Yes. * * *
>
> "Q. Is it your testimony Doctor, that one exposure to a chemical can irritate a cancer or pre-existing lesion, or ulcer which is malignant? A. Yes, if it is irritated—if the material is irritating enough, it can.
>
> "Q. Is it your testimony, Doctor, that a person who claims, as Mrs. Hagy claims that she inhaled some SO_2 gas, is it your opinion that that would irritate a pre-existing cancerous condition? A. It might * * * if it is concentrated enough."

[7, 8] The testimony in the record that Mrs. Hagy's health had been good just prior to December 21 and that she became unconscious on entering the smog bank, was sufficient basis for an inference that the

concentration of sulphur dioxide was in fact strong enough to cause her unconsciousness. As was said in Fireman's Fund Indemnity Co. v. Industrial Accident Comm., 93 Cal.App.2d 244, 246, 208 P.2d 1033, 1034: "expert evidence of a medical possibility taken with other evidence of a non-expert character may be sufficient to support an inference of medical probability." And as said in Alonso v. Hills, 95 Cal.App.2d 778, 786, 214 P.2d 50, 56: "Even regular scientific expert testimony is not entitled to preference over testimony as to the facts; the relative weight must be decided by the trier of facts. Rolland v. Porterfield, 183 Cal. 466, 469, 191 P. 913."

Dr. Bertram Capus, another eye, ear, nose and throat specialist, also testified for plaintiffs. His opinion was that the condition of Mrs. Hagy's mouth on January 5, 1950 "could well fit the picture of a chemical burn." He testified: "I definitely feel that exposure to this material, produced a chemical laryngitis, and an aggravation of any pre-existing condition she may have had."

Dr. Manuel Barbosa, a general practitioner, also testified for the plaintiffs. We see no reason, however, to quote further from the testimony of those doctors. It appears that the moisture in a person's mouth and nose will itself form a sulphuric acid when such person breathes sulphurous fumes (of a sufficiently high concentration). The medical history shows that immediately following December 21 Mrs. Hagy lost her voice and from there on she became progressively worse.

The opinions of the doctors aligned on the defense side differed from those on the plaintiffs' side. To again quote from the Shaw case, 4 Cal.App.2d at page 196, 40 P.2d at page 590: "But at best their opinions raised merely a conflict; and as to what should be the true deduction from conflicting testimony is a problem for the jury and not the reviewing courts. Gambrel v. Duensing, 127 Cal.App. 593, 16 P.2d 284."

[9] Appellants also argue that there were conflicts within the testimony of the plaintiffs' own medical witnesses. Assuming that there were some differences, the rule in California as to conflicts "applies not only to a conflict between the witnesses for the respective parties, but between the witnesses for the same party [citations]." Dietlin v. General American Life Ins. Co., 4 Cal.2d 336, 344–345, 49 P.2d 590, 595.

Russell Hagy's case:

[10] It is conceded in appellant's opening brief that "For some time (for many years in fact) before December 21, 1949, Russell Hagy * * * had a heart condition." There is considerable testimony in the record bearing upon the aggravation of this pre-existing heart condition, and we think more than sufficient to sustain the verdict in his favor for $5,000.

[11] Appellants however contend that that it is insufficient. Since the complaint alleges damages to him in the sum of $10,000, as a result of being deprived of the services of his wife, and that "his comfort and happiness in her society and companionship have been greatly impaired", it is apparent in a case such as this that a verdict of $5,000 in his favor can be upheld as amply sustained by evidence in support of those allegations, even if there were no evidence sustaining allegations of aggravation of his heart condition.

The judgment is affirmed.

DOOLING, J., concurs.

Mr. Justice (pro tem.) JONES deeming himself disqualified has taken no part in the consideration or decision of this case.

Hearing denied; EDMONDS, SCHAUER and SPENCE, JJ., dissenting.

122 Cal.App.2d 390

BAKER v. MANNING'S, Inc.

Civ. 19743.

District Court of Appeal, Second District,
Division 3, California.
Dec. 31, 1953.

Personal injury action by patron who slipped and fell on waxed floor of defendant's bakery. The Superior Court of Los Angeles County, Paul Nourse, J., instructed jury to return verdict for defendant, and patron appealed. The District Court of Appeal, Parker Wood, J., held that question whether condition of floor was reasonably safe was one of fact for jury.

Judgment reversed.

1. Trial 🔑139(1)

It is proper to direct a verdict for defendant only when there is not sufficient evidence to support a verdict for plaintiff.

2. Trial 🔑178

In determining whether a directed verdict for defendant is proper, the court must view the evidence in light most favorable to plaintiff, accept every inference that legitimately may be drawn in favor of plaintiff, and disregard evidence which is in conflict with evidence favorable to plaintiff.

3. Negligence 🔑136(22)

In personal injury action by patron who slipped and fell on waxed floor of defendant's bakery, question whether condition of floor was reasonably safe was one of fact for jury.

◆

Demler & Eckert, Edison J. Demler, and Charles E. Samuel, Long Beach, for appellant.

Moss, Lyon & Dunn, Richard B. Coyle, and Henry F. Walker, Los Angeles, for respondent.

PARKER WOOD, Justice.

Action for damages for personal injuries sustained as a result of slipping and falling on the floor of defendant's bakery and restaurant in Long Beach. The jury was instructed to return a verdict for defendant. Plaintiff appeals from the judgment.

The bakery department, which is 20 feet wide, is in the front part of the building, and the restaurant is in the rear. The building (lengthwise) extends north and south. The bakery counter also extends north and south, and the front side of the counter is about 8 feet from the east wall. The east wall is paneled with mirrors.

Plaintiff testified that on October 5, 1950 (Thursday), about 6:30 p. m., she went to the bakery counter and purchased bakery goods; then she went to the mirror and adjusted her hat; then she started toward the entrance door; after she had taken two or three steps in a "natural walk," she suddenly slipped; she felt herself skidding; her left foot skidded forward; she made circular motions with her arms to prevent falling; in trying to regain her balance, she went forward three or four feet from where she started to slip, and then she fell; the next thing she remembered was that she was sitting in a chair in the front part of the bakery, facing the mirror; at that time she felt shaken and shocked; she looked at the area where she was when she fixed her hat—from where she had come—and she saw that the floor had a dark shiny surface and that it was made of asphalt tile; she saw a mark there which "would be as if you had taken an eraser over a shiny black surface and made a streak"; the mark started two or three feet from the mirror, was between three and four feet in length, and extended in the same direction that she had been walking—leading from the mirror to the door; she did not see any other marks or any material or moisture or anything foreign on the floor; she was wearing black suede shoes with leather soles and cuban heels about two inches high; she had the shoes about six months and had worn them a great deal; after she had fallen and while she was sitting in the chair or when she was at home, she saw a streak of white-greyish substance on the side of her shoe; the substance was wax and she removed it with a wire brush; the shoes were lost in an automobile accident.

The manager of the store, called as a witness by defendant, testified that he did not see plaintiff fall but that he was informed by an employee of the store that a woman had fallen; he went to the scene of the accident and saw plaintiff lying on her side on the floor and he would say that she was unconscious at that time; they assisted her to a chair; he tried to find out what happened but he did not remember whether she told him anything; she seemed quite upset and she left immediately; he inspected the area of the floor where she had been lying and he did not see any foreign substance on the floor; he walked over the floor several times and it was not slippery; it was not shiny and it was never glossy after being used all day; it had been swept the night before and probably was dusty but not dirty; the floor was damp-mopped nightly; the floor was waxed each Saturday after the close of business; he did not know whether the floor was waxed the Saturday night before the accident; the purpose in waxing the floor was for the appearance—to clean the floor and give it a gloss; about one thousand people had passed through the entrance on the day of the accident; the people who come into the store go over the same general path in order to get to the restaurant and that area (path) was less glossy than the area to the side; he had been the manager about 21 months before the accident. He was asked if he had received reports prior to the accident herein that other people had slipped and fallen at the place where plaintiff had fallen, and he replied that "There were a few I remember, whether they were before or after, I couldn't say." He testified further that the standard practice for waxing the floor was as follows: The floor was washed; after it was dry a liquid wax known as San-a-sheen was applied to the floor with a mop in the same manner as one would damp-mop a floor; the floor was allowed to dry about thirty minutes and then it was buffed with a rotary buffing machine. He also testified that buffing removed "very little, if any," of the wax, and that after the buffing was finished the floor appeared shiny and glossy.

A witness, who was an expert in the manufacture and use of floor wax, testified that his company manufactures San-a-sheen, a water emulsion wax; the water evaporates and leaves a film of non-volatile components; the principal film-forming components of San-a-sheen are wax, turpentine, and resin; the resin renders the film more rigid, decreases the tendency of the wax to mash or yield on impact, thereby making it more safe against "slip hazard"; under normal conditions the wax will not cake and after it is applied to an asphalt tile floor the floor is less slippery.

[1, 2] It is proper to direct a verdict for a defendant only when there is not sufficient evidence to support a verdict for the plaintiff. See Sokolow v. City of Hope, 41 Cal.2d 668, 262 P.2d 841. In determining whether such a directed verdict is proper, the court must view the evidence in the light most favorable to plaintiff, accept every inference that legitimately may be drawn in favor of plaintiff, and disregard evidence which is in conflict with evidence favorable to plaintiff. See Sokolow v. City of Hope, supra; and Kataoka v. May Dept. Stores Co., 60 Cal.App.2d 177, 181, 140 P.2d 467.

[3] The evidence shows, in part, that the floor had been waxed and buffed every Saturday for about 21 months preceding the accident; the floor was shiny and glossy; the buffing or polishing removed little if any of the wax; the area where plaintiff fell was more glossy than the area which was next to the counter and which led directly from the front door, through the bakery, to the restaurant. The evidence also shows that plaintiff was walking in a normal manner, that she suddenly slipped, and that after she had fallen she saw an eraser-like streak on the floor and a streak of wax on the side of one of her shoes. The person who waxed and polished the floor, the last time preceding the accident, did not testify. The jury might have inferred from the evidence that the part of the floor where plaintiff fell had not been used as much as the part of the floor next to the bakery counter, and that wax had accumulated on that less-used part of the

floor, as a result of waxing the floor more than 80 times (each week for 21 months), to such an extent that an excessive amount of highly polished wax produced a slippery and dangerous condition. In view of the evidence that there was an eraser-like streak on the floor and a streak of wax on her shoe, the jury might have inferred that wax was unevenly and excessively applied at the spot on the floor where she suddenly slipped. Also, it might have inferred that defendant had received reports prior to this accident that other persons had slipped and fallen on the floor. The manager testified that he had had a few reports that other persons had slipped and fallen, but he did not remember whether the reports were before or after this accident. In viewing this evidence in the light most favorable to plaintiff, and in considering the demeanor of the witness, the jury might have inferred that the reports were before the accident. In Nicola v. Pacific Gas & Electric Co., 50 Cal.App.2d 612, at pages 615, 616, 123 P.2d 529, at pages 530, 531, it was said: "The right of a proprietor of a place of business to wax a floor which the customers are expected to use is not one which upon any reasonable theory can be held to be superior to his duty to use ordinary prudence and caution to avoid injury to those who come to his premises by invitation. * * * Of course slipperiness is an elastic term. From the fact that a floor is slippery it does not necessarily result that it is dangerous to walk upon. It is the degree of slipperiness that determines whether the condition is reasonably safe. This is a question of fact." In Cagle v. Bakersfield Medical Group, 110 Cal.App.2d 77, 241 P.2d 1013, plaintiff slipped and fell on a highly polished "marbleized tile" floor that had been polished once every two weeks during a period of six weeks before the accident; there was no foreign substance on the floor; and judgment for plaintiff was affirmed. The court therein, at page 81, of 110 Cal.App.2d, at page 1015 of 241 P.2d, quoted from Nicola v. Pacific Gas & Electric Co., supra, and then said: "From the decision in that case it might be held that under proper circumstances, considering the type of floor and the type of patrons using the floor, a jury might well find that the application of any wax at all might be a violation of the duty to use ordinary prudence and caution to avoid injury." In Sanders v. MacFarlane's Candies, 119 Cal.App.2d 497, 259 P.2d 1010, plaintiff slipped and fell on a polished floor which was similar to asphalt tile; while her hands were on the floor they "sort of stuck to the floor," and she could feel wax on her hands; the janitor who took care of the floor did not testify; among his supplies were liquid wax and a mop; no foreign substance was on the floor; and the judgment of nonsuit was reversed. The court therein held, 119 Cal.App.2d at page 502, 259 P.2d at page 1013, that there was "sufficient evidence tending to show that the floor had been waxed in a manner not reasonably safe for defendant's invitees * * *." It was also stated therein, 119 Cal.App.2d at page 501, 259 P.2d at page 1013: "Storekeepers are under duty * * to keep the floors of their premises reasonably safe for the business invitees who must pass over them. [Citation.] If a storekeeper has a floor waxed or polished it must be done in such a manner that it remains reasonably safe for his invitees. [Citations.] When an unsafe condition which causes injury to an invitee has been created by the owner of the property himself or by an employee within the scope of his employment, the invitee need not prove the owner's notice or knowledge of the dangerous condition; the knowledge is imputed to the owner." In the present case the question as to whether the condition of the floor was reasonably safe was a question of fact for the jury. It was error to instruct the jury to return a verdict for defendant.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.

122 Cal.App.2d 422

NIKOLAUS v. HOWE et al.

Civ. 4738.

District Court of Appeal, Fourth District, California.

Jan. 4, 1954.

In action to recover for services rendered to defendants in hauling tungsten ore, the Superior Court, Inyo County, John P. McMurray, J., rendered judgment for plaintiff, and two of the three defendants appealed. The District Court of Appeal, Mussell, J., held that evidence sustained finding that employer-employee relationship existed between plaintiff and all of defendants and that all of defendants had become indebted to plaintiff in sum claimed for services rendered to defendants at their special instance and request.

Affirmed.

1. Master and Servant ⚷6, 80(10)

In action to recover for services rendered to defendants in hauling tungsten ore, evidence sustained finding that employer-employee relationship existed between plaintiff and all of defendants and that all of defendants had become indebted to plaintiff in sum claimed for services rendered to defendants at their special instance and request.

2. Appeal and Error ⚷989

When confronted with question of sufficiency of evidence, appellant tribunal's only duty is to determine whether there is any substantial evidence, contradicted or uncontradicted, to support findings and judgment.

3. Contracts ⚷212(1)

When consideration for labor or materials is definite and certain, but time for payment thereof is uncertain or dependent upon happening of event which fails through no fault of contractor, consideration does not fail, but becomes due within reasonable time.

Andrew J. Copp, Jr., and H. Dexter McKay, Los Angeles, for appellants.

Willis Smith, Bishop, for respondent.

MUSSELL, Justice.

Plaintiff brought this action to recover for services rendered to defendants in hauling tungsten ore from Fallon, Nevada, to Bishop, California. His original complaint stated a cause of action on a book account and at the conclusion of the presentation of plaintiff's evidence, he was permitted to file an amended complaint to conform to the proof. In the second cause of action therein it was alleged that the defendants were copartners engaged in the business of mining under the firm name and style of Red Top and Red Ant Mining Company, a copartnership; that between January 4 and February 13, 1952, the defendants and each of them became indebted to plaintiff in the sum of $3,281.51 for services rendered to said defendants, at their special instance and request, for the hauling of ores and materials; that defendants promised to pay plaintiff said sum and that it has not been paid. The trial court rendered judgment against the three named defendants and defendants Burney and Moreno appeal.

On or about November 26, 1951, defendant Howe, who was the sole owner of a contract for the purchase of six mining claims in Nevada, entered into three written agreements with defendants Burney and Moreno in which Howe agreed to advance $6,500, Burney $5,800 and Moreno $2,000, all to be used in enabling Howe to complete the payments under his contract for the purchase of said claims, for which advances Howe was to receive 45% interest, Burney a 40% interest and Moreno a 15% interest in the ownership of said mining claims and purchase contract. The parties agreed to enter into a partnership agreement covering the percentages to each. One of the agreements was in the form of a certificate of limited copartnership agreement prepared in accordance with the provisions of section 15502 of the Corporations Code. This instrument was not filed and recorded because defendants

Burney and Moreno refused to acknowledge it before a notary public. The transfers of interest in the purchase contract and in the mining claims were never consummated.

Defendant Howe testified that he first talked with plaintiff about hauling ore on December 28, 1951; that "I told him that myself and Mr. Ernest Moreno and Mrs. Burney were associated in a mine over east of Fallon, Nevada; that we had some ore on the dump and that we wanted to haul that ore and wondered if he would be interested in hauling and he said he would." I said "Now as to the grade of the ore, I have an engineer out in the car here and I also have one of my associates and you can go out and see them and talk to them." He said "All right, we will go out and talk to them;" that he then introduced plaintiff to defendant Moreno and the engineer, Mr. Rhodimer; that he told Moreno that plaintiff had agreed to haul the ore for $12 per ton; that later the same day after he had gone to Bishop with Moreno, another conversation was had with plaintiff at which defendant Moreno was present; that he there told Mr. Nickolaus that Mr. Brown had agreed to mill the ore and that the deal they had made for hauling it was satisfactory to them and that the deal was on; that Moreno was "in accord with the whole thing"; that all that was said at this conversation as to the payment for plaintiff's services was that he might have to wait for his money for a period of time while they were selling the ore; that he had a conversation with Moreno on January 4, 1953, in which Moreno stated that he had called plaintiff and that a truck would be there the following morning; that up to that time plaintiff had not hauled any ore; that he telephoned Mrs. Burney on December 28, 1951, and told her that they had a hauler and that "he would haul it for $12.00 a ton and she said that was fine"; that on November 28, 1951, he had a conversation with Mrs. Burney in which he told her that they would have to have a hauler to haul the ore; that he had previously talked to her about entering into the mining business; that they entered into a joint venture and that they were engaged in business together on December 28, 1951; that thereafter they talked about hauling the ore several times; that he did not work in the mine but that Moreno was in charge and Mrs. Burney was jointly interested with them; that "she okeyed a 100% Mr. Moreno having charge of the hauling of the ore."

Plaintiff testified that on December 28, 1951, Howe told him that he represented Mrs. Burney and Mr. Moreno; that he was then introduced to Moreno and that Howe told Moreno that he (plaintiff) was willing to haul the ore for $12 per ton; that Moreno told plaintiff what would constitute the loading and what would be required; that Howe stated that he had contacted the milling corporation and that they were willing to run the ore and take the milling charges out of it; that he then asked if plaintiff would be willing to do that; that plaintiff said he would if there would not be too much delay and that it would be agreeable provided he did not have to wait too long for his money; that he had to be assured of payment; that nothing was said to the effect that if the proceeds were not sufficient he would not be paid.

Bernice Morris, plaintiff's bookkeeper, testified as to the various entries in the account which was kept for "Frank Howe Associates" and which showed the deliveries of the ore involved, the price charged, and the amount due plaintiff. She stated that Moreno was introduced to her as an associate of Howe and that Moreno "acknowledged it"; that Moreno made the loading arrangements; that she called the owner of the mine in Nevada and found that a substantial payment had been made on the property by Frank Howe and Mrs. Burney and was informed that they were a partnership; that they were buying the mine and had "made enough of a payment that they should be responsible"; that she made this investigation before they started to haul the ore.

Defendant Olive Burney testified that on November 26, 1951, she invested $5,800 in the mining enterprise and carried on her negotiations with defendant Howe; that she found out that ore was being hauled on or about January 6, 1952, but did not find out that plaintiff was hauling it until January 23, 1952; that some time in November, 1951, she went with Howe to Fallon, Nevada, to get a hauler and on other trips discussed haulers with Howe; that in February, 1952, she called the mill manager and told him that she was supposed to have 40% of the proceeds of the ore from the mine; that she first deposited money in the mining venture on November 26, 1951, and that she paid the money to develop the mine and get it started.

Defendant Moreno testified that he was a miner; that on or about December 28, 1951, he was introduced to plaintiff; that he helped the loader pick up the ore and put it in the trucks and worked at the mine approximately 21 days; that Mrs. Burney was present when he was instructed by Howe to go up to the mine and work.

[1–3] The trial court found that the allegations in plaintiff's second cause of action were true and that defendants became indebted to plaintiff in the sum claimed for services rendered to defendants at their special instance and request; that they promised to pay the same and that no part of it had been paid. The evidence is sufficient to support these findings.

Where, as here, we are confronted with the question of the sufficiency of the evidence our only duty is to determine whether there is any substantial evidence, contradicted or uncontradicted to support the findings and judgment. Anglin v. Conway, 41 Cal.2d 683, 263 P.2d 1. Defendant Howe acted with implied authority of defendants Burney and Moreno to bind them with the obligations of the hauling contract. It clearly appears that plaintiff was employed by defendant Howe as representing the remaining defendants; that they knew of his employment and knew that he was hauling the ore; that defendant Olive Burney, when informed by Howe that he had a hauler who would haul the ore for $12 per ton, said "That was fine"; that defendant Moreno actually directed the loading operations, defendants accepted the benefit of plaintiff's services and are obligated to pay for them. 6 Cal.Jur. 23. The defendants were engaged jointly in mining the premises involved. The employer-employee relationship between defendants and plaintiff was established irrespective of whether a partnership existed as between the defendants, and since we have reached this conclusion, it is not necessary to determine the question of the sufficiency of the evidence to support the trial court's finding that the defendants were copartners.

Defendants argue that Howe's promise to pay hauling charges was subject to a condition that they be paid out of proceeds derived from the milling of the ore hauled. However, there was no agreement that plaintiff would not be paid unless the proceeds from the ore were sufficient for that purpose. Plaintiff informed Howe when asked if he would be willing to take his charges out of the ore that it would be agreeable if there would not be too much delay and stated that he had to be assured of payment. As was said in Bartholomae Oil Corp. v. Oregon Oil, etc., Co., 106 Cal.App. 57, 64, 288 P. 814, 817:

> "When the consideration for labor or materials is definite and certain, but the time for the payment thereof is uncertain or dependent upon the happening of an event which fails through no fault of the contractor, the consideration does not fail, but becomes due within a reasonable time. 21 R.C.L. 11, § 5; Rosenheim v. Howze, 179 Cal. 309, 176 P. 456; Wallace v. Carlin, 92 Cal.App. 31, 267 P. 596."

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

122 Cal.App.2d 355

CORCORAN et al.
v.
CITY OF SAN MATEO et al.

Cr. 15613.

District Court of Appeal, First District, Division 1, California.

Dec. 31, 1953.

Rehearing Denied Jan. 29, 1954.

Hearing Denied Feb. 24, 1954.

Action by parents against lot owners for death of their minor child who was fatally injured when she fell into city drainage ditch. The ditch, which was adjacent to unfenced empty lot owned by defendants, was so covered with grass as to give it the appearance of solid ground. The Superior Court, County of San Mateo, Richard B. Eaton, J., rendered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Fred B. Wood, J., held that in absence of statute imposing duty on landowners to erect a fence to prevent trespassers from crossing lot and being injured by some defect on adjacent land, landowners were not liable for death of child trespasser.

Judgment affirmed.

1. **Negligence** ⚷33(1)

At common law, a landowner had no duty to fence his land to prevent trespassers from crossing his land and being injured by some defect on adjacent property.

2. **Common Law** ⚷12

The common law of England, so far as it is not repugnant to or inconsistent with Constitution of the United States, or the Constitution or laws of California, is the rule of decision in all courts in California. Civ.Code, § *22.2*.

3. **Negligence** ⚷39

The fact that landowners subdivided and developed a tract of land adjacent to a city drainage ditch, and sold improved lots to members of public, did not import an invitation to children of persons buying improved lots to play on unsold lots.

4. **Negligence** ⚷33(3)

Landowners had no duty to fence vacant lot to prevent child trespasser from crossing lot and falling into drainage ditch located on adjoining property, and landowners were not liable for death of child who fell into drainage ditch.

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William C. Burns, James A. Himmel, San Francisco, for appellants.

Hoffman & Nagle, San Mateo, for respondents.

FRED B. WOOD, Justice.

Plaintiffs have appealed from a judgment in favor of defendants Conway & Culligan Development Company, a corporation, and Andrew Conway and Thomas J. Culligan, individually and as co-partners doing business under the name of Conway & Culligan.[1] The judgment was rendered upon the sustaining of these defendants' general demurrer to plaintiffs' second amended complaint, without leave to amend.

Question: Did the defendants owe to a child trespassing upon their land a duty to erect a fence or other barrier or protective device at or near the boundary, to protect the child from going onto adjacent land, owned and controlled by a third party, and there falling into a ditch the water surface of which was so covered with grass and debris as to give it the appearance of solid ground?

In the first count of the complaint plaintiffs allege that (1)[2] defendants owned a large tract of land immediately adjacent to and contiguous with the side or bank of an open drainage ditch owned and maintained by the city of San Mateo; (2) defendants undertook the development and promotion of this tract, subdividing it and building homes which they advertised and offered for sale to the public; (3) plaintiffs purchased and became residents of one of these homes, near an unfenced lot belonging to and under exclusive control of the defendants; (4) on land immediately adjacent to and conterminous with the unfenced lot, the city of San Mateo owned and maintained said open drainage ditch and stream, five feet deep and flowing water three feet in depth; (5) the ditch and stream, immediately at the rear of the unfenced lot, was covered with black dirt and sand and grass, giving the appearance of solid ground; (6) on December 29, 1950, and for a long time prior thereto defendants knew or should have known that small children resided in homes in this tract, on the street which fronted the unfenced lot and on the same side of the street as the lot, and that it was customary and common practice for said small children to play on the sidewalk fronting these homes and to gather in and play on the unfenced lot; (7) the city of San Mateo, its engineers, agents, servants, and employees carelessly and negligently maintained the ditch and stream and ground appurtenant thereto in a dangerous and defective condition in that debris, mud and sand were allowed to collect therein and make the same [un]safe to the public; (8) defendants Conway and Culligan knew or should have known that the small children who played upon the unfenced lot could not discover the dangerous condition of the ditch and stream; (9) defendants[3] neglected and failed after notice of such condition to erect a fence, barrier or other protective device to protect the public and small children from falling into the stream or ditch; (10) plaintiffs' minor child stepped into the ditch and stream, resulting in her death, caused by said dangerous condition and as a direct and proximate result of the concurrent negligence of the defendants; and (11) plaintiffs have thereby sustained injuries to their damage in the sum of $250 for funeral and burial expenses, and $75,000 for deprivation of the services and comfort of the child; and $25,000 by plaintiff Alberta Corcoran for nervous breakdown and medical and hospital treatment.

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[1] Mentioned hereinafter as "defendants." The city of San Mateo and Carl Thorsby, city engineer, are also named as defendants but are not involved upon this appeal.

[2] For convenience of reference we have assigned numbers to these clauses. They do not refer, by number, to the paragraphs of the complaint.

In the second count of the complaint plaintiffs incorporated by reference the allegations summarized in clauses (1) to (5), inclusive, (10), and (11), above, and additionally alleged that (a) defendants city of San Mateo, its engineers, servants, and employees owned and maintained said drainage ditch which, immediately adjacent to the southeast corner of the tract and of the unfenced lot, flowed through a culvert under the Bayshore Highway, a public highway which passed over and caused the ditch and stream to accumulate debris, grass, soil and mud on the top of the water flowing in the stream and gave the ditch and stream the appearance of solid ground; (b) "said defendants" knew or should have known that said condition was perilous and dangerous to the public, particularly to small children living in the vicinity, but neglected to erect a safety device, barrier, or fence upon the bank on the northerly side of the drainage ditch or stream to protect small children from falling or sliding into the ditch or stream; and (c) as a direct and proximate "cause" [result?] of the negligence of "the defendants above named," plaintiffs' minor child because of her immaturity of mind fell or slipped into the unprotected and unguarded stream owned and maintained by the "aforesaid defendants" and was drowned.

It is not clear whether the expressions "said defendants," the "defendants above named," and the "aforesaid defendants" (in clauses (b) and (c), above) were used to designate all of the defendants or only the city of San Mateo and possibly its agents and employees. However, for the purpose of considering respondents' general demurrer we will treat the second count as if the quoted expressions were intended to designate the respondents as well as other defendants.

It is apparent from this summary that plaintiffs seek to hold the respondents legally liable for an alleged dangerous condition existing on land not their own, a condition not created or maintained by the respondents and one over which they have no control. Yet, because the drainage ditch, as alleged by plaintiffs, is "immediately adjacent to the rear" of the unfenced lot, "on land immediately adjacent to and conterminous with" the southern boundary of the tract which respondents subdivided and developed for sale to the public, and because small children living in the vicinity play on this lot and respondents allegedly know or should know that they do so, plaintiffs contend that the law imposes upon respondents a duty to erect a fence, barrier or other protective device on their lot along or near its southern boundary.

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[3] Apparently includes the respondents herein.

[1, 2] The owner or possessor of land owed no such duty at common law. "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State." § 22.2 added to Civil Code by Stats. 1951, ch. 655, p. 1833; a continuation of former § 4468, Pol.Code, which was based on Stats. 1850, ch. 95, p. 219. No judicial decision has been brought to our attention, and we have found none, which holds that the common law rule applicable to the facts of the instant case is "repugnant to or inconsistent with" our Constitution and laws. As early as 1869 it was held that at common law no duty is imposed upon a lot owner to repair a defect in a public street fronting his lot. Mere ownership, control or possession of the lot does not make one legally responsible in damages to a person who is injured by reason of defects in the street. Such a duty and responsibility, if any exist, must be found in the statutes of the state. Eustace v. Jahns, 38 Cal. 3, 14–15 and 17. That principle finds expression in a series of decisions over the years. As recently as 1952 the Supreme Court said: "It is the general rule that in the absence of statute a landowner is under no duty to maintain in a safe condition a public street abutting upon his property."[4] Sexton v. Brooks, 39 Cal.2d 153, 157, 245 P.2d 496, 498.

It is true that some exceptions to the original common law concept of non-liability toward persons trespassing upon one's land have been developed over the years. But those exceptions pertain solely to conditions existing upon one's own land, not to conditions, natural or artificial, which obtain upon the land of another and over which one has no control. See Restatement of the Law of Torts, §§ 333–339, liabilities of possessors of land to trespassers thereon; and discussion in Marino v. Valenti, 118 Cal.App.2d 830, 259 P.2d 84.

[3] Plaintiffs in their briefs speak of an "implied invitation" extended by the respondent to children who play on the unfenced lot. They do not point to any facts alleged in the complaint which furnish a legal basis for such an implication, nor do we find any such. The mere fact, if it be a fact, that respondents subdivided and developed a tract of land adjacent to a city drainage ditch, and sold the improved lots to members of the public, including the plaintiffs, does not of itself import an invitation to children to play on unsold lots. We find nothing in the complaint which characterizes the children as licensees. They are in legal effect trespassers, as we read the complaint. It is not at all like the case of a landowner who affirmatively maintains a public playground for the entertainment of children of tender years. He conceivably might be under a duty to fence his boundary if it physically adjoined a ditch of the kind described in the complaint. But that is not this case.

[4] No statute imposing upon respondents a duty to erect a fence, barrier, or other protective device, under the circumstances described in the complaint, has come to our attention. The judgment must be affirmed.

In view of this conclusion it is unnecessary to consider the respondents' other contentions; i. e., that there are grounds additional to those we have discussed for holding that the complaint fails to state a cause of action against the respondents.

The judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

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[4] That, of course, is consistent with the principle that an abutting owner may be liable for portions of a public sidewalk which he has constructed or altered for the benefit of his property and which serve a use independent of and apart from the ordinary and accustomed use for which sidewalks are designed. See page 157 of 39 Cal.2d, page 496, of 245 P. 2d.

122 Cal.App.2d 490

PEOPLE v. MITMAN.

Cr. 943.

District Court of Appeal, Fourth District, California.

Jan. 8, 1954.

Rehearing Denied Jan. 21, 1954.

Hearing Denied Feb. 3, 1954.

Defendant was convicted of violating Penal Code, § 288a. The Superior Court, Orange County, Robert Gardner, J., rendered judgment, and defendant appealed. The District Court of Appeal, Barnard, P. J., held, inter alia, that certain photographs had been properly admitted in evidence.

Affirmed.

1. Criminal Law 🔑178

Dismissal of misdemeanor charge would not bar prosecution on felony complaint. Pen.Code, § 1387.

2. Criminal Law 🔑576(1)

On appeal from conviction for violating Penal Code, § 288a, record would not sustain appellant's contention that action should have been dismissed for lack of timely prosecution. Pen.Code, § 1382.

3. Criminal Law 🔑444

Photographs were properly admitted into evidence when defendant admitted in prosecution for violating Penal Code, § 288a, that he himself took same and evidence conclusively showed that negatives from which the pictures had been printed were "pure negatives" and had not been tampered with, and that they correctly depicted what actually occurred at time.

4. Criminal Law 🔑1035(3)

Reversal could not be predicated upon trial court's statement to jury that jury should not be prejudiced against defendant because he was not represented by an attorney, where it clearly appeared from context that court was referring only to fact that defendant had not seen fit to defend himself by counsel and jury could not have been misled into believing that defendant had made no defense at all, and where no request was made to have remark stricken or jury instructed to disregard it.

5. Criminal Law 🔑1109(1)

Reversal could not be predicated upon alleged error occurring when reporter failed to take down for record remarks made before, during and after playing of tape recording before jury, where trial court had ordered reporter to transcribe from his notes material on tape recording and all other proceedings in that connection and reporter had complied with such order, in so far as he was able, by inserting transcript of tape recording, and where no objection had been made by defendant and no effort had been made by him to avail himself of opportunity afforded by rules to secure record of anything further, if he deemed it important to his appeal. Rules on Appeal, Rule 36(b).

6. Criminal Law 🔑913(1), 977(3)

Failure to impose sentence within time prescribed by statute does not affect court's jurisdiction, and such failure being, at most, an error of procedure, granting of new trial because thereof is prohibited by Constitution in absence of showing of prejudice. Pen.Code, § 1191; Const. art. 6, § 4½.

7. Criminal Law 🔑1186(4)

On appeal from conviction for violating Penal Code, § 288a, neither error nor prejudice appeared in connection with sentencing of defendant. Pen.Code, § 1191; Welfare and Institutions Code, §§ 5501–5512, 5504; Const. art. 6, § 4½.

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Richard Henry Mitman, in pro. per.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The appellant was found guilty of violating section 288a of the Penal Code, and he appeals from the judgment and an order denying his motion for a new trial.

On September 20, 1952, the appellant and a woman registered at a motel near Laguna Beach and occupied a room there. The next morning the appellant took a number of pictures which clearly disclose a violation of section 288a by these parties. The woman later complained to police officers in

Los Angeles, accusing the appellant of extortion. A dictaphone device was set up in the woman's apartment in Los Angeles and on November 6, 1952, a conversation between the woman and the appellant was recorded on a tape by this device. The appellant was then arrested on a Los Angeles warrant charging him with being a vagrant under subdivision 5 of section 647 of the Penal Code. The officers found camera equipment and some rolls of undeveloped film in his car. The film, when developed, produced the pictures which were here introduced in evidence. The appellant admitted ownership of a camera found in his apartment and said he had used this camera to take these pictures.

The appellant was also arrested on November 12, 1952, on a warrant issued in Orange County charging him with a violation of section 288a of the Penal Code. The matter was heard in a justice's court in Orange County on December 2, 1952, and the appellant was held to answer, apparently on that date. An information was filed on December 12, 1952, and a trial of the action began on January 19, 1953. The woman involved was charged with the same offense in the same information, and they were tried together. They admitted the acts charged but the woman claimed that she had been forced by the appellant to participate in the acts, and the appellant relied on the defense of former jeopardy. The jury found both defendants guilty and found for the People on the appellant's plea that he had been once in jeopardy for the offense charged. Sexual psychopathy proceedings regarding the appellant were commenced and psychiatrists were appointed pursuant to Welfare and Institutions Code section 5504. The court found that there was probable cause for believing that he was a sexual psychopath, and adjourned proceedings in the case until that matter could be determined. At the time of the hearing the court found that he was a sexual psychopath and ordered him committed to Norwalk Hospital for an observation period. Subsequently, he was ordered returned to the court on the report of the hospital authorities. The sexual psychopathic proceedings were then terminated, and the case was restored to the calendar for criminal proceedings. The appellant's application for probation was denied and he was sentenced to the county jail for six months. This appeal followed.

[1] Appellant's main contention is that it appears as a matter of law that he had been once in jeopardy. It is argued that a complaint had been filed in the municipal court in Los Angeles charging him with a violation of subdivision 5 of section 647 of the Penal Code; that the matter was set for trial on December 17, 1952; that when the case was called the complaint was dismissed on motion of the city attorney, with no reason given for the dismissal; that the photographs which were admitted in evidence in this case were in court at that time and that the officers who arrested him were present, waiting to testify in that matter; that the charge in that case that he was a lewd and dissolute person was based on the same acts and pictures as was the instant charge in Orange County; that the evidence showing he violated section 288a would also show that he was a lewd and dissolute person; and that a prosecution of the instant action was barred by section 1387 of the Penal Code.

Under well-established rules, the dismissal of the misdemeanor complaint in Los Angeles would not bar the prosecution on this felony complaint. People v. Head, 105 Cal. App. 331, 288 P. 106; People v. Smith, 143 Cal. 597, 77 P. 449; People v. Brown, 42 Cal.App. 462, 183 P. 829; People v. Nowak, 76 Cal.App. 216, 244 P. 634. Moreover, while some of the evidence would have been admissible in either case, the necessary elements of the two offenses were considerably different. While section 1387 provides that such a dismissal is a bar to any other prosecution for the same offense, it does not forbid prosecution for a different offense merely because some of the same acts and evidence might be involved in the other offense. It rather clearly appears that the legislature never intended this statutory bar to apply under such circumstances as here appear. In this connection the appellant further contends that the court erred in improperly advising the jury that in his opinion it should find for the People on the plea of once in jeopardy, since this plea had not been sustained by the evidence. The court also told the jury that despite this advice it was free to render the opposite verdict if it so desired. There was no evidence presented or offered which would have supported a contrary verdict on this issue, and no error appears in that connection.

[2] The appellant further contends that he was entitled to a dismissal for lack of prosecution within the statutory time. It is argued that section 1382 of the Penal Code requires a dismissal where the information is not filed within fifteen days after a defendant is held to answer, and where it is not brought to trial within sixty days after the filing of the information; that while a warrant was issued in Orange County on November 12, 1952, he was held in jail in Los Angeles and was not "arraigned" until December 2, 1952; and that the filing of the information on December 12, 1952, was fifteen days too late. An information was filed on December 12, within ten days after the appellant was held to answer, as indicated by the record, and the action was brought to trial on January 19, 1953, well within the time allowed. The appellant states that he was held in jail in Los Angeles from November 12 to December 2, which seems to explain why the preliminary hearing was not held at an earlier date. Moreover, on December 12, 1952, when the appellant entered his pleas, he stated, in response to the court's question, that the date of January 19 was satisfactory to him. No lack of jurisdiction appears, and the record fails to disclose that the appellant was entitled to a dismissal of the action for a lack of timely prosecution.

[3] It is next contended that the "unsponsored" photographs were inadmissible for the purpose of proving the corpus delicti, and that without such improper evidence the corpus delicti was not proven and the admissions of the appellant were not admissible. These photographs were properly admitted into evidence. People v. Doggett, 83 Cal.App.2d 405, 188 P.2d 792. Not only do all of the essential facts set forth in the opinion in that case appear in the instant case, but the appellant here admitted that he himself took these pictures and he described in detail the method by which this was done. He testified to this effect while on the stand, and there was also considerable other evidence which conclusively shows that the negatives from which these pictures were printed were "pure negatives" and had not been tampered with, and that they correctly depicted what actually occurred at the time. There was additional evidence of the corpus delicti in the testimony of the appellant himself, including his statement that he had taken the pictures and that he and the woman had committed the acts depicted at the times when the pictures were being taken.

It is next contended that the court erred in admitting evidence concerning the appellant's arrest in Los Angeles, and particularly in admitting evidence of an extortion charge that was never filed in Los Angeles. Some Los Angeles officers testified as to the finding of the camera and films in appellant's apartment and car, and other matters which were proper as a foundation for the admission of the pictures into evidence. The appellant's codefendant brought out without objection, on cross-examination of these officers, the reference to a proposed extortion charge, and this was again brought out by the appellant himself in cross-examining these officers. No error appears and the appellant is in no position to complain with respect to these matters. People v. Seely, 66 Cal.App.2d 408, 152 P.2d 454.

The appellant next complains that the court erred in denying his request for an expert witness. The only thing which appears in this connection is that the appellant asked the court to authorize the sheriff of Orange County to take him to Los Angeles for the purpose of subjecting himself to a lie-detector test, which request was refused. No error appears.

[4] It is next contended that the court erred in telling the jury that the appellant had not seen fit to defend himself. Just prior to giving his instructions the court

stated that some comment had been made about appellant being represented by counsel and about his sitting at the table with counsel for the other defendant, and told the jury that while the appellant had a right to an attorney and while he had been offered the services of the public defender "and he hasn't seen fit to defend himself, you are not to be concerned with that so far as your determination in this case as to the guilt or innocence of either of these defendants," and that the jury should not be prejudiced against him because he was not represented by an attorney. It clearly appears from the context that the court was referring only to the fact that he had not seen fit to defend himself by counsel. The appellant took an active part in the trial, making objections, cross-examining witnesses, taking the stand to testify, and arguing. The jury could not have been misled into believing that he had made no defense at all, and no possible prejudice appears. No request was made to have the remark stricken or the jury instructed to disregard it, and no reversible error appears. People v. Goldstein, 84 Cal.App.2d 581, 191 P.2d 102.

It is next contended that the court erred in refusing to give ten instructions requested by the appellant. Eight of these instructions related to the matter of former jeopardy and, as held by the court, there was no evidence which justified the giving of those instructions. The other two instructions related to the meaning of section 288a of the Penal Code, and were fully covered by instructions given in language which was much more favorable to the appellant than the language of the instructions offered and refused.

It is next contended that the court erred "in not protecting the appellant from the verbal abuse of the codefendant's counsel" and from the remarks of the district attorney in referring to the cost of bringing in a machine to reproduce the language on the recorded tape which the appellant had asked to have brought into court. No error appears in connection with the remarks of codefendant's counsel. The language of the tape recording was reproduced twice before the jury, and we are unable to see where any prejudice appears. Moreover, no objection to the district attorney's remark was made and no request made to have the jury instructed to disregard it.

[5] It is next contended that error occurred when the reporter failed to take down for the record the remarks made before, during and after the playing of the tape recording before the jury. Nothing is said as to the nature of these remarks, and there is nothing in the record from which it could be determined whether or not anything therein was prejudicial. At the request of the appellant, the court ordered the reporter to transcribe from his notes the material on the tape recording played at that time, and all other proceedings in that connection. The reporter complied with this order, insofar as he was able, by inserting a transcript of this tape recording, and no objection was made by the appellant and no effort was made by him to avail himself of the opportunity afforded him by rule 36(b), Rules on Appeal, to secure a record of anything further, if he deemed it important on his appeal.

[6, 7] Appellant's final contention is that the court erred in denying his motion for a new trial since the court had failed to sentence him within the statutory time. It is argued that section 1191 of the Penal Code requires that judgment be pronounced within twenty-one days after the verdict, with certain exceptions not applicable here, and that his rights were violated when the court suspended proceedings in connection with the sexual psychopathy proceedings.

The jury returned its verdict on January 28, 1953. On January 29, 1953, the court signed an order appointing psychiatrists pursuant to section 5504 of the Welfare and Institutions Code, and an order requesting a probation officer's report. On the same day, it signed an order adjourning proceedings in the criminal matter until a hearing to determine whether or not the appellant was a sexual psychopath could be had. These proceedings were not terminated until May 1, 1953, when the sexual psychopathy proceedings were terminated and the case restored to the calendar for criminal proceedings. The application for probation was then denied and the appellant sentenced to the county jail for six months. The procedure followed was that provided for in sections 5501 to 5512 of the Welfare and Institutions Code, and neither prejudice nor error appears. In any event, the failure to impose sentence within the time specified by section 1191 of the Penal Code does not affect the court's jurisdiction. People v. Williams, 24 Cal.2d 848, 151 P.2d 244. And being, at most, an error of procedure the granting of a new trial because of such an error is prohibited by section 4½ of Article VI of the Constitution, in the absence of a showing of prejudice. No such prejudice here appears and we are far from convinced that any miscarriage of justice has occurred.

The judgment and order appealed from are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

122 Cal.App.2d 503

PEEBLER et al. v. SEAWELL.

Civ. 4707.

District Court of Appeal, Fourth District, California.

Jan. 11, 1954.

Rehearing Denied Feb. 1, 1954.

Hearing Denied March 10, 1954.

Action by lessors against lessee in unlawful detainer. The Superior Court of Riverside County, John G. Gabbert, J., entered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Mussell, J., held that where option to purchase required lessee to pay one-third of purchase price down, purported exercise of option without a down payment, despite notice by lessors that sale would be cancelled unless all required payments on account were made, was insufficient to bring into existence a binding contract of purchase and sale, and lessees continued to be obligated, under terms of lease, for payment of rental as tenants.

Judgment modified by striking award for attorney's fees, and affirmed as so modified.

1. Landlord and Tenant 🔑92(1), 197

Where option to purchase given in lease required lessee, in event of exercising option, to pay at least one-third of the purchase price down, and lessors, after receipt of notice of purported exercise of option, notified lessee that unless he made all required payments on account of purchase price, the sale would be cancelled, and lessee failed to comply with notice and made no tender or payment on purchase price, purported exercise of option was insufficient to bring into being a binding contract of purchase and sale, and lessee continued to be liable for the agreed rental for the property.

2. Landlord and Tenant 🔑238

Where lease provided that, should lessors be compelled to commence action to collect rents or dispossess the lessees, the prevailing party should pay all costs in connection therewith, including a reasonable fee for the attorney of the "prevailing party", and no effort was made by lessees in their action for unlawful detainer to reform the lease by appropriate pleadings or proof, allowance of attorney's fees to lessors, upon their success in the action, was improper, especially in absence of evidence as to reasonableness of the fee allowed.

3. Trial 🔑393(1)

Provisions of section of Code of Civil Procedure with respect to service of findings of fact are merely directory, and compliance therewith is not necessary to the validity of a judgment. Code Civ.Proc. § 634.

4. Appeal and Error 🔑1071(1)

Where, after proposed findings were served on defendant's counsel, defendant submitted proposed findings and a hearing resulted in order resubmitting the case, following which a minute order was made entering judgment for plaintiff, which was in turn followed by signing of proposed findings originally served on defendant's counsel, no prejudicial error appeared with respect to the service of findings. Code Civ.Proc. § 634.

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Joseph Seymour and J. David Hennigan, Riverside, for appellant.

Roland Maxwell and Paul H. Marston, Pasadena, for respondents.

MUSSELL, Justice.

On August 30, 1945, plaintiffs, owners of real property in Indio, entered into a written lease of the premises to defendant J. F. Seawell and H. H. Snow. The lease was for five years at a monthly rental of $150, with an option to purchase as follows:

> "12. Lessees are hereby granted an option to purchase said real property at the expiration of said term or any renewal thereof by giving to the lessors at least sixty days notice in writing of such election before the end of said term or renewal thereof. In the event the price cannot be mutually agreed upon, the same shall be fixed by board of arbitrators in the same manner as designated in the next preceding paragraph. In the event of such purchase and the lessees desiring terms, lessees shall pay at least one-third of the purchase price down and the balance in monthly installments of at least $125.00 per month, plus six per cent interest on the deferred balance."

Paragraph 7 of the lease provides:

> "7. That should the lessees occupy said premises after the expiration date of this lease, with the consent of the lessors, expressed or implied, such possession shall be construed to be a tenancy from month to month and said lessees shall pay said lessors for said premises the sum of $150.00 per month for such period as said lessees may remain in possession thereof."

Defendant Seawell succeeded to the interest of H. H. Snow and the rent on the property was paid by the lessee Seawell at the agreed rate during the entire term of the lease. On May 5, 1950, Seawell wrote to plaintiffs notifying them of his election to exercise his option to purchase and offered the sum of $15,000 for the property. On July 6, 1950, plaintiff Byron Peebler made a counter offer to sell for the sum of $40,000. The parties could not agree upon the purchase price and it was fixed by arbitration, on February 7, 1951, at the sum of $22,500. On February 8, 1951, defendant prepared and forwarded to the Riverside Title Company proposed escrow instructions for the purchase of said property for the sum of $22,500, one-third, or $7,500, to be paid before close of escrow and the balance at the rate of $125 per month, to include principal and interest, and to be evidenced by a trust deed and promissory note. Plaintiffs refused to sign these instructions and offered to consummate the sale through the pending escrow if defendant, in addition to the amount stated in his proposed instructions, would pay additional rental to and including the close of escrow. However, the parties were unable to agree as to the terms of sale and the instant action in unlawful detainer was filed by plaintiffs on April 23, 1951. Plaintiffs alleged that the defendant occupied the premises under a month to month tenancy at the agreed rental of $150 per month and had failed to pay said rental since August 30, 1950. Defendant answered, alleging that he was in possession of the property as vendee under the provisions of paragraph 12 of the lease and that he was not a month to month tenant.

The trial court found in favor of plaintiffs and rendered judgment against the defendant for the sum of $1,200 rent from September 1, 1950, to May 1, 1951, and also awarded plaintiffs damages in the sum of $5 per day since that period and attorney's fees in the sum of $200.

[1] The principal question raised by defendant on his appeal from the judgment is whether the plaintiffs were entitled to rental of the premises involved after the termination of the lease, his contention being that the option to purchase was exercised and that thereafter he was

not obligated to pay rent. We are not in accord with this contention. The record shows that defendant failed to tender or pay plaintiffs the sum required by paragraph 12 of the lease as a down payment in the event of the exercise of the option. On March 15, 1951, plaintiffs notified defendant that unless he forthwith proceeded to complete his purchase of the property and make all required payments on account of the purchase price, the sale would be canceled and plaintiffs would take possession of the property. Defendant failed to comply with this notice. The sale of the property has never been consummated.

Defendant argues that the option provided for in the lease was exercised by his letter and notice of May 5, 1950, and that thereafter a binding contract of purchase and sale between the parties came into existence. Citing Murfee v. Porter, 96 Cal.App.2d 9, 214 P.2d 543; Gordon v. Dufresne, 205 Cal. 512, 271 P. 1066; and Group Property Inc. v. Bruce, 113 Cal.App.2d 549, 248 P.2d 761. In the Murfee-Porter case the court stated the general principles relating to the "exercise" of an option as follows [96 Cal.App. 2d 9, 214 P.2d 549]:

> "'The "exercise" of an option is merely the election of the optionee to purchase the property.' 66 C.J. 497. 'Except where required by statute to be in writing, an option may be exercised or accepted orally unless the contract requires a written acceptance * * *.' 66 C.J. 499. '* * * payment or tender is not essential unless it is a condition precedent.' 66 C.J. 500. 'If no time is specified the acceptance must be within what is a reasonable time under the circumstances of the particular case. The principle that time is of the essence of an option generally applies only to acceptance and not to performance.' 66 C.J. 503; see, also, 55 Am.Jur. 512. 'It is a general rule that an optionor who has given the right to purchase property within a specified time may not do any act or omit to perform any duty calculated to cause the optionee to delay in exercising the right.' 55 Am.Jur. 510. For a detailed discussion of these general principles see 3 Thompson on Real Property (Per.Ed.), §§ 1325, 1329, 1330 and 1331; vol. 8, §§ 4569 and 4573. Once the option to purchase was exercised, the lease and option agreement no longer existed, and a binding contract or purchase and sale came into existence between the parties. 55 Am.Jur. 494; Smith v. Post, 167 Cal. 69, 138 P. 705; W. G. Reese Co. v. House, 162 Cal. 740, 124 P. 442."

In Cates v. McNeil, 169 Cal. 697, 706, 147 P. 944, 948, the court said:

> "The option clause gave the respondents a right to purchase the leased premises for the price of $600 an acre. There is nothing in the option clause which requires payment of the price of the land to be made or tendered when the option right is exercised in order to constitute an acceptance. Payment may or may not be made an essential condition to the exercise of such a right, just as the parties see fit to provide for in the option agreement."

In Gordon v. Dufresne, supra, the action was to enforce specific performance of an option clause in a lease. Plaintiff had tendered the first installment on the purchase price and the court held that the lease and option agreement were not severable but that the lease and option formed one document, the provisions of which were interdependent, and the covenant to pay rent or do other acts supported the option as well as the right to occupy the premises.

In the Group Property case, supra [113 Cal.App.2d 549, 248 P.2d 768], the requirements for tender were met and we there said:

> "As to the second contention that plaintiff failed to make timely tender of the purchase price, this fact is not borne out by the evidence. Defendant was notified orally that plaintiff was exercising its option and defend-

ant was asked that he meet plaintiff's agent at the title company to open the escrow and arrange for the necessary deposit of funds and the deed. Apparently defendant did not act on the suggestion, and within a reasonable time a sufficient offer and tender was made, and under the interlocutory judgment defendant was again given the opportunity to accept the offer and tender as made, but again refused to do so. It is apparent from the facts related that a tender would have been refused under any conditions. No advantage can now be claimed by defendant on the ground that a tender was not properly and timely made immediately following the exercise of the right to purchase."

In the instant case a condition to the exercise of the option was a down payment of one-third of the purchase price. This was not paid or tendered to plaintiffs and the cited cases do not support defendant's contention that the option was exercised by his notice of May 5, 1950.

In Journe v. Hewes, 124 Cal. 244, 56 P. 1032, the court held that under a lease containing an option to purchase, the relation of lessor and lessee, and the liability of the lessee for rent, continued until a tender or offer to pay the purchase money was made. And in Knowles v. Murphy, 107 Cal. 107, 115, 40 P. 111, it was held that if the tender was made by virtue of the option clause in the lease it did not release the defendants from their obligation to pay the rent, unless they should in some manner have sought the enforcement of the agreement to sell on the part of the lessor.

Paragraph 7 of the lease provides for the payment of rental in the sum of $150 per month in the event that the lessees should occupy the premises after the expiration of the lease and that possession shall be construed to be a tenancy from month to month. Since the parties failed to agree upon the terms of the sale, the provisions of said paragraph 7 of the lease control as to the relationship of the parties after the termination of the lease.

[2] Appellant contends that the allowance of attorney's fees was improper. The lease provided:

> "That should the lessors be compelled to commence or sustain an action at law to collect said rent or parts thereof or to dispossess the lessees or to recover possession of said premises, the prevailing party shall pay all costs in connection therewith, including a reasonable fee for the attorney of the *prevailing* party." [Emphasis ours.]

Respondent contends that a typographical error was made in writing the lease in using the word "prevailing" instead of "losing" in this paragraph of the lease. The trial court permitted an amendment to the complaint to allege that under the terms of the lease plaintiffs are entitled to recover from defendants a reasonable attorney's fee. However, no evidence was offered as to the reasonableness of the fee allowed and no effort was made by plaintiffs to reform the lease by appropriate pleading or proof. Under the circumstances disclosed by the record, the allowance of attorney's fees was improper.

[3, 4] Appellant argues that he was not served with findings of fact and conclusions of law and that the judgment should therefore be reversed. This contention is without merit. The record shows that proposed findings were served on defendant's counsel by mail on March 6, 1952. Thereafter defendant submitted proposed findings and a hearing was had thereon, following which the trial court made a minute order resubmitting the case. After the resubmission, on June 9, 1952, a minute order was again made ordering judgment for plaintiffs. Thereafter the court signed the proposed findings which had been served on defendant's attorney on March 6, 1952. The provisions of section 634 of the Code of Civil Procedure with respect to the service of findings have been held to be merely directory, so that compliance therewith is not necessary to the validity of a judgment. First Nat. Bank of Escondido v. Williams, 54 Cal. App. 537, 202 P. 164; Estate of Rosland, 76 Cal.App.2d 709, 711, 173 P.2d 830. No

prejudicial error appears with respect to the service of the findings.

The judgment is modified by striking therefrom the provisions awarding plaintiffs judgment for attorney's fees and is affirmed as so modified. Plaintiffs to recover costs.

BARNARD, P. J., and GRIFFIN, J., concur.

122 Cal.App.2d 608

GOLDSTEIN v. McNEIL et al.

McNEIL et al. v. GOLDSTEIN.

Civ. 15616.

District Court of Appeal, First District, Division 2, California.

Jan. 19, 1954.

Seller's action for breach of oral contract of sale, wherein the buyers filed a cross-action for return of expenses. The Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., rendered judgments favorable to plaintiff, and defendants appealed. The District Court of Appeal, Nourse, P. J., held that under the special circumstances of case the trial judge had not abused his discretion in holding the defendants estopped from asserting the statute of frauds.

Affirmed.

1. Frauds, Statute of 🔑144

If refusal to enforce contract would lead to unconscionable injury or unjust enrichment, no separate representation that statute will not be invoked is required to estop contractee from asserting statute of frauds. Code Civ.Proc. § 1973a, subd. 1.

2. Frauds, Statute of 🔑144

Not all injury caused by attempted performance by seller under oral contract is sufficient to cause estoppel to assert statute of frauds; it being necessary that there be unusual circumstances which give injury an unjust and unconscionable character. Code Civ.Proc. § 1973a, subd. 1.

3. Frauds, Statute of 🔑125(3)

Normally an oral agreement under statute of frauds is voidable at election of either party and each party to such agreement accepts risk that other party may withdraw.

4. Estoppel 🔑119

Unless but one inference can be drawn from evidence, estoppel is question for trier of facts.

5. Frauds, Statute of 🔑144

Where seller had missed very high market existing around time of contract for sale of second-hand automobiles and had been caught in sharp slump, and would not otherwise have transported automobiles from Louisiana to California prior to having purchaser for them, buyer would be estopped to assert statute of frauds as defense to seller's action for breach of such contract. Code Civ.Proc. § 1973a, subd. 1.

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Jack Flinn, San Francisco, for appellant.

Louis Thomas Hiller, Los Angeles, for respondent.

NOURSE, Presiding Justice.

Plaintiff, seller, recovered damages for breach of an oral contract of sale of 14 secondhand automobiles. The sole contention of the appellants-defendants is that the trial court erred in holding them estopped from asserting the statute of frauds, to wit, section 1973a Code of Civil Procedure, reading in part: "1. A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged, or his agent in that behalf."

The findings of the trial court are in general not attacked as unsupported by the evidence, although appellants' statement of facts deviates strongly from them. The findings based on conflicting evidence are binding on this court; they are to the following effect:

Plaintiff, a used car dealer, with principal place of business in Los Angeles, on July 26, 1950, by oral contract sold to defendants 14 used automobiles for a total sum of $29,450, free on board Shreveport, Louisiana, the automobiles to be delivered at defendants' place of business in San Francisco on or about August 16, 1950, and to be high-class, modern and in salable condition. Defendants paid plaintiff $910 for caravan expenses and requested him to purchase caravan permits for the cars in the name of defendant Neal McNeil. Plaintiff secured the permits at a cost of $210—expended by him. On or about August 16, 1950, plaintiff was ready and willing to deliver the 14 automobiles which in caravan had reached Fresno, California, but defendants, who had inspected them there refused to accept them and pay for them. Plaintiff's tender was in substantial compliance with the contract and the refusal was unjustifiable. After notice to defendants, plaintiff resold the automobiles for $26,400, which price was then the reasonable market value; the necessary expenses on the resale were $815.22, so that there is a total deficiency of $3,865.22 due and owing by defendants. By reason of the expenditure of $210 for caravan permits and plaintiff's substantial performance of the contract plaintiff suffered a substantial change of position, thereby estopping the defendants from asserting the statute of fauds, so that plaintiff's action is not barred by sec. 1973a Code of Civil Procedure.

Accordingly judgment was given for plaintiff for that amount and on a cross-action of defendants for return of the amount of $910 for caravan expenses the judgment was also for cross-defendant.

[1] Appellants contend that there is no evidentiary basis for the finding of an estoppel to assert the statute. They contend, citing Albany Peanut Co. v. Euclid Candy Co., 30 Cal.App.2d 35, 38-39, 85 P.2d 471, that the estoppel requires evidence that plaintiff, induced by representations that the invalidity of the contract under the statute would not be asserted, has changed his position to his detriment to such an extent that assertion of the statute would cause him unconscionable injury. It is said that in this case there was neither inducing representation nor unconscionable injury. The cars had already been bought by plaintiff; at most a profit from the contract failed to materialize but this is insufficient to constitute unconscionable loss.

Respondent contends that appellants' request that he provide caravan permits, in McNeil's name and a caravan crew, and payment of caravan costs constituted a representation by deeds that they would adhere to the contract, and further that the payment of $210 for the caravan permits in McNeil's name, the transportation of the cars from Louisiana to California, and the abstention from sale to others during three weeks in which the old car market from its top around the time of the contract showed a strong decline and the lesser price obtained because of this decline constituted a change of position to respondent's detriment which would cause an unconscionable loss if the contract was considered invalid. It is pointed out correctly that, according to the later cases, if refusal to enforce the contract would lead to unconscionable injury or unjust enrichment no separate representation that the statute will not be invoked is required. Monarco v. Lo Greco, 35 Cal.2d 621, 626, 220 P.2d 737.

[2, 3] The essential question herein is the one as to unconscionable injury, unjust enrichment of appellants not being involved. Not all injury caused by attempted performance by seller under an oral contract is sufficient to cause an estoppel. In Booth v. A. Levy & J. Zentner Co., 21 Cal.App. 427, 431, 131 P. 1062, 1064, it is said: "It is a plain case where the seller chose to ship goods to a distant buyer who was bound by an oral agreement only. To hold that under such circumstances the buyer, who refuses to accept the goods is estopped to rely upon the statute would be to practically ab-

rogate the statute of frauds." Normally an oral agreement under the statute of frauds is voidable at the election of either party and each party to such an agreement accepts the risk that the other party withdraws. Sousa v. First California Co., 101 Cal.App.2d 533, 539, 225 P.2d 955. To cause an estoppel there must be unusual circumstances which give the injury an unjust and unconscionable character, Jirschik v. Farmers & Merchants Nat. Bank, 107 Cal.App.2d 405, 406, 237 P.2d 49.

Whether in this case invalidation of the contract would cause injury of such serious and special character may well be subject to reasonable difference of opinion. The amount of $210 laid out by respondent at appellants' special request for permits in connection with the caravaning of the cars into California is not a large amount compared to the total purchase price involved and it seems quite possible that if appellants were permitted to avoid the contract respondent could nevertheless recover this amount from them, because it was paid by him as their agent. It is conceded that the fact that the permits were in the name of McNeil did not cause any additional expense. Neither did the transportation of the cars to California in itself necessarily cause serious injury. With the exception of the price of the caravan permits the transportation was paid for by appellants and there is no evidence that used automobiles were of less value or more difficult to sell in California, where respondent had his main place of business, than in Louisiana. However, there was also evidence from which the court could conclude that respondent would not have transported the cars from Louisiana prior to having a purchaser for them. The main element of unconscionable loss on which respondent must rely is that because of his performance of the contract he missed the very high market existing around the time of the contract and was caught in a sharp slump.

Respondent introduced evidence that in July, 1950, the outbreak of the Korean conflict had caused used car dealers to expect a possible shortage of new automobiles and increased demand for used cars, for which reason they bought up big stocks, but that when the great public demand failed to materialize the market broke around the tenth of August. There was also evidence introduced by appellants that the break in the market came later, but in support of the judgment and findings we must assume that the court believed respondent's evidence.

[4, 5] Unless but one inference can be drawn from the evidence estoppel is a question for the trier of facts. Krobitzsch v. Middleton, 72 Cal.App.2d 804, 815, 165 P.2d 729; Parke v. Franciscus, 194 Cal. 284, 297, 228 P. 435. Accordingly the trial court has a large discretion in determining whether allowing a party to set up the statute would be inequitable and an appellate court will not interfere in the absence of an abuse of that discretion, 12 Cal.Jur. 935. We cannot say that the trial court abused its discretion in preventing appellants from reneging under the special circumstances stated

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

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122 Cal.App.2d 551

PEOPLE v. WHITE.

Cr. 2940.

District Court of Appeal, First District,
Division 2, California.
Jan. 18, 1954.

Hearing Denied Feb. 17, 1954.

Defendant was convicted of perjury. The Superior Court in and for the County of Santa Cruz, James L. Atteridge, J., entered judgment, and defendant appealed. The District Court of Appeal, Dooling, J., held that statute providing that, whenever, by state Constitution or laws, county clerk is required to determine what number of voters have signed any petition or paper, affidavit of person circulating such petition or paper shall have affixed thereto the residential voting address of each such circulator does not require the attachment of an affidavit to charter amendment petitions, and, therefore, affidavits in support of such petition were neither authorized nor required by law and could not support a charge of perjury, especially in view of fact that there was not any evidence that neither council nor clerk did in fact require or authorize such affidavits.

Judgment reversed.

1. Perjury ⚷5

To support a conviction of perjury, the false oath must be one authorized or required by law.

2. Statutes ⚷186

It is against all settled rules of statutory construction that the court should write into a statute by implication express requirements which the Legislature itself has not seen fit to place in the statute.

3. Perjury ⚷5

Statute providing that, whenever county clerk is required to determine number of voters signing any petition or paper, affidavit of person circulating such petition or paper shall have affixed thereto the residential voting address of each such circulator, does not require the attachment of an affidavit to charter amendment petitions, and therefore affidavits in support of such petition were neither authorized nor required by law and could not support a charge of perjury. Elections Code, §§ 45, 46.5, 1708, 1773 1801–1806, 11109; Const. art. 11, § 8 (h).

◆

Athearn, Chandler & Hoffman, F. G. Athearn, Hartwell H. Linney, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was convicted by a jury on each of five counts of perjury. The basis of the convictions was that appellant executed five affidavits, each attached to a petition to submit a proposed amendment to the charter of the City of Santa Cruz, in each of which he falsely stated that he was the person who circulated the petition to which the affidavit was attached and that all of the signatures to such petition were made in his presence.

[1] It is established that to support a conviction of perjury the false oath must be one authorized or required by law, People v. Brophy, 49 Cal.App.2d 15, 120 P.2d 946; People v. French, 134 Cal.App. 694, 698–699, 26 P.2d 310; People v. Millsap, 85 Cal.App. 732, 260 P. 378; 70 C.J.S., Perjury, § 20a, p. 476, and the crucial question in this case is whether there is any statutory authorization or requirement in California that an affidavit, swearing to the facts here found by the jury to be false, be annexed to a petition proposing an amendment to a city charter.

It is not claimed by the attorney general that there is any statutory provision expressly authorizing or requiring such an affidavit in the case of a petition to amend a city charter. Section 8, subdivision (h), Article XI of the State Constitution which sets forth the manner of proposing such amendments contains no reference to an affidavit, nor does Article 3 of Chapter 3, Division 4 of the Elections Code, secs. 1801–1806, which deals specifically with "Freeholders' Charter Amendments". Section 1806 provides: "The petition shall be in substantially the following form" and then sets out a form of petition *without any affidavit.* Section 1805 provides: "Each signer of the petition shall sign it in the manner prescribed by Section 45 of this code." Section 45, which deals with the manner of signing of all petitions required to be signed by voters, provides, as to the manner of signing: "Each signer shall * * * affix thereto his place of residence, giving street and number, and if no street or number exists, then a designation of his place of residence which will enable the location to be readily ascertained * * *." No other requirement applying to voters' petitions generally or to other special types of petitions such as initiative, referendum and recall is referred to in Art. 3, Chap. 3, Div. 4, secs. 1801–1806, of the Elections Code and no provision is there or elsewhere made by express language for any affidavit to be attached to a charter amendment petition.

In contrast to this total lack of express statutory provision for an affidavit in the case of charter amendment petitions, there is express requirement for an affidavit in the case of initiative petitions, sec. 1708, Elections Code, recall petitions, sec. 11109, Id. and referendum petitions, sec. 1773, Id. Faced by this absence of express statutory provision for an affidavit of the sort made by appellant the attorney general relies upon section 46.5 Elections Code, adopted in 1951. That section reads: "Whenever, by the Constitution or laws of this State, the county clerk is required to determine what number of voters have signed any petition or paper, the affidavit of the person circulating such petition or paper shall have affixed thereto the residential voting address of such circulator."

The argument runs that since the county clerk is required to determine what number of voters have signed a petition proposing a charter amendment section 46.5 by its reference to "the affidavit" requires an affidavit in the form appended to the petitions in this case. It is obvious that to so construe sec. 46.5 requires the interpolation by implication into section 46.5 of some such language as the following: "an affidavit in the form required to be attached to initiative, referendum and recall petitions shall be attached thereto" so that the section would be construed as if it read: "Whenever * * * the county clerk is required to determine what number of voters have signed any petition or paper, *an affidavit in the form required to be attached to initiative, referendum and recall petitions shall be attached thereto and* the affidavit of the person circulating such petition or paper shall have affixed thereto the residential voting address of such circulator."

[2] The attorney general does not spell out his argument in such express terms but it comes to this if it means anything. It is, however, against all settled rules of statutory construction that courts should write into a statute by implication express requirements which the legislature itself has not seen fit to place in the statute. This rule was clearly stated in People v. One 1940 Ford V-8 Coupe, 36 Cal.2d 471, 475, 224 P.2d 677, 680: "In construing the statutory provisions a court is not authorized to insert qualifying provisions not included and may not rewrite the statute to conform to an assumed intention which does not appear from its language. The court is limited to the intention expressed."

Similarly the court said in Seaboard Acceptance Corp. v. Shay, 214 Cal. 361, 365, 5 P.2d 882, 884: "This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed. This court is limited to interpreting the statute, and such interpretation must be based on the language used." The court then quoted from sec. 1858, Code Civ. Proc.: "In the construction of a statute * * * the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted. * * *"

[3] The attorney general asks us to hold that although no affidavit was required to be attached to a charter amendment petition prior to the enactment of sec. 46.5, the legislature by enacting sec. 46.5 amended the law to require an affidavit thereafter to be attached to all such petitions, leaving to implication the form of such affidavit. We cannot ascribe to the legislature the intention to amend an important statute relating to a fundamental right of the citizens in any such cavalier fashion. Sec. 46.5 may be given full effect, without adding anything to its language by judicial legislation, if the words "the affidavit" are held to refer to those cases in which an affidavit is elsewhere provided for. So construed it adds the requirement that such affidavit must have affixed thereto the residential voting address of the circulator whenever the statutory or constitutional law imposes upon the county clerk the duty of verifying the signatures.

Alternatively it is argued that the city council or the county clerk could authorize the affidavit. Without going into the question whether either could legally do so, it is a complete answer in this case that no evidence is pointed to in the transcript that either the council or the clerk did in fact require or authorize these affidavits.

We are satisfied that the affidavits here in question were neither authorized nor required by law and hence cannot support the charge of perjury.

Judgment reversed.

NOURSE, P. J., concurs.

122 Cal.App.2d 692

MITCHELL
v.
SOUTHERN CALIFORNIA GAS CO. et al.

Civ. 19695.

District Court of Appeal, Second District,
Division 1, California.
Jan. 20, 1954.

Action for injuries sustained after plaintiff motorist entered intersection from stop street, collided with automobile of defendant motorist, and was burned when plaintiff's automobile struck defendant gas company's riser, which was located within highway boundaries, and ignited the gas therefrom. The Superior Court of Los Angeles County, J. T. B. Warne, J., entered judgment notwithstanding verdict as to defendant motorist and new trial as to defendant gas company, and plaintiff appealed. The District Court of Appeal, Drapeau, J., held that negligence of defendants was for jury.

Judgment notwithstanding verdict reversed and order granting new trial affirmed.

1. Judgment 🔑199(3.10)

Judgment notwithstanding verdict may properly be granted only when, disregarding conflicting evidence and indulging in every legitimate inference which may be drawn from plaintiff's evidence, result is a determination that there is no evidence sufficiently substantial to support the verdict.

2. Automobiles 🔑245(50, 90)

In personal injury action arising out of automobile accident jury had duty to consider all the circumstances and to find whether any party to action contributed to the accident.

3. Automobiles 🔑245(78, 80)

In personal injury action arising out of automobile accident, jury had duty to determine whether plaintiff motorist failed to obey the basic speed law, to keep a proper lookout for other vehicles approaching intersection at which accident occurred, or to observe any duties of a prudent driver in operation of a motor vehicle at the time and place of accident.

4. Automobiles 🔑245(1)

In personal injury action arising out of automobile accident, skid marks at scene of accident, position of vehicle after accident, all testimony, and all other relevant facts were for jury.

5. Negligence 🔑136(8, 9, 26)

Question whether one is guilty of contributory negligence is usually one of fact for jury and becomes one of law for the court only when the facts are undisputed and reasonable minds can draw but one conclusion therefrom upon issue of plaintiff's negligence.

6. Automobiles 🔑245(14)

In action for injuries sustained after plaintiff motorist entered intersection from stop street, collided with automobile of defendant motorist, and was burned when plaintiff's automobile struck defendant gas company's riser, which was located within highway boundaries, and ignited gas therefrom, question of defendant motorist's negligence was for jury.

7. New Trial 🔑70
Trial 🔑136(1)

It is exclusive province of jury to find facts; but it is duty of trial court to see that this function is intelligently and justly performed, and, in exercise of its supervisory power over verdict, the court, upon motion for new trial, should consider the probative force of the evidence and satisfy itself that the evidence as a whole is sufficient to sustain the verdict.

8. Gas ⚿20(4)

In action for injuries sustained after plaintiff motorist entered intersection from stop street, collided with automobile of defendant motorist, and was burned when plaintiff's automobile struck defendant gas company's riser, which was located within highway boundaries, and ignited gas therefrom, gas company's negligence was for jury.

◆

Demler & Eckert and Charles E. Samuel, Long Beach, for appellant.

W. P. Smith, Los Angeles, for respondent Cartwright.

T. J. Reynolds and Neil G. Locke, Los Angeles, for corporate respondent.

DRAPEAU, Justice.

Plaintiff, Lawrence G. Mitchell, was driving an automobile south on Grove street, in San Bernardino county. Defendant, James Thomas Cartwright, was driving another automobile east on Merrill street.

At the intersection of Grove and Merrill there was a boulevard stop, which it was plaintiff's duty to observe and to obey. Merrill was a through street.

The intersection was in open farming country; but there were eucalyptus and walnut trees on plaintiff's right-hand side, on the west side of Grove. These trees interfered somewhat with the vision of both drivers across the field, as they approached the intersection. Both drivers had been through the intersection many times.

It was late afternoon, but not dark. The weather was clear and the pavements were dry.

The two automobiles collided within the intersection.

Damages from the collision would not have been serious, except that plaintiff's automobile was knocked toward the southeast corner of the intersection, and over a gas meter installation maintained by defendant, Southern California Gas Company.

The meter installation consisted of a riser coming from an underground service pipe, two regulators, and a meter. Around the installation was a "three-leg" guard, built of 2-inch pipe. The meter installation was in cultivated ground, beyond a roadway gutter, and an earthen bank or shoulder, but was within the boundaries of the highway.

The projection of plaintiff's automobile over the meter caused a break in the gas pipe (riser) below ground. Escaping natural gas from the broken riser caught fire; and, like a giant blow torch, burned through the floor of plaintiff's car, and burned plaintiff, who was sitting dazed in the driver's seat.

Plaintiff was terribly injured. He was in the hospital for months, unable to work for more than a year, and will probably never fully recover.

This action was tried by a jury, which rendered a verdict for plaintiff against both defendants for $154,396.92.

Judgment was entered in accordance with the verdict.

Then the trial judge ordered judgment notwithstanding the verdict, as to the defendant driver, Mr. Cartwright; and, on the ground of insufficiency of the evidence, ordered a new trial as to the defendant gas company.

Appeals from both orders have been consolidated, and have been argued and briefed together.

As the rules are essentially different, each appeal will be discussed separately.

The Appeal from the Judgment Notwithstanding the Verdict.

The fundamental rule as to when a trial judge may order judgment notwithstanding the verdict of a jury is repeated in almost the same language in many cases:

[1] A judgment notwithstanding the verdict may properly be granted only when, disregarding conflicting evidence and indulging in every legitimate inference which may be drawn from plaintiff's evidence, the result is a determination

that there is no evidence sufficiently substantial to support the verdict. Champion v. Bennetts, 37 Cal.2d 815, 236 P.2d 155; Washington v. City & County of San Francisco, 111 Cal.App.2d 368, 244 P.2d 774; In re Lekos' Estate, 109 Cal.App.2d 42, 240 P.2d 387; In re Wellauer's Estate, 107 Cal.App.2d 268, 236 P.2d 906; Tremeroli v. Austin Trailer Equipment Co., 102 Cal.App.2d 464, 227 P.2d 923; Howell v. Ducommon Metals & Supply Co., 101 Cal.App.2d 163, 225 P.2d 293; and see 28 West's California Digest, Judgments, 🔑 199(3.10).

With the rule in mind let us turn to the evidence.

The defendant, Mr. Cartwright, two passengers in his car, and a witness who was coming toward the intersection from the east, all testified that plaintiff, Mr. Mitchell, failed to make the boulevard stop; that he went into the intersection without stopping and at a speed of more than thirty miles an hour.

An officer of the California Highway Patrol who interviewed Mr. Mitchell at the hospital testified that he admitted he didn't make the boulevard stop. And the records of the Justice's Court show a plea of guilty by Mr. Mitchell to the criminal offense of not stopping at the intersection. However, there is not much probative value in the last two items of evidence. The testimony of the traffic officer as to the admission of Mr. Mitchell, when he was in the hospital, incoherent from pain, and swathed in bandages, does not commend itself to that method of getting evidence, or of instituting criminal proceedings, by an officer of the state. Mr. Mitchell's plea of guilty was made by his father, without his knowledge.

Of course, if this were all of the evidence in the case, plaintiff's own contributory negligence, as a matter of law, would bar any recovery by him against either defendant.

But plaintiff's testimony is to the contrary. Portions of it are as follows:

On direct examination:

"Q. And what did you do as you came to Merrill? Describe just what you did. A. Well, I slowed to a stop, the road looked clear, so I put it in gear, went on across, and well, I looked again to my left.

"Q. Have you finished? A. Yes.

"Q. Did you actually bring your automobile to a complete stop before you came into Merrill? A. Well, as I remember it, it was very near to a stop.

"Q. You remember specifically whether you actually stopped or nearly stopped, or just what? A. I can't tell whether I came to an absolute dead stop. * * *"

On cross examination:

"Q. (By Mr. Smith) Now, you think that you stopped your car, although I believe you said you were not certain whether you came to a complete stop or just rolled through; is that right? A. I think I came to a stop.

"Q. You think you did? A. Yes. * * *"

Again:

"Q. Place that in the street where you think you were when you came to a stop, then make us a red line around it.

"(Witness complies with request of counsel.) * * *"

And again:

"Q. You, of course, came to a stop there because then you considered it would be dangerous to go on through without? A. To go through there without coming to a stop and looking.

"Q. considering the obstructions to the view and considering the fact that there was no stop sign on Merrill, it would be foolish for anybody to go on across there without stopping and looking? A. That is right."

[2-4] It was the duty of the jury to consider all the circumstances, and to find whether the negligence of any party to the action contributed to the accident. It was the jury's duty to determine whether Mr. Cartwright failed to obey the basic speed law, or to keep a proper lookout for other vehicles approaching and crossing the intersection, or to observe any of the duties of a prudent driver in the operation of a motor vehicle at the time and place. Skid marks at the scene, the position of the ve-

hicles after the accident, all the testimony, and all the other relevant facts were for the jury. If the verdict finds substantial support in the evidence, a judgment notwithstanding the verdict may not be granted by the trial court.

Moreover, it is only when the testimony of even one witness, in the light of the undisputed facts is inherently so improbable and impossible of belief as to constitute no evidence at all that that testimony may be disregarded and the verdict of a jury set aside. See 4 Cal.Jur.2d p. 484, Secs. 605 et seq.

[5] Whether one is guilty of contributory negligence is usually a question of fact for the jury. It becomes a question of law for the decision of the court only when the facts are undisputed, and even then, only when, on those facts, reasonable minds can draw but one conclusion on the issue of plaintiff's negligence. Shiya v. Reviea, 122 Cal.App.2d 155, 264 P.2d 190.

[6] Therefore in this case it was beyond the power of the trial judge to order judgment notwithstanding the verdict.

The Order Granting a New Trial to Defendant Gas Company

This phase of the case is to be determined in accordance with entirely different rules. The many decisions which hold that on a motion for a new trial the trial judge should consider the proper weight to be given to the evidence,whether it be conflicting or not, are set forth and reviewed, and the law stated, by our Supreme Court in People v. Robarge, 41 Cal. 2d 628, 262 P.2d 14.

[7] In that case the basic rule for the guidance of the judge who hears the testimony is set forth in 41 Cal.2d at page 633, 262 P.2d at page 17:

"While it is the exclusive province of the jury to find the facts, it is the duty of the trial court to see that this function is intelligently and justly performed, and in the exercise of its supervisory power over the verdict, the court, on motion for a new trial, should consider the probative force of the evidence and satisfy itself that the evidence as a whole is sufficient to sustain the verdict."

[8] Plaintiff's argument that the defendant gas company was negligent as a matter of law is without substance. Negligence of the gas company is a question of fact.

Consideration should be given to all the circumstances of the accident; whether contributory negligence, if any, bars plaintiff's recovery; and whether the maintenance of the guard pipes, meter, and gas pipes within the highway right-of-way, was, in all the circumstances present on the date of the accident, the conduct of a reasonably prudent person, having regard to the dangerous nature of natural gas, the position and construction of the meter installation, and the volume of vehicular traffic at the intersection.

The judgment notwithstanding the verdict is reversed.

The order granting a new trial as to the defendant, Southern California Gas Company, is affirmed.

WHITE, P. J., and DORAN, J., concur.

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122 Cal.App.2d 396

PADDOCK v. VASQUEZ et al.

Civ. 19747.

District Court of Appeal, Second District,
Division 3, California.
Dec. 31, 1953.

Rehearing Denied Jan. 21, 1954.
Hearing Denied Feb. 24, 1954.

Action was brought for declaration of rights under mineral deed. The Superior Court of Los Angeles County, Caryl M. Sheldon, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Vallée, J., held that mineral deed granting grantee 3 percent of 100 percent of oil and gas, and providing that realty was subject to oil and gas lease and that deed included $^{6}/_{25}$ths of all bonuses, rents, royalties, and other benefits, was not ambiguous and conveyed 6/25ths of royalties.

Affirmed.

1. Mines and Minerals 🔑55(2)

Primary objective of all interpretations of a mineral deed is to ascertain and give effect to intention of parties.

2. Mines and Minerals 🔑55(2)

Arbitrary and technical rules of construction are not to be invoked, if intention of parties to mineral deed can be plainly discovered from four corners of deed without aid of such rules. Civ. Code, §§ 1066, 1067, 1069, 1070, 1643, 3541.

3. Mines and Minerals 🔑55(2)

Intention of parties to mineral deed is to be gained from consideration of entire deed, though immediate objective of inquiry is the meaning of isolated clause, taking into consideration every provision, clause, and word, whether of grant, description, qualification, exception, or explanation.

4. Mines and Minerals 🔑55(2)

Every part of a mineral deed is to be given effect if reasonably practicable.

5. Mines and Minerals 🔑55(1)

Two separate and distinct mineral interests can be conveyed by one instrument.

6. Mines and Minerals 🔑55(1)

One interest conveyed by mineral deed may be an absolute interest in minerals, and the other interest conveyed by the same deed may be interest in royalty to be payable under existing lease and under any future lease.

7. Mines and Minerals 🔑55(1)

Where mineral deed conveys fractional interest in royalty and interest in minerals, fractional interest in royalty need not correspond with interest in minerals, and royalty interest may be larger or smaller.

8. Mines and Minerals 🔑55(5)

Where owners of realty, who had entered into oil and gas lease whereby lessee agreed to pay landowners royalty of 12½ percent of value of oil and gas, executed mineral deed granting grantee three percent of 100 percent of oil and gas, and providing that realty was subject to oil and gas lease, and that deed included 6/25ths of all bonuses, rents, royalties, and other benefits, which may accrue to owners under such lease or any other lease that may be entered into, provisions granting three percent of 100 percent of oil and gas and provision granting 6/25ths of all bonuses, rents, royalties, and other benefits were not inconsistent, since first provision was a grant of a percentage of minerals and second was a grant of interest in royalties.

9. Mines and Minerals 🔑74

Where owners of realty, who had entered into oil and gas lease whereby lessee agreed to pay landowners royalty of 12½ percent of value of oil and gas, executed mineral deed granting grantee three percent of 100 percent of oil and gas, and providing that realty was subject to oil and gas lease, and that deed included 6/25ths of all bonuses, rents, royalties, and other benefits, which may accrue to owners under such lease or any other lease that may be entered into, and grantee executed to plaintiff an instrument identical to mineral deed, and lessee quitclaimed to owners all of its interest in lease, and owners conveyed realty to defendants, who executed oil and gas lease under which lessee agreed to pay defendants 18 percent of oil and gas, plaintiff was entitled to 6/25ths of 18 percent royalty received by defendants and of bonus received by defendants for executing lease. Civ.Code, §§ 1066, 1067, 1069, 1070, 1643, 3541.

10. Mines and Minerals 🔑55(2)

Where terms of mineral deed are plain and unambiguous, construction given to deed by parties is ordinarily immaterial.

11. Evidence 🔑448

Where terms of mineral deed are plain and unambiguous, parol evidence is not admissible to vary terms of deed, in absence of fraud, accident, or mistake.

12. Mines and Minerals 🔑55(2)

Acts of parties may be considered in construing mineral deed only if parties acting did so with knowledge of terms of deed.

13. Mines and Minerals ⟹55(2)

Where mineral deed was clear, definite, certain, and unambiguous, no act of either party could be considered in determining meaning of deed.

14. Mines and Minerals ⟹55(2)

Where nearly 11 years had elapsed between time when plaintiff had mineral deed read to him and time when he replied to letter, which was misleading, plaintiff's reply to letter could not be considered in determining proper construction of deed.

◆

Burke, Williams & Sorensen, Los Angeles, for appellants Leandro Vasquez and Ruby Alari, as trustees of Vasquez Trust.

Reynolds, Painter & Cherniss, Los Angeles, for appellant Southern California Petroleum Corp.

John C. Gillham, Los Angeles, for respondent.

VALLÉE, Justice.

Plaintiff brought this action for a declaration of his rights under a mineral deed, and dependent on the determination of his rights to recover money due.

On January 15, 1937, Anselmo M. Vasquez and Bertha R. Vasquez, being the owners of a parcel of realty, entered into an oil and gas lease of the realty with Ohio Oil Company, as lessee, by which Ohio agreed to pay the Vasquezes, as landowner's royalty, the equal ⅛th part (12½%) of the value of all oil, gas, and other hydrocarbon substances removed from the demised premises. On April 24, 1940, while the lease with Ohio was in force, the Vasquezes, pursuant to a permit issued to them by the commissioner of corporations, executed to H. C. Bailie the instrument in question, which reads:

"Grant Deed

"Anselmo Vasquez, also known as Anselmo M. Vasquez, and Bertha R. Vasquez, husband and wife, herein called Grantors, for and in consideration of the sum of Ten Dollars ($10.00) in hand paid, and other good and valuable consideration, receipt whereof is hereby acknowledged, do hereby grant to H. C. Bailie, herein called Grantee, an undivided Three (3%) per cent of 100% of all petroleum, oil, gas and other hydrocarbons within or underlying, or which may be produced, saved and sold from that certain real property located in the County of Los Angeles, State of California, more particularly described as follows, to-wit: * * *

[Description]

Said real property is presently subject to an oil and gas lease dated the 15th day of January, 1937, executed by Anselmo Vasquez, also known as Anselmo M. Vasquez, and Bertha R. Vasquez, as lessors, and The Ohio Oil Company, an Ohio corporation, as lessee. Said lease was filed for record on February 19, 1937, in the office of the County Recorder of Los Angeles County, California, and provides for a royalty payment to the Lessors of one-eighth (⅛th) part of all petroleum, oil, gas and other hydrocarbons extracted and saved from said real property. This Grant Deed includes, but is not limited to 6/25ths of all bonuses, rents, royalties and other benefits which may accrue to the lessors under the terms of said Oil and Gas Lease or any extension or assignment thereof, or any other oil and gas lease that may be entered into with respect to said real property from and after the date hereof.

"To have and to hold unto the said grantee, H. C. Bailie, his heirs, executors, administrators, successors and assigns forever."

On May 6, 1940, Bailie and wife, pursuant to a permit from the commissioner of corporations, executed to plaintiff an instrument identical in wording with the foregoing instrument from the Vasquezes to Bailie. This instrument also contained a clause that it was its intent and purpose to grant to plaintiff the total interest in the realty conveyed by the deed from the Vasquezes to Bailie.

In June of 1949, Ohio quitclaimed to the Vasquezes all of its interest in the lease.

On April 6, 1950, the Vasquezes conveyed the realty to defendants Leandro Vasquez and Ruby Alari, as trustees. On June 1, 1950, defendants Vasquez and Alari, as lessors, entered into an oil and gas lease of the realty with defendant Southern California Petroleum Corporation, referred to as the corporation, as lessee. At the time this lease was executed the corporation paid $5,000 to defendants Vasquez and Alari as a bonus for executing the lease. By the lease the corporation agreed to pay defendants Vasquez and Alari a landowner's royalty of 18% of all of the oil, gas, and other hydrocarbon substances produced and saved from the leased lands. About November 13, 1950, the corporation completed a well on the property and placed it on production.

The facts as we have stated them were agreed to by written stipulation.

The court concluded: 1. Under the grant deed of April 24, 1940, from the Vasquezes to Bailie, plaintiff's predecessor in interest, the Vasquezes granted unto Bailie 6/25ths of all bonuses, rents, royalties, and other benefits which accrued and which may accrue to the lessors under the lease from Vasquez and Alari to the corporation. 2. By reason thereof plaintiff is entitled to judgment declaring he is the owner of and entitled to 6/25ths of the 18% landowner's royalty payable under that lease. 3. Plaintiff is entitled to judgment against Vasquez and Alari, as trustees, declaring he was and is entitled to 6/25ths of the $5,000 bonus, that is, $1,200, but since he had received $833.33 of the $1,200 he was entitled to a money judgment of $366.67. Judgment was entered accordingly. Defendants appeal.

Defendants' point is that the grant deed of April 24, 1940, provides that the grantee shall receive 3/18ths of 18%, and not 6/25ths of 18%, because 3/18ths of 18% is the same as 6/25ths of 12½%. They say the 6/25th language was not meant to convey any more than the 3% of 100% conveyed by the first part of the deed; thus, they add, plaintiff's royalty interest under the lease with the corporation is 3% of 18% rather than 6/25ths. We have concluded that the trial court correctly construed the deed and that defendants' contention cannot be sustained.

[1–4] A grant is to be construed in like manner with contracts in general. Civ. Code, § 1066. A clear and distinct limitation in a grant is not controlled by other words less clear and distinct. Civ.Code, § 1067. A grant is to be construed in favor of the grantee, with exceptions not relevant here. Civ.Code, § 1069. If several parts of a grant are absolutely irreconcilable, the former part prevails. Civ.Code, § 1070. A contract must receive such an interpretation as will make it operative, definite, reasonable, and capable of being carried into effect if it can be done without violating the intention of the parties. Civ.Code, § 1643. An interpretation which gives effect is preferred to one that makes void. Civ. Code, § 3541. The primary objective of all interpretations of a conveyance is to ascertain and to give effect to the intention of the parties. 9 Cal.Jur. 245, § 119. Arbitrary and technical rules of construction are not to be invoked if the intention of the parties can be plainly discovered from the four corners of the instrument without their aid. 9 Cal.Jur. 243, § 117; 16 Am.Jur. 570, § 237. The intention of the parties is to be gained from a consideration of the entire instrument though the immediate objective of the inquiry is the meaning of an isolated clause, taking into consideration every provision, clause and word, whether of grant, or description, or of qualification, exception, or explanation. 9 Cal.Jur. 255, § 128. Every part of the deed is to be given effect if reasonably practicable. Idem.

[5–7] Two separate and distinct mineral interests can be conveyed by one instrument. One interest may be an absolute interest in the minerals; the other may be in the royalty to be payable under an existing lease and under any future lease. The fractional interest in the royalty need not correspond with the interest in the minerals; the royalty may be larger or smaller. Richardson v. Hart, 143 Tex. 392, 185 S.W. 2d 563.

We think the deed is clear, definite, certain, and unambiguous. See Richardson v. Hart, supra, 143 Tex. 392, 185 S.W.2d 563. The first paragraph preceding the description grants an undivided 3% of 100% in the minerals. If the deed had stopped there the parties would have been tenants in common, the grantor owning 97% and the grantee 3% of the minerals subject to the Ohio lease. Barnard v. Jamison, 78 Cal.App.2d 136, 137–138, 177 P.2d 341. But the deed did not stop there. It went on to explain that the property was subject to the Ohio lease, and that said lease provided for a 1/8th royalty. The second paragraph then clearly states that the conveyance includes, but is not limited to, 6/25ths of all bonuses, rents, royalties, and other benefits which may accrue to the grantors under the terms of the Ohio lease, "or any other oil and gas lease that may be entered into with respect to" the property. Six twenty-fifths of 1/8th (12½%) equals 3% of 100%. Six twenty-fifths of 18% equals 4.32% of 100%. As long as the Ohio lease was in effect, if an oil well were brought in with a net production of 100 barrels a day with the royalty of 1/8th or 12½%, the grantor would receive 9½ barrels and the grantee, 3 barrels or the equivalent in money. Under the lease with Southern California Petroleum Corporation, with the same assumption a well producing a net 100 barrels of oil a day with the royalty of 18%, the grantor would receive 13.68 barrels and the grantee, 4.32 barrels or the equivalent in money.

In Barnard v. Jamison, 78 Cal.App.2d 136, 177 P.2d 341, 343, a conveyance was made while an oil and gas lease was in force. It conveyed 2% "of all oil, gas, other hydrocarbon substances and other minerals in and under and that may be produced, saved and sold or removed from" the land. This provision was followed by a clause to the effect that the interest conveyed was chargeable with its proportionate share of taxes and other costs permitted to be withheld by the lessee under the lease and under any other lease. The conveyance then read: "'It is also expressly provided that Grantee herein at all times and under any such Oil and Gas Lease shall be entitled to receive and shall be paid said full Two Percent (2%) of all the oil, gas and other hydrocarbon substances hereby conveyed to Grantee, and Grantee's Proportionate share of all cash and oil bonuses, rentals for delayed drilling, and other considerations paid by any such Lessee.'" The lease was canceled and a new lease with a different company was executed. The new company paid a bonus. The question was what percentage of the bonus was the grantee entitled to. The court held at page 140 of 78 Cal.App.2d at page 344 of 177 P.2d: "This is a clear grant of 2% of all the hydrocarbons in the described property with that interest only chargeable with taxes and other deductions provided for in the leases. The only deductions permitted in the two leases, other than taxes, are oil and gas used in lessees' operations and a percentage of casing head gasoline if any be produced. The provision that the grantees shall be entitled to receive the full 2% of all hydrocarbons produced is clear and explicit and is not subject to interpretation. The final clause to the effect that the grantees shall be entitled to receive their proportionate share of all cash, oil bonuses and rentals for delayed drilling, and any other considerations paid by any lessee, is also clear when construed with the rest of the deed, for the only proportionate share of the grantees, set forth in the deed, is the full 2% of all hydrocarbons 'in and under and that may be produced, saved and sold or removed' from the leased land."

In Krutzfeld v. Stevenson, 86 Mont. 463, 284 P. 553, the court considered deeds similar to the one in the present case. The deeds granted a 5% interest in and to all of the oil, gas, and other minerals in and under and that may be produced from the described land. This clause was followed by provisions which are set out in the margin.[1]

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[1] "'And said lands being now under * * * lease * * * in favor of K. G. Luke * * * it is understood and agreed that this sale is made subject to said lease, but covers and includes two-fifths of all oil royalty and gas rental or royalty due and to be paid under the terms of said lease.

"'It is agreed and understood that two-fifths of the money rentals which may be paid to extend the term of said lease is to be paid to the said L. C. Stevenson, Trustee, and, in the event that the said above described lease for any reason becomes cancelled or forfeited, then and in that event the lease interests and all fu-

The court held, 284 P. 556: "Considering the deeds as a whole, under the modern rule, these explanatory clauses but make clear the intention of the parties, and should be considered, if divisions are made, as a part of the granting clause, and, so considered, may either enlarge or diminish the grant so long as it deals with the identical property or interest described in the granting clause; and likewise, where explanatory clauses are incorporated in the habendum, if the intention of the parties is clearly expressed, the habendum may control over the granting clause, as every deed or contract is supposed to express the intention of the parties executing it, and, when called in question in a court, the first inquiry is as to what that intention was as expressed in the instrument, and it is the duty of the court to carry out that intention, if no legal obstacle lies in the way. * * * Under the lease 87½ per cent. of the oil and gas produced and saved would be retained by the lessee and 12½ per cent. delivered to the landowner; the deed therefore conveyed outright 5 per cent. or two-fifths, of the royalty oil, and then declared that this amount should be delivered to the grantee while the lease was in force, but that, if the present lease should be forfeited or canceled, the grantor should 'own' two-fifths of all oil and gas. This, then, is a grant of a two-fifths interest in all that the landowner would receive from the land during the life of the lease, and a two-fifths interest in all of the oil and gas in or under the land when the same shall have reverted to the landowner on forfeiture or cancellation of the lease." The Krutzfeld case was followed in Broderick v. Stevenson Consolidated Oil Co., 88 Mont. 34, 290 P. 244.

In Richardson v. Hart, 143 Tex. 392, 185 S.W.2d 563, the deed granted an undivided 1/16th of 1/8th interest in and to all of the oil, gas, and other minerals in and under, and that may be produced from the land, with the right of ingress and egress for the purpose of exploring for and producing minerals. The third paragraph read: "'Said land being now under an oil and gas lease executed in favor of C. M. Joiner, Trustee, it is understood and agreed that this sale is made subject to the terms of said lease, but covers and includes 1/16th of 1/8th of all of the oil royalty, and gas rental of royalty due and to be paid under the terms of said lease. * * *'" The court construed the instrument thus, 185 S.W.2d 564: "It is clear, we think, that the instrument conveyed two separate and distinct estates in the land. The first was a permanent interest in the minerals in place which was to subsist during and beyond the life of the existing lease. The other was the royalty to be due and payable under the lease. * * * Without any stipulation as to royalties the interest thus conveyed would carry with it by operation of law the right to 1/128 of the royalties paid under any lease. However, the parties did not leave the matter of the payment of royalties under the existing lease to be determined by operation of law. In the third paragraph of the deed they made a covenant in regard thereto which passed to the grantee the second estate above mentioned. The fact that it fixes the share in the present royalties the same as would have obtained by operation of law does not lessen its force and effect as a conveyance. As is often the case such payment of royalty might have been larger or smaller than a pro rata share. At any rate, the third paragraph conveys the second estate by subjecting the estate granted in the first and fourth paragraphs to the terms of the present lease and limiting the royalty interest to the same proportionate share as such estate bears to all the minerals, that is, 1/16 of 1/8, or 1/128 of 'all of the oil royalty' due or to be paid under the lease. In our judgment the term '1/16th of 1/8th of all of the oil royalty' could reasonably have but one meaning, and that is 1/128 of all the royalty paid under the lease. Since 'all of the oil royalty' to be paid was the equivalent of 1/8 of all of the oil pro-

ture rentals on said land for oil, gas and mineral privileges shall be owned jointly by John Krutzfeld & Cacilie Krutzfeld, his wife, and L. C. Stevenson, Trustee, each owning 3/5 and 2/5 respectively in all oil, gas or other minerals in and upon said land, together with same proportionate interest in all future rents.'"

duced, the interest of respondent in such 1/8 royalty would amount to 1/128 thereof or 1/1024 of all of the oil or other minerals produced under the lease. Hoffman v. Magnolia Petroleum Co., Tex.Com.App., 273 S.W. 828; Jones v. Bedford, Tex.Civ. App., 56 S.W.2d 305, writ refused." See, also, Citizens' Inv. Co. v. Armer, 179 Ark. 376, 16 S.W.2d 15; Rowland v. Griffin, 179 Ark. 421, 16 S.W.2d 457, 460–461; Smiley v. Thomas, 220 Ark. 116, 246 S.W.2d 419, 421; Segars v. Goodwin, 196 Ark. 221, 117 S.W.2d 43, 44; Richards v. Shearer, 145 Kan. 88, 64 P.2d 56, 58; Stanley v. Slone, 216 Ky. 114, 287 S.W. 360, 361; Koenig v. Calcote, 199 Miss. 435, 25 So.2d 763, 764, 766–767; Olvey v. Jones, Tex.Civ.App., 95 S.W.2d 980, 982; Clemmens v. Kennedy, Tex.Civ.App., 68 S.W.2d 321, 323; Simms v. Mitchell, Tex.Civ.App., 44 S.W.2d 1056, 1058; Hoffman v. Magnolia Petroleum Co., Tex.Com.App., 273 S.W. 828, 830; Collins v. Stilger, Tex.Civ.App., 253 S.W. 572, 573; Shinn v. Buxton, 10 Cir., 154 F.2d 629, 633.

Hochsprung v. Stevenson, 82 Mont. 222, 266 P. 406, relied on by defendants, was expressly overuled in Krutzfeld v. Stevenson, supra, 86 Mont. 463, 284 P. 553. See, also, Broderick v. Stevenson Consolidated Oil Co., 88 Mont. 34, 290 P. 244, 245; Johannes v. Dwire, 94 Mont. 590, 23 P.2d 971, 972; 3 Summers, Oil and Gas, Perm. Ed., 507, § 606.

[8, 9] The grant of 3% of 100% is not a limitation on the percentage of royalties granted. It is a grant of a percentage of the minerals. The last sentence of the granting clause "spells out" the grantee's interest in the royalties under the Ohio lease and under all subsequent leases. The two provisions are not inconsistent or irreconcilable, as defendants argue. They have to do with two separate and distinct mineral interests: one an absolute interest in the minerals; the other, in the royalties to be payable under the Ohio lease and under any future lease. We are at a loss to understand how 6/25ths can equal 3/18ths. To sustain defendants' contention would be to disregard the clear and explicit provisions of the grant and to vary its terms by changing its wording from "6/25ths of all bonuses, rents, royalties and other benefits which may accrue to the lessors under the terms of * * * any other oil and gas lease that may be entered into with respect to said real property from and after the date hereof," to 3/18ths of such bonuses, rents, royalties, and other benefits. If the Vasquezes had intended to convey a 3% landowner's royalty regardless of the amount of royalty payable under any future lease, it would have been a simple matter to have said so as was done in Barnard v. Jamison, supra, 78 Cal.App.2d 136, 177 P.2d 341. We cannot by legerdemain convert 6/25ths into 3/18ths. It was clearly the intention of the grantors to grant 6/25ths of whatever bonuses, rents, royalties, and other benefits should accrue to the grantors under any future lease.

Defendants contend that the acts of the parties may be considered in determining the proper construction of a written instrument, and that the parties, by their acts, have construed the deed as entitling the grantee to receive 3/18ths of the 18% royalty under the lease with the corporation. On February 8, 1951, eight months after the lease with the corporation had been entered into, the attorneys for Vasquez and Alari wrote a letter to plaintiff informing him the lease had been made, the royalty was 18%, and a bonus of $5,000 had been paid. In the letter they said: "[W]hile there would appear to be some possible question as to whether you are entitled to a share in the consideration paid for the lease, corresponding to your three percent mineral interest in the property, we are willing to recommend that you be paid the equivalent of three percent (3/18ths), or $833.33 of the consideration paid for the lease, together with 3/18ths of all royalties on oil, gas, etc., produced from the property." On February 22, 1951, plaintiff in part replied: "This settlement is satisfactory to me and I would appreciate it if you would follow the suggestion in the last paragraph of your letter and advise the lessee to forward to me direct the 3% royalty interest now payable and to become payable." On February 26, 1951, defendants' attorneys sent plaintiff a check for $833.33, with a letter saying it represented 3/18ths of the $5,000 bonus. Shortly thereafter, at the request of defendants' attorneys, the corporation sent plaintiff a check for $1,305.49, representing 3/18ths of the 18% royalty for the months of November and December of 1950 and January of 1951. Plaintiff cashed these checks. On March 20, 1951, the corporation sent plaintiff a check for $310.34, representing 3/18ths of the 18% royalty for February, 1951. Plaintiff did not cash this check.

The deed to plaintiff was executed on May 6, 1940. On execution it was deposited in escrow with one Clary as escrow holder pursuant to the permit of the corporation commissioner. It has remained in Clary's possession ever since. At the time plaintiff purchased from the Bailies, Paul Younkin, now deceased, acted as his attorney. Mr. Younkin, at that time, obtained a copy of the deed from Clary and read it to plaintiff. The copy, at all times since, has been in Mr. Younkin's files. Plaintiff did not see the deed until about March 23, 1951, when he called on Clary and read it. He forthwith employed his present attorney who immediately wrote to the attorneys for Vasquez and Alari stating that plaintiff had replied to their letter of February 8, 1951, without examining the deed; that plaintiff is entitled to 6/25ths of the bonus and of the 18% royalty; that the checks plaintiff had received were incorrect in amount; that plaintiff rescinded the statements made in his letter of February 22, 1951; that he demanded 6/25ths of the bonus and of the royalty; and that he was enclosing plaintiff's check for $833.33 for delivery to Vasquez and Alari. The attorneys for Vasquez and Alari returned the check saying they could not accept it. On March 26, 1951, the attorney for plaintiff also wrote the corporation, enclosing plaintiff's check for $1,305.49, the corporation's check for $310.34, and demanding 6/25ths of the 18% royalty. The corporation impounded the $1,305.49 check, destroyed the $310.34 check and has impounded the funds represented thereby together with 6/25ths of 18% of all landowner's royalties accruing subsequent to February, 1951.

The court found: "That it is not true as alleged in the separate and distinct defense of the answer of defendants Leandro Vasquez and Ruby Alari that the parties by their actions determined their rights under said 'grant deed.'"

[10–12] Where the terms of a deed are plain and unambiguous the construction given it by the parties is ordinarily immaterial and, in the absence of fraud, accident, or mistake, parol evidence is not admissible to vary its terms. Joerger v. Pacific Gas & E. Co., 207 Cal. 8, 30–33, 276 P. 1017; Hartwig v. Central-Gaither Union School Dist., 200 Cal. 425, 427, 253 P. 733; Marlin v. Robinson, 123 Cal.App. 373, 375, 11 P.2d 70. Acts of the parties may be considered in construing a written instrument only if the party acting did so with knowledge of its terms. Woodbine v. Van Horn, 29 Cal. 2d 95, 104, 173 P.2d 17.

[13] Since the deed is clear, definite, certain, and unambiguous, no act of either party may be considered in determining its meaning. However, since the facts were stipulated to, were before the trial court, and a finding was made with respect thereto, we have considered their effect.

Nearly eleven years had elapsed between the time plaintiff had the deed read to him by Mr. Younkin and February 22, 1951, when he replied to the letter from the attorneys for Vasquez and Alari. The checks for $833.33 and $1,305.49 were cashed prior to March 23, 1951, when he saw the deed for the first time after its execution. When he saw what in reality it said, he immediately consulted an attorney, returned the amounts of the checks he had received, and did not cash the check for $310.34. Further, the letter of February 8, 1951, from the attorneys for Vasquez and Alari to plaintiff, was misleading (no doubt unintentionally) in that it stated the Vasquezes had "conveyed an undivided three percent of one hundred percent of all oil, etc., to H. C. Bailie," without making any reference to the 6/25ths provision of the deed. In view of the fact that plaintiff had not seen the deed for nearly eleven years it was entirely reasonable for him to assume that the statement in the letter was correct and that his interest was 3/18ths of the bonus and of the royalties.

[14] Under these circumstances we cannot say that the trial court erred in finding that the parties by their actions did not de-

termine their rights under the deed. Plaintiff's rights under the deed cannot be taken away from him because of acts done in ignorance of those rights.

Affirmed.

WOOD, J., concurs.

SHINN, Presiding Justice.

I concur in the judgment.

The deed in question evidences a confusion of thought which I think has not been given sufficient attention. For this reason, and the additional reason that I wish to express my disapproval of the manner in which the interest of the grantee was indirectly enlarged I am expressing the following views.

Vasquez and wife had the following interests which were subject to sale and transfer: (1) a share of the so-called mineral rights consisting of underlying oil and gas, (2) a percentage of gross production, and, (3) a percentage of their landowner's royalty. They sold numbers 1 and 2 and conveyed the interests in the following terms: "Grantors * * * hereby grant to H. C. Bailie, herein called Grantee, an undivided Three (3%) per cent of 100% of all petroleum, oil, gas and other hydrocarbons within or underlying, or which may be produced, saved and sold from that certain real property located in the County of Los Angeles, State of California, more particularly described as follows, to-wit:" The grant of Number 1 conveyed 3 per cent of undeveloped oil and gas; number 2 conveyed 3 per cent of gross production of oil and gas. The instrument referred to the existing Ohio lease and made it clear that the 3 per cent would apply to any production or bonus paid under that lease. Under the grant the interest of the grantee would never exceed 3 per cent of gross production, whether under the Ohio lease, or any future lease.

Vasquez and wife did not convey *a percentage of their royalty.* Had they done so the percentage of production going to the grantee would have increased or diminished proportionately as the royalty percentage might be increased or decreased by any new arrangement.

Twelve and one-half per cent, as called for in the Ohio lease, was a minimum royalty. Three per cent of 100 per cent was 6/25 of 12–½ per cent. In order to enlarge the interest of the grantee the following was written into the deed: "This Grant Deed includes, but is not limited to 6/25ths of all bonuses, rents, royalties and other benefits which may accrue to the lessors under the terms of said Oil and Gas Lease or any extention or assignment thereof, or any other oil and gas lease that may be entered into with respect to said real property from and after the date hereof."

This was correct with respect to the Ohio lease and did not enlarge the interest of the grantee thereunder. But by the addition of the words "any other oil and gas lease" the instrument was made to apply to an interest entirely separate from the ones conveyed (1 and 2), namely, a percentage of the landowner's royalty. That there is an inconsistency between the granting clause and the later recital as to what the grant meant is clear. If it had been the intention of the parties that the grant should run to a percentage of landowner's royalty that interest should have been added in the granting clause. As it is the interest of the grantee has been enlarged from 3 per cent to 4.32 per cent of production by covert and indirect means. I so characterize them for the reason that the writing says, in effect, that the landowners had conveyed something they had not conveyed. In fact, I doubt that the contracting parties understood the import of the added words. Both plaintiffs and defendant evidently believed that the deed conveyed only 3 per cent of production. Defendant did not realize he could claim more until he had resorted to legal counsel and plaintiffs are not yet convinced.

If there is one type of conveyance which, above others, should be drawn with care it is one which evidences a sale of an oil and gas interest by a landowner to a speculator in oil royalties. Such questionable phraseology as we have here has been the cause of much misunderstanding and litigation, in which the land owner has usually been the loser and the speculator the gainer.

It would have taken but slight evidence to convince me that the questioned provisions of the deed resulted from mistake, but there is no evidence, other than the writing. Those provisions, however erroneous as a definition of the interest conveyed, may not be ignored. I realize that they contain a mere shadow of expression of intention to make them effective as a transfer of the greater interest, but I think they have to be given effect as a matter of contract.

Hearing denied; SCHAUER, J., dissenting.

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122 Cal.App.2d 376

JETER
v.
AUSTIN TRAILER EQUIPMENT CO. et al.

Civ. 19678.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1953.

Rehearing Denied Jan. 25, 1954.

Hearing Denied Feb. 24, 1954.

Action against foreign corporation and co-partnership, allegedly the agent of the corporation, for injuries sustained in Arizona when fifth wheel sold by co-partnership to plaintiff for motor vehicle broke on public highway. On corporation's motion, the Superior Court, Los Angeles County, Ellsworth Meyer, J., entered an order quashing service of summons and complaint, and plaintiff appealed. The District Court of Appeal, Fox, J., held, inter alia, that the corporation was "doing business" within the state and was amenable to service of process.

Reversed.

1. Corporations 🔑642(1)
Taxation 🔑164

The degree of activity or contact which is required in order for foreign corporation to be deemed to be "doing business" within the state varies according to purpose for which corporation is sought to be subjected to local laws, that is, whether state has power to impose local taxation, whether corporation falls within state's regulatory power, or whether jurisdiction exists for service of process. Code Civ. Proc. § 411, subd. 2; Corporations Code, §§ 6501, 6502.

2. Corporations 🔑642(1)
Taxation 🔑164

In determining whether corporation is "doing business" within the state, a less strict meaning may be attributed to the phrase "doing business" where question relates simply to whether state court has jurisdiction for service of process than where taxation or regulatory statutes are involved. Code Civ.Proc. § 411, subd. 2; Corporations Code, §§ 6501, 6502.

3. Constitutional Law 🔑309(1)
Corporations 🔑642(1)

Although interpretation of what constitutes "doing business" within the state by foreign corporation may be broadly or narrowly construed in consonance with purpose for which power of state over foreign corporation is sought to be exercised, it is a fundamental requisite that it be compatible with requirements of due process under federal Constitution. Code Civ. Proc. § 411, subd. 2; Corporations Code, §§ 6501, 6502.

4. Corporations 🔑642(1)

Whether a corporation is "doing business" within the state in the sense required by service of process statute is peculiarly dependent upon facts of the particular case and no inflexible algebraic formula can be applied as a criterion governing every situation. Code Civ.Proc. § 411, subd. 2; Corporations Code, §§ 6501, 6502.

5. Constitutional Law 🔑309(1)

The essentials of due process are fully met, at least for purposes of amenability to local process and jurisdiction, if foreign corporation maintains substantial contacts with state through course of regularly-established and systematic business activity, as distinguished from casual, isolated, or insubstantial contacts or transactions. Code Civ.Proc. § 411, subd. 2; Corporations Code, §§ 6501, 6502.

6. Corporations 🔑642(4½)

Where person had solicited orders at behest of foreign corporation, and corporation had kept merchandise within state and had filled orders from local stock, and had partially contributed to payment of such person's business rental, and there had been a judicial determination that corporation was doing business within the state so as to be amenable to service of process, even if corporation thereafter had discontinued keeping stock within the state and had discontinued payments toward such person's rental, in view of fact that it had thereafter continued to retain such person for solicitation of orders, corporation was "doing business" within the state and was amenable to service of process. Code Civ.Proc. § 411, subd. 2; Corporations Code, §§ 6501, 6502.

See publication Words and Phrases, for other judicial constructions and definitions of "Doing Business".

7. Evidence 🔑67(1)

The status of "doing business" within the state so as to be amenable to service of process, once established, is presumed to continue unless controverted by other evidence. Code Civ.Proc. § 411, subd. 2; Corporations Code, §§ 6501, 6502.

8. Evidence 🔑89

Presumption that corporation, which had been judicially determined to have been "doing business" within the state so as to be amenable to service of process, had continued so "doing business" was not controverted by subsequent judicial determination quashing service of process made upon person who solicited orders for corporation and whose activities were responsible for the earlier determination, in view of fact that such person was not an agent authorized to receive such process. Code Civ.Proc. § 411, subd. 2; Corporations Code, §§ 6501, 6502.

9. Corporations 🔑668(4)

A foreign corporation may be "doing business" in a state through the instrumentality of independent contractors located therein, yet those persons through whom its local business is conducted may not be so bound to the foreign corporation as to make them agents capable of receiving process on behalf of the corporation. Code Civ.Proc. § 411, subd. 2; Corporations Code, §§ 6501, 6502.

10. Courts 🔑7

Action against foreign corporation and local business which sold plaintiff a fifth wheel for a motor vehicle for injuries sustained in Arizona when the wheel broke was transitory in character and, not being based upon a theory repugnant to laws or public policy of California, was within jurisdiction of California courts.

11. Corporations 🔑665(1)

In absence of serious inconvenience to defendant or other equitable considerations, there is no constitutional limitation precluding assumption of jurisdiction over transitory causes of action which are not repugnant to laws or public policy of the state by courts of a state in which a foreign corporation is "doing business".

12. Corporations 🔑665(1)

In transitory action against foreign corporation, foreign corporation failed to show in support of contention that court should not assume jurisdiction that, in any estimate of inconveniences or balancing of hardships between it and plaintiff, it would be inequitable or unduly burdensome to require it to defend the action in California. Code Civ.Proc. § 411, subd. 2; Corporations Code, §§ 6501, 6502.

* * *

King & Mussell, San Bernardino, for appellant.

Parker, Stanbury, Reese & McGee, Los Angeles, for respondent.

FOX, Justice.

In April, 1951, plaintiff brought an action for damages against Austin Trailer Equipment Company, a Michigan corporation (hereinafter referred to as Austin), and Callahan Engineering Company, a co-partnership, alleging a sale by defendants of a defective Austin "fifth wheel" to plaintiff in January, 1949, and that it broke on a public highway in Arizona in June, 1950, causing injury to plaintiff. In its answer Callahan admitted its partnership status, with its principal place of business in Los Angeles. It denied, however, the sale and the further allegation that it was the agent of Austin.

Plaintiff seeks to hold both defendants responsible on the ground that they warranted the equipment to be fit and proper for the indicated use. He also alleges Austin was negligent in the manufacturing of said fifth wheel.

Upon plaintiff's application, the trial court ordered service of summons and complaint upon Austin by delivery to the Secretary of State, as provided in Corporations Code, §§ 6501 and 6502. Such service was made and thereupon Austin appeared specially and moved to quash service. The motion was heard upon affidavits and the files of two superior court actions to which Austin was a party. No oral testimony was received. It is from the order granting this motion that plaintiff appeals.

There is very little conflict in the affidavits. In one filed by F. Van Wassenhover, affiant states that he is manager of A-1 Auto Works, Inc., in Los Angeles; that an examination of their records reveals purchases of Austin fifth wheels in June and July, 1951, from Foster Trailer Company of Los Angeles. This is followed by an affidavit by Milton E. Foster, president of the Foster Trailer Company, that his company purchases from Austin fifth wheels and other trailer equipment that it manufactures. Such purchases are made both direct from the Austin Company, Muskegon, Michigan, and "also from another of their sales representatives, Walter L. Shirey, of Oakland, California."

One of the files the court had for its consideration was that of Tremeroli v. Austin Trailer Equipment Company from the Superior Court of San Francisco. In that case, as in the instant proceeding, service was effected by serving the Secretary of State. Austin made a motion to quash that service which, however, was denied in May, 1947. Thus, as of that time, Austin was sufficiently present in this state by reason of its business activities to be amenable to process of our courts and subject to their jurisdiction. An examination of the affidavits in that case reveals that they relate largely to the activities of Mr. Shirey in relation to and on behalf of Austin. One affidavit states that the concern of which the affiant was the controller had been doing business with Austin since 1942 and that the inception of its business with Austin was prompted by Shirey as the factory representative of Austin in California, and that since that time the visits of Shirey to this concern had been frequent and were made for the purpose of soliciting business. In another affidavit it is stated Shirey called on this customer approximately every 60 days for the purpose of soliciting orders for Austin over a six-year period. It is also stated in an affidavit of one of Austin's officers that Austin's sales in California in 1946 "amounted to not more than approximately 10 percent of the entire gross sales" of Austin.

It was further disclosed in the Tremeroli file that in and prior to 1947 Austin maintained a stock of its equipment at Shirey's warehouse in Oakland and that about 10 percent of his orders were filled from such local stock. As to the remaining 90 percent of the business, the orders were sent to Austin's main headquarters in Michigan, where they were acted upon, shipments being made direct to the purchaser. Shirey, also, upon occasions, adjusted complaints against Austin. A number of the affidavits stated that he was known to the affiant as the "California representative" of the Austin company.

The other file which the court had before it for consideration was Floyd Austin v. Ash, No. 542256 of the Los Angeles Superior Court. The Austin company was also a defendant. An attempt to gain jurisdiction over the company was made by service upon Shirey. A motion by the Austin company to quash service was granted in March, 1949. The motion was upon two grounds: (1) that it was not doing business in California, and (2) Shirey was not its agent for service of summons. Shirey's affidavits in that case averred that he was an independent contractor operating a business solely for his own account as a selling agent for products of several manufacturers, including Austin, for whom he solicited orders which were accepted and filled in Michigan by Austin. His sole compensation from Austin was a commission on actual sales. He paid his own employees, and leased on his own account a warehouse in which he kept products he had ordered from the companies for whom he solicited business. Shirey stated he caused to be inserted in the 1948 telephone directory in Oakland, California, as a listing on his own telephone subscription, the name of "Austin Trailer Equipment Company," for which listing he alone paid. He denied that he was an officer, agent or employee of Austin, or a person designated for service of process upon Austin, or was authorized by Austin to accept service of process.

In his affidavit in the instant matter Shirey states he owns and operates his own business under his own name and is engaged in selling the products of several manufacturers in eight western states strictly on a commission basis; that he is solely responsible for all expenses of operation including the wages of his employees and his automobile and other travel expenses; that no one has any control or authority over him in his solicitation of orders and that Austin is one of the companies whose products he thus offers for sale.

As to his specific relation to Austin, Shirey states he "solicits orders for products manufactured by Austin * * * including 'fifth wheels' "; that such orders are forwarded to Austin in Michigan for acceptance and are filled by direct shipment to the purchaser from the factory there, which also handles the billing and collections. He is paid on a commission basis. Neither he nor Austin service any of the equipment. Shirey describes himself as "serving Austin * * * as a selling agent," but disclaims authority to otherwise represent the company.

O. A. Seyferth, president of Austin, states the corporation was dissolved on December 31, 1951. His affidavit affirms that orders for equipment are accepted or rejected at the company's principal place of business in Muskegon, Michigan, and payments therefor are made there. He asserts that Austin does not maintain any agents or employees in California. He does state, however, that Austin "retains the services" of Shirey to solicit sales of its equipment on a commission basis. Shirey has no authority to represent the company in any way other than as a commission salesman according to the Seyferth affidavit.

The single, disputed issue is whether Austin was "doing business in this State", Code Civ.Proc. § 411(2), in such a manner and to such an extent as to make it amenable to local process at the time summons was served upon the Secretary of State of California.

[1-4] The inquiry as to whether a corporation is "doing business" has three significant aspects. It may determine (1) the power of the state to impose local taxation, (2) whether the corporation falls within the state's regulatory power, or (3) whether jurisdiction exists for service of process. Ruppert v. Morrison, 117 Vt. 83, 85 A.2d 584, 588; 23 Am.Jur., Foreign Corps., p. 339; Restmt., Conflict of Laws, § 167; 16 U.Chic.L.Rev., 523, 525-6. The degree of activity or contact which is required varies according to the purpose for which the foreign corporation is sought to be subjected to local laws. Thew Shovel Co. v. Superior Court, 35 Cal.App.2d 183, 95 P.2d 149; 23 Am.Jur., Foreign Corporations, § 362. Thus, a state may have jurisdiction over a foreign corporation by virtue of its local activities for purposes of service of process, whilst lacking the power to tax or regulate the same corporation. Fielding v. Superior Court, 111 Cal.App.2d 490, 494, 244 P.2d 968; Liquid Veneer Corp. v. Smuckler, 9 Cir., 90 F.2d 196; Thurman v. Chicago, M. & St. P. R. Co., 254 Mass. 569, 151 N.E. 63, 46 A.L.R. 563. A less strict meaning may be attributed to the phrase "doing business" where the question relates simply to whether a state court has jurisdiction than where taxation or regulatory statutes are involved. Fielding v. Superior Court, supra, 111 Cal.App.2d at page 496, 244 P.2d 968; Davis-Wood Lumber Co. v. Ladner, 210 Miss. 863, 50 So.2d 615, 621. But whether the interpretation of what constitutes "doing business" be broadly or narrowly construed in consonance with the

purpose for which the power of a state over a foreign corporation is sought to be exercised, it is a fundamental requisite that it be compatible with the requirements of due process under the federal Constitution. West Pub. Co. v. Superior Court, 20 Cal.2d 720, 726, 128 P.2d 777; Bomze v. Nardis Sportswear, 2 Cir., 165 F.2d 33, 35. Whether a corporation is doing business in a state in the sense required by a process statute is peculiarly dependent upon the facts of the particular case. West Pub. Co. v. Superior Court, supra, 20 Cal.2d at page 727, 128 P.2d 777; Boote's Hatcheries, etc., Co. v. Superior Court, 91 Cal.App.2d 526, 205 P.2d 31. No inflexible algebraic formula can be applied as a criterion governing every situation. The line of demarcation in many instances is often a tenuous one. State v. Winstead, 66 Idaho 504, 162 P.2d 894, 897.

In Kneeland v. Ethicon Suture Laboratories, 118 Cal.App.2d 211, 257 P.2d 727, there appears an exhaustive treatment of the issue here posed. In analyzing the cases which have significantly contributed to the changing philosophy regarding the concept of "doing business" which will subject a foreign corporation to local process, it is pointed out that a modern treatment of the subject must begin with International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. Previous to that case, the power of a state court to render a judgment in personam against a foreign corporation rested on judicially-devised fictions or symbolisms, the courts frequently relying on an "implied consent" by the corporation to an exercise of jurisdiction, or to the "presence" of the corporation within the state where its activities are carried on. 16 U.Chic.L.Rev., 523, 524; 26 U.So.Cal.L.Rev. 215, 216. In the landmark International Shoe case, the climate of judicial thinking on this problem, formerly encased in rigid legal formalisms, was profoundly revised. The approach taken was based on a realistic appraisal of the considerations involved. The Supreme Court of the United States, speaking through Justice Stone, substituted a qualitative criterion in place of the "mechanical or quantitative" concepts formerly accepted as determinative. The court there stated that the "test is not merely * * * whether the activity * * * is a little more or a little less." International Shoe Co. v. State of Washington, supra, 326 U.S. at page 319, 66 S.Ct. at page 159. All that is required is that the foreign corporation have "certain minimum contacts with it (the forum) such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 326 U.S. at page 316, 66 S.Ct. at page 158. The requirements of due process "may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection." 326 U.S. at page 317, 66 S.Ct. at page 158.

The principles announced in the International Shoe case have had a most telling and devastating effect on the venerable rule laid down in Green v. Chicago, B. & Q. R. Co., 205 U.S. 530, 27 S.Ct. 595, 51 L.Ed. 915, that personal jurisdiction cannot be obtained over a foreign corporation when the sole basis thereof consists of "mere solicitation" within the area of the forum's sovereignty. Dissatisfaction and disagreement with the so-called "mere solicitation" rule antedated the opinions expressed in the International Shoe case. In International Harvester Co. of America v. Commonwealth of Kentucky, 234 U.S. 579, 34 S.Ct. 944, 946, 58 L.Ed. 1479, the rule of the Green case was branded as "extreme." In the Harvester case, the facts disclosed that the company had sales agents in the state of Kentucky, who solicited orders which were then sent to the out of state home office for approval, whereupon machinery in fulfillment of the orders was shipped into Kentucky. The agents were authorized to receive payment in money or checks, and might take the notes of customers, payable at Kentucky banks. While the court found "something more than mere solicitation", it did not emphasize these latter transactions of the agents. It stated: *"Here was a continuous course of business in the solicitation of orders which were sent to another state, and in response to which the machines of the Harvester Company were delivered within the state of Kentucky. This was a course of business, not a single transaction."* 234 U.S. at page 585, 34 S.Ct. at page 946. (Italics added.) Kentucky was held to have jurisdiction.

Other leading state authorities, disinclined to follow blindly the "mere solicitation" rule, have interpreted the Harvester Company case as turning basically on the quantity and continuity of the solicitation of business, rather than on the incidental supplementary circumstance of collection of money by the salesmen. In Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915, Justice Cardozo stated the proposition that where there is a systematic and regular solicitation of orders as part of a continuous pattern of business activity by agents of the corporation, resulting in a flow of goods into the state in fulfillment of the orders, the corporation is sufficiently present in the state to render it amenable to local process. In American Asphalt Roof Corp. v. Shankland, 205 Iowa 862, 219 N.W. 28, 60 A.L.R. 986, defendant was a foreign corporation whose agent in Iowa, on whom service was made, had authority only to solicit orders which were forwarded to the Missouri home office for approval. He had no authority to accept orders, make contracts, or receive payments. He maintained no office in Iowa. In holding that defendant was doing business in Iowa, the court relied heavily on the Harvester and Tauza cases, supra. The court stated:

> "* * * it seems to us that the facts disclosed by the record establish that petitioner was, and has been for many years, engaged in a systematic and continuous course of business in the solicitation of orders and the delivery and shipment of merchandise to numerous customers, new and long established, and that such conduct constitutes doing business in this state * * *." American Asphalt Roof Corp. v. Shankland, supra, 219 N.W. at page 32.

A case from our own Supreme Court, West Pub. Co. v. Superior Court, 20 Cal. 2d 720, 128 P.2d 777, is of strong didactic value. It is not amiss to observe that it anticipated the result later reached in the International Shoe case. In its discussion of the adjudicated cases since the Harvester case, it points out that while some cases have stressed the fact that the soliciting agents in the Harvester case were authorized to receive payments in Kentucky, other prominent authorities have regarded the quantity and continuity of the solicitation of business in Kentucky as the crucial aspect of the decision, citing the Tauza and Shankland cases, supra. The Wisconsin court in Petition of Northfield Iron Co., 226 Wis. 487, 277 N.W. 168, follows the rationale of the Shankland and Tauza cases. In Hutchinson v. Chase & Gilbert, 2 Cir., 45 F.2d 139, 141, Judge Learned Hand, in discussing the amenability of a foreign corporation to state jurisdiction, wrote as follows: "Possibly the maintenance of a regular agency for the solicitation of business will serve without more." Immediately prior to the rendition of the International Shoe decision, a review of the current trend of opinion was undertaken in Frene v. Louisville Cement Co., 77 U.S.App.D.C. 129, 134 F.2d 511, 146 A.L.R. 926. Justice Rutledge there said: "In other words, the fundamental principle underlying the 'doing business' concept seems to be the maintenance within the jurisdiction of a regular, continuous course of business activities, whether or not this includes the final stage of contracting." 134 F.2d at page 515. In recommending the abolition of the "mere solicitation" rule when the solicitation process is a continuous and permanent activity, the court said: "Solicitation without * * * additional activities * * * may be more sustained, more insistent, more productive of business than it is with them. Solicitation is the foundation of sales. Completing the contract often is a mere formality when the stage of 'selling' the customer has been passed. No business man would regard 'selling,' the 'taking of orders,' 'solicitation' as not 'doing business.' The merchant or manufacturer considers these things the heart of business." 134 F.2d at page 516.

The advent of the enlightened and liberal pronouncements of the International Shoe case presaged a more practical handling of the concept of "doing business," untrammeled by the rigidity of the "mere solicitation" doctrine. In the International Shoe case, the defense of "mere solicitation" was raised in opposition to the assumption of jurisdiction by the Washington court. In finding this defense deficient, the Supreme Court in effect disavowed the rule. This was the construction of the International Shoe case, made two years later in United States v. Scophony Corporation, 333 U.S. 795, 68 S.Ct. 855, 92 L.Ed. 1091, which involved the analogous issue of venue. The court said: "Refinements such as previously were made under the 'mere solicitation' and 'solicitation plus' criteria, cf. Frene v. Louisville Cement Co., supra, and like those drawn, e. g., between the People's Tobacco and International Harvester cases * * * were no longer determinative. The practical, everyday, business or commercial concept of doing or carrying on business 'of any substantial character' became the test of venue." 333 U.S. at page 807, 68 S.Ct. at page 861.

In Travelers Health Ass'n v. Commonwealth of Virginia, 339 U.S. 643, 70 S.Ct. 927, 94 L.Ed. 1154, which involved an adjudication upon the question of how far a state could go in asserting jurisdiction without violating defendant's rights under the Constitution, the Supreme Court again extended the concept of what was formerly regarded as the limits of the judicial arm of the state. In the Travelers case, the foreign company was a nonprofit membership association incorporated in Nebraska, where its only office was located. It conducted a mail-order health insurance business, systematically soliciting new members, usually through the unpaid activities of Virginia residents who were already members. It delivered insurance certificates through the mail and investigated benefit claims in Virginia. After being served by registered mail, it was enjoined by the Virginia State Corporation Commission from further solicitation or sales in Virginia. The corporation appeared "specially" to quash service on the ground that Virginia did not obtain jurisdiction, arguing the Virginia Blue Sky Law authorizing service by mail violated due process. The court held that its contacts with Virginia were sufficient to sustain such jurisdiction, relying in part on the International Shoe case.

Other federal cases have adopted the new standards. It was said in Steinway v. Majestic Amusement Co., 10 Cir., 179 F.2d 681, 684, 18 A.L.R.2d 179: "These cases (International Shoe and Scophony Corporation) do indicate a definite disposition to broaden the concept of 'engaging in business' to include mere solicitation, if it is sufficiently continuous to amount to a course of business." In French v. Gibbs Corp., 2 Cir., 189 F.2d 787, 789, it is reiterated that "* * * continuous activities, be they as little as one will, satisfy the necessity of that physical 'presence' on which jurisdiction depends in a jurisprudence, territorially limited." In overruling a motion to quash summons based on the defense of mere solicitation, the court in Star Elkhorn Coal Co. v. Red Ash Pocahontas Coal Co., D.C., 102 F.Supp. 258, 259, quotes the following language from Nippert v. City of Richmond, 327 U.S. 416, 66 S.Ct. 586, 90 L.Ed. 760: "* * * that *'mere solicitation' when it is regular, continuous and persistent, rather than merely casual, constitutes 'doing business,' contrary to formerly prevailing notions.*" (Italics added.) In accord with these views are Boyd v. Warren Paint & Color Co., 254 Ala. 687, 49 So.2d 559; Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664, 25 A.L.R.2d 1193; Red Top Brewing Co. v. Mazzotti, D.C., 107 F.Supp. 921.

Passing now to the California view, there is little question that this state stands with the vanguard of jurisdictions committed to a liberal approach to this issue. In Perkins v. Louisville & N. R. Co., D.C., 94 F. Supp. 946, the court was presented with the question as to whether or not the solicitation of business by a foreign corporation maintaining an office in San Francisco, California, constituted doing business so as to render the corporation subject to the jurisdiction of the courts of this state. Under the rule of Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, the law of California was regarded as primarily decisive of the issue. After considering the California cases, the court observed that "it is apparent that California courts take a broad view of the concept of doing business by a foreign corporation, and although no California case has been found which involved mere solicitation, it is the view of this court that under California law the continued solicitation of business by a foreign corporation maintaining a regular office within this state constitutes doing business and renders the foreign corporation present in the state of California and amenable to its process." 94 F.Supp. at page 949. In Kneeland v. Ethicon Suture Laboratories, 118 Cal.App. 2d 211, 221, 257 P.2d 727, 733, the court remarks that the "latest California cases * * * seem to consider the question of 'doing business' within the meaning of § 411 (Code Civ.Proc.,) as synonymous with the power of the state to subject foreign corporations to local process." Such power, as the International Shoe case teaches, depends on the existence of sufficient continuous and substantial contacts with the state of the forum to make it just and reasonable under traditional concepts of fair play and justice to permit the state to assume jurisdiction. And, as the court in the Kneeland case continues, the concept of "doing business" enlarges to the extent that the federal constitution permits it to expand through "decisions of the federal courts interpreting the due process clause". 118 Cal.App.2d at page 222, 257 P.2d at page 734.

In Sales Affiliates, Inc. v. Superior Court, 96 Cal.App.2d 134, 137, 214 P.2d 541, 543, the test of "doing business" for purposes of process was related to an examination of whether the foreign corporation's modus operandi in the forum gave it "substantially the same commercial advantages that would be available to it through an office or a force of employees maintained in the state devoted exclusively to this phase of its business." The business last referred to was the solicitation by "jobbers" of licensing agreements with local beauty shops for the use of the foreign corporation's products. Furthermore, whether those activities and contacts of the foreign corporation indigenous to the forum are carried on through an independent contractor working on a commission basis or by salaried agents, is not, standing alone, of controlling importance when the issue involved is amenability to local process. Thew Shovel Co. v. Superior Court, 35 Cal.App.2d 183, 95 P.2d 149; Fielding v. Superior Court, 111 Cal.App.2d 490, 244 P.2d 968. "The essential thing is merely whether the corporations are present within the state, whether they operate through an independent contract, agent, employee, or in any other manner." Fielding v. Superior Court, supra, 111 Cal.App. 2d at page 494, 244 P.2d at page 971; Iowa Mfg. Co. v. Superior Court, 112 Cal.App.2d 503, 506, 246 P.2d 681.

Finally, we may conclude this digest of the authorities with an excerpt from Koninklijke Luchtvaart Maatschappij v. Superior Court, 107 Cal.App.2d 495, 500, 237 P.2d 297, 300, where the late Mr. Justice Wilson, speaking for this court, stated: "In the more recent decisions, solicitation, without more, constitutes doing business within a state when the solicitation is a regular, continuous and substantial course of business. [Citations.]"

[5] By way of recapitulation of the current state of the law under the evolving concept of the "doing business" requirement, it is deducible from the cases that the essentials of due process are fully met, at least for the purposes of amenability to local process and jurisdiction, if a foreign corporation maintains substantial contacts with a state through a course of regularly-established and systematic business activity, as distinguished from casual, isolated, or insubstantial contacts or transactions. The court must be astute to weigh the facts of the individual case to determine whether the particular type of activity in, relation to, or nexus with, the forum is of such substance as will make it just and equitable to conclude that a corporation is "doing

business" in the sense required by the purpose at hand.

[6–9] Applying these principles to the instant case, it is abundantly clear that Austin was doing business in California in the sense required to make it amenable to service of process here. For at least five years prior to 1947, in addition to Shirey's solicitation at its behest, Austin kept merchandise in California, filled some of its orders from local stock, and partially contributed, on occasion, to the payment of Shirey's business rental. Early in 1947, it was found, in the Tremeroli litigation, Tremeroli v. Austin Trailer Equipment Co., 102 Cal.App.2d 464, 227 P.2d 923, to be doing business in California. "The status of 'doing business' once established is presumed to continue unless controverted by other evidence. [Citations.]" Thew Shovel Co. v. Superior Court, 35 Cal.App. 2d 183, 189, 95 P.2d 149, 153. This presumption was not controverted by the 1949 Superior Court case of Austin v. Ash. There the service of process which was quashed was made upon Shirey. Such ruling was entirely proper, since Shirey was not an agent of Austin and was not authorized to receive such process. A foreign corporation may be doing business in a state through the instrumentality of independent contractors located therein, yet those persons through whom its local business is conducted may not be so bound to the foreign corporation as to make them agents capable of receiving process on behalf of the corporation. Fielding v. Superior Court, 111 Cal.App.2d 490, 495, 244 P.2d 968; 20 C.J.S., Corporations, page 159, § 1920. This was the rationale underlying Jameson v. Simonds Saw Co., 2 Cal. App. 582, 84 P. 289, as well as Fuller v. Lindenbaum, 29 Cal.App.2d 227, 84 P.2d 155, where the attempted service of a foreign corporation under section 404 of the Vehicle Code was quashed upon a showing that a commission salesman was not an agent of the foreign corporation so as to render the corporation liable for the negligence of the salesman.

Austin contends that in any event its mode of operation has changed since the time of the Tremeroli case in 1947, and that the facts in the instant case are considerably different. It points out that where formerly it kept stock in California, this is no longer true. It has discontinued any payments towards Shirey's rent. Other differences are also noted, and Austin suggests in its brief that the Tremeroli case might have induced these changes. We must fully accept the accuracy of these statements. However, the fundamental fact remains, as appears from the affidavits filed by Austin itself, that it has continued to retain Shirey's services, and these services have always consisted of solicitation of orders for Austin's product. It is clear that the basic activity of solicitation carried on in this state by Shirey in Austin's behalf was not haphazard, irregular or sporadic but was of a continuous and systematic nature during the past decade. In other words, there has been no interruption in Shirey's solicitation activities, which have been constant and regular, and as the direct result of which there has been a flow of Austin's products into California. This phase of Austin's contacts with and activity in California has undergone no transformation, though certain of its local arrangements may have been altered. Under the prevailing rules, Austin was doing business here in the sense required to make it amenable to process in this state where it carries on substantial activities.

[10–12] Austin suggests there is no specific showing that any cause of action arose in this jurisdiction. It is clear, however, from the complaint that both causes of action are transitory in character and that neither is based upon a theory that is repugnant to the laws or public policy of this state. It is now established that, absent serious inconvenience to defendant or other equitable considerations, there is no constitutional limitation precluding the assumption of jurisdiction over such causes of action by the courts of a state in which a foreign corporation is doing business. Perkins v. Benguet Consol. Min. Co., 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485. Austin has made no showing that, in any estimate of the inconveniences or balancing of the hardships between it and plaintiff, it would be inequitable or unduly burdensome to require it to defend this action in our courts. In Koninklijke Luchtvaart Maatschappij v. Superior Court, 107 Cal. App.2d 495, 237 P.2d 297, this court sustained the exercise of jurisdiction over a foreign corporation although the cause of action arose in England and was unconnected with business done locally.

Since Austin's activities in this state bring it within the framework of the "doing business" concept for the purpose of assumption of jurisdiction and amenability to process it was error to quash service.

The order is reversed.

MOORE, P. J., concurs.

Hearing denied; SCHAUER, J., dissenting.

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122 Cal.App.2d 555

RABOFF v. ALBERTSON.

Civ. 19396.

District Court of Appeal, Second District, Division 3, California.

Jan. 18, 1954.

Action against a wife to recover money lent to her husband based upon oral promise of wife to repay loan. The Superior Court, Los Angeles County, William B. McKesson, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Parker Wood, J., held that where plaintiff had loaned defendant's husband money with which to buy house, title to which was taken in joint names of defendant and her husband, and upon husband's death, defendant orally promised to repay such money if plaintiff would not take any action against her personally, if plaintiff would place her on payroll of certain corporation at salary of $400 a month for the year 1948 and if plaintiff would purchase stock of defendant and her husband in such corporation, promise of defendant was upon a consideration beneficial to her and was an original obligation, the enforcement of which was not barred by statute of frauds relating to oral promises to answer for debt of another.

Affirmed.

1. Liens 🔑3

Writing stating "I owe you $7,500 on my house" signed and dated by house owner was insufficient to create lien on the house.

2. Frauds, Statute of 🔑33(2)

Where plaintiff had loaned defendant's husband money with which to buy house, title to which was taken in joint names of defendant and her husband, and upon husband's death, defendant orally promised to repay such money if plaintiff would not take any action against her personally, if plaintiff would place her on payroll of certain corporation at salary of $400 a month for the year 1948 and if plaintiff would purchase stock of defendant and her husband in such corporation, promise of defendant was upon a consideration beneficial to her and was an original obligation, the enforcement of which was not barred by statute of frauds relating to oral promises to answer for debt of another. Civ.Code, §§ 1624, subd. 2, 2794(4).

Albert E. Wheatcroft and Charles Murstein, Los Angeles, for appellant.

Paul R. Hutchinson, Los Angeles, for respondent.

PARKER WOOD, Justice.

This action against a wife to recover money lent to a husband (now deceased) is based upon an oral agreement of the wife, allegedly founded upon a new consideration, to repay the loan. The money allegedly was applied on the purchase price of a house which the husband and wife purchased as a residence for themselves. The title to the house was conveyed to them as joint tenants. In a nonjury trial judgment was for plaintiff. Defendant appeals from the judgment.

[1] The court found: On May 11, 1946, Lee Albertson (the husband), in the presence of defendant Christine J. Albertson (the wife), represented to plaintiff that he

had found a house which he wished to buy and that he needed $7,500 in addition to other loans to purchase the house. Plaintiff lent $7,500 to Lee Albertson and did not ask him for a promissory note or security for the loan. On said May 11 plaintiff delivered his check for $7,500 to Lee Albertson in the presence of defendant Christine J. Albertson, payable to Lee Albertson, as a loan on the purchase price of the house. The check was deposited in a joint bank account of Lee and Christine and was paid out of that account into the escrow set up for the purchase of the house. Title to the house was acquired in the name of Lee and Christine as joint tenants. Plaintiff received no security for the loan. Plaintiff asked Lee for some evidence of the loan of $7,500, and on August 5, 1946, Lee signed and delivered to plaintiff a writing as follows: "I O U $7,500 Lee Albertson August 5th 1946 on my house." The only house in which Lee had any interest, and which was referred to in said writing, was the said house which Lee and Christine purchased. It was the intent of Lee at the time he made the writing to encumber said property with a lien in favor of plaintiff to secure said loan. The said writing was insufficient to create such a lien. In each of the months of September and October, 1946, Lee paid $1,000 to plaintiff. On December 27, 1946, plaintiff loaned $1,000 to Lee to purchase an automobile. On September 22, 1947, Lee died. Defendant Christine Albertson, as joint tenant, succeeded to the interest of Lee in said house. Christine was appointed administratrix of his estate. After the death of Lee, plaintiff notified defendant that $6,500 was due on said loans. On November 19, 1947, defendant orally represented to plaintiff that she believed that she was legally and morally obligated for the payment of said debt to plaintiff. On said day defendant orally promised and agreed that if plaintiff would not take any action against her personally at that time, other than to file a creditor's claim against Lee's estate, and if plaintiff would place her on the payroll of Lee Products, Inc., at a salary of $400 a month for the year 1948, and if plaintiff would purchase the stock of Lee Albertson and defendant in said corporation, she personally would pay said $6,500 to plaintiff. Plaintiff accepted said offer, and they orally agreed that defendant would pay said $6,500 to plaintiff, that plaintiff would take no action for the collection of said money against defendant, that plaintiff would give defendant employment in Lee Products, Inc., at a salary of $400 a month for the year 1948, and that plaintiff would purchase the stock of Lee Albertson and defendant in said corporation for $5,000. Plaintiff performed all said agreements on his part to be performed, and he took no action for the collection of said debt other than to file a creditor's claim in the estate until the filing of this action on December 29, 1948, after said agreement was repudiated by defendant on December 22, 1948. Plaintiff caused defendant to be employed by Lee Products, Inc., during all the year 1948 at a salary of $400 a month. Plaintiff purchased the stock of Lee and defendant in the corporation for $5,000. Plaintiff would not have caused said employment of the defendant, nor have purchased said stock, had it not been for said promise of defendant. For a period of two years after said loan was made plaintiff had a good cause of action against defendant for the recovery of said money but the statute of limitations on said cause would have expired after two years, but defendant orally promised to repay the money on November 19, 1947, and on several occasions thereafter until November 27, 1948, when defendant agreed to pay the $6,500 due to plaintiff. On December 22, 1948, defendant refused to pay said balance of $6,500. Plaintiff has been damaged thereby in the sum of $6,500 together with interest thereon at 7 per cent. On December 23, 1947, plaintiff presented to defendant, as administratrix of said estate, a creditor's claim for $6,500, and on said day the claim was approved by said administratrix, and thereafter the claim was approved by the court. No part of said claim has been paid, and the estate is insolvent.

Appellant contends that the findings and judgment are not supported by the evidence. She argues that there was no evidence that she signed any writing wherein she agreed to pay the debt of her husband and therefore under the statute of frauds, Civ.Code, § 1624, an oral promise by her, if any, to pay such debt was invalid. Respondent asserts that the oral promise of appellant to pay the debt was supported by a new consideration which was "fully executed," and that under section 2794 of the Civil Code, subdivision (4), wherein "the promise is upon a consideration beneficial to the promisor," it is not necessary that her promise be in writing. Section 1624 of the Civil Code provides in part: "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent: * * * 2. A special promise to answer for the debt, default, or miscarriage of another, *except in the cases provided for in section 2794;* * * *." (Italics added.) Section 2794 of the Civil Code provides in part: "A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing: * * * (4) Where the promise is upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person; * * *." Plaintiff (respondent) testified that in September, 1947 (the day after Lee's funeral), he asked defendant what was going to happen with the debt "you" owe me, and then said, "you know the money was loaned to you for the purpose of buying the house"; in October, 1947, plaintiff talked to defendant about the money that Lee owed to plaintiff, and defendant told plaintiff that she would certainly take care of all the debts that had been contracted; on November 19, 1947, defendant said that she was going to pay that money; plaintiff told her "we would buy her stock" and Lee's stock in the corporation for $5,000, and that if she repaid his money "we would put her on the payroll for the year 1948 for $4,800 a year"; the corporation entered into a written contract with her regarding that employment. That contract, made on November 19, 1947, was signed by plaintiff as president of the corporation and by defendant. The contract provided that "in consideration of the mutual covenants herein contained, and other good and valuable consideration" the parties agreed as follows: The corporation agreed to employ defendant for a year commencing January 1, 1948, and to pay her an annual salary of $4,800; defendant agreed to accept the employment and to give to the corporation such time, attention, and services as the corporation requested, and that in the performance of her duties she would be subject to the direction of the corporation. Plaintiff testified further that the corporation paid defendant $5,000 for the stock; in December, 1947, defendant told plaintiff that she was going to make good everything that was owed; at another time in December, 1947, she told plaintiff that she would "certainly take care of this," and she asked him not to bring any court action.

Mr. Bridges, an attorney who had represented the corporation and the defendant and who had acted as a scrivener in the preparation of the employment agreement, testified that on November 19, 1947, while defendant and plaintiff were in his office, the defendant said that she was going to pay the balance that was due plaintiff; that in December, 1948, when another payment was due on defendant's employment contract, she told Mr. Bridges that she did not intend to pay plaintiff anything but she was not going to say anything to him until she collected the balance due on her employment contract. Defendant rendered services under the employment contract for a few months, but she was paid the full salary of $4,800 for the year.

[2] The evidence was sufficient to support the finding that defendant orally agreed to pay said debt if plaintiff would take no action for the collection thereof, and if plaintiff would give her employment at a salary of $400 a month for the year 1948, and if plaintiff would purchase the stock for $5,000. Also the evidence supported the finding that no action was taken until the present action was commenced, that she was so employed and paid, and the stock was so purchased. In Behannesey v. Paton, 203 Cal. 444, 264 P. 763, a motion picture company entered into a contract

with a finance company whereby the finance company would furnish part of the money for the production of a motion picture, and whereby under certain conditions the finance company could substitute itself in the place of the motion picture company and complete the production of the picture. The plaintiff therein furnished certain personal property which was used by the picture company in the production of the picture. In that case, eventually the finance company assumed full charge of the production and completion of the picture, and the court held, in 203 Cal. at pages 448–449, 264 P. 765, that the inference from the testimony of certain witnesses was that the manager of the finance company gave the plaintiff and other creditors "to understand" that the indebtedness incurred by the picture company was assumed by the finance company and that a continuance of the performance of the contract which plaintiff had with the picture company "was the condition upon which and thereby furnished a consideration" for the assumption by the finance company of the obligations arising from plaintiff's contract with the picture company. The court said at pages 449 and 450 of 203 Cal., at page 765 of 264 P.: "Appellant has cited * * * certain sections of the Civil Code, to the effect that a special promise to answer for the debt or default of another is invalid unless in writing * * * except in the cases provided for in section 2794, Civil Code. We have been cited to no case where the court applied appellant's contentions to facts similar to the facts of the instant case. The respondent [plaintiff] in this case was induced to complete his indivisible contract upon the promise of appellant that he would be treated as an original contractor, *based upon a consideration that was beneficial to the promisor.* It is not probable that respondent would have otherwise agreed to complete the contract, but for the promise on the part of appellant that it would place itself in the place of the original promisor. All of the inferences support respondent's claim." (Italics added.) In Schumm v. Berg, 37 Cal.2d 174, at page 187, 231 P.2d 39, at page 46, 21 A.L.R.2d 1051, it was said: "Among other reasons why the statute [of frauds] does not apply is the rule that a promise to answer for the debt of another is deemed an original obligation and not within the statute 'Where the promise is upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person'. Civ.Code, § 2794(4). The rule is stated: 'Whenever a promise to answer an antecedent obligation of another is made upon a fresh consideration beneficial to the promisor, no matter from what source it may move, the promise is an original one and valid though oral; or, as was said in an early case, whenever the leading and main object of the promisor is not to become surety or guarantor of another, but to subserve some purpose or interest of his own, his promise is not within the statute, although the effect of the promise may be to pay the debt or discharge the obligation of another.'" In the present case the evidence and findings were sufficient to support the conclusion of the trial court that the oral promises of defendant to pay said obligation, including the promise of November 19, 1947, "were made for good and sufficient consideration had and received by the said defendant, and fully executed by the plaintiff." It could be inferred from the evidence herein that the promise of defendant to pay the said debt was upon a consideration beneficial to the defendant and was an original obligation of defendant.

By reason of the above conclusion, it is not necessary to discuss other contentions of appellant.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

122 Cal.App.2d 717

RODGERS v. MITCHELL et al.

Civ. 4769.

District Court of Appeal, Fourth District, California.

Jan. 21, 1954.

Action by husband against administratrix of wife's estate and against wife's heirs to enforce alleged reciprocal oral agreement whereby wife was to devise property to husband. The Superior Court, Orange County, Raymond Thompson, J., entered judgment against husband and he appealed. The District Court of Appeal, Griffin, J., held that evidence supported finding that no such oral agreement existed.

Judgment affirmed.

1. Wills 🔑58(2)

Wife's purported will, which was not dated and which purported to give part of wife's property to husband, did not conclusively establish that wife had made oral agreement to devise all her property to husband.

2. Specific Performance 🔑123

In action by husband to enforce alleged reciprocal oral agreement between husband and deceased wife, whereby wife was to devise all her property to husband, it was not necessary to determine whether or not property was community property or whether or not husband and wife acquired property by joint effort.

3. Specific Performance 🔑121(7)

In action by husband to enforce alleged oral agreement between husband and deceased wife, whereby wife was to devise all her property to husband, evidence supported finding that no such oral agreement existed at time of wife's death.

4. Frauds, Statute of 🔑144

Where no fraud appeared to have been involved in wife's failure to devise property to husband under alleged oral agreement, wife's administratrix was not estopped from interposing statute of frauds as defense to husband's action on alleged agreement. Civ. Code, § 1624, subd. 6.

Meyer & Dreizen, N. D. Meyer, Samuel Dreizen, Santa Ana, for appellant.

Blodget & Blodget, L. W. Blodget, June E. Blodget, Santa Ana, for respondents.

GRIFFIN, Justice.

Plaintiff and appellant John Rodgers filed this action against the administratrix and heirs of deceased Marie A. Rodgers, to enforce an alleged reciprocal oral agreement between plaintiff and his deceased wife to devise property to him by will and to establish a trust thereon.

He alleged that beginning May 28, 1926, to the date of her death on May 28, 1951, plaintiff and the deceased acquired property in Orange County consisting of a cafe and motel business, through their joint efforts and capital as well as certain money in two loan associations and certain cash in a bank, all totaling in excess of $13,000. He alleged that deceased orally agreed that the property would be the property of both parties with equal interests, notwithstanding that it, at all times, stood in the name of the deceased.

The testimony shows that plaintiff was managing a little cafe in San Juan Capistrano. Marie was operating a small cafe and auto court in Capistrano Beach, located on two lots which were owned by her. They became acquainted. Plaintiff claims that Marie borrowed various small sums of money from him over a period of time, totaling $800, for the purpose of paying some bills in connection with her property; that in about 1926, he went to her place of business to help her operate it; that they lived together as man and wife until 1934, when they were married; that she purchased additional lots in her name and together they erected more cabins and enlarged the business in general; that a bank account was maintained in her name; that the proceeds from the business went into the bank account, and the bills for the improvements and operation of the business were paid from it; that in 1940 or 1941, they separated and Marie brought an action for divorce and alleged that all of the property described in the complaint was her separate property, excepting two automobiles. Mr.

Rodgers contested the divorce and particularly asserted his claimed community interest in and to the property described. The court made a finding, and a final decree, entered May 22, 1941, decreeing that the property here involved and the business operated upon that property was Marie's separate property and that John had no interest in it, and that he was forever barred from asserting title thereto. No appeal was taken from the judgment.

It is plaintiff's claim that during the divorce proceedings he and Marie agreed that she could obtain the divorce and if he would quit his habitual drinking which he had been doing in the past, she would remarry him, and in one year after the interlocutory decree if he had proved "he was a man" they would go back together and she would leave the property "just like it was" in her name and "if we get back together it is still our community property". The trial court specifically found this claim to be untrue. Plaintiff thereafter obtained work in some other locality and Marie visited him there. They were thereafter remarried on September 15, 1941, and John returned to her place of business, but apparently nothing further was done, in reference to title to the described property. They bought a car, title was taken in both names, and they took a trip to Texas. It is plaintiff's claim (and this is the crux of this action) that on their return from this trip they discussed their business affairs and their property, and that he said he would make out a will to her as soon as he returned home and she said she was going to make her will to him and if they had an "accident on the road or anything" they would not "have to worry about anything"; that he said "That's fine", and when they returned home he wrote out his will devising her all of his property, and told her to leave it with her lawyer; that she said she was going to make one and give it to the same lawyer; that thereafter they conducted the business and they filed joint income tax returns; that after Marie's death he destroyed the will he made and found, among her papers, an envelope on which she had written in her own handwriting, the following:

> "Mr. and Mrs. Byram nothing
> Brothers & sister nothing
>
> ---
>
> "Mr. and Mrs. Bob Tevrey
>
> ---
>
> "Mr. & Mrs. Buster Mitchell
> my personal savings ac.
> Half & Half
> Santa Ana & Laguna
> Bank that will help
> Pay for their home
>
> ---
>
> "Johnnie Rodgers all
> my property and Bonds
> & Business Bank ac.
> (Last Will & Testament)
> to all it may
> concerne
> Marie A. Rodgers
> Don Harwood, Atnny."

This document was undated, and its probate was rejected. The accountant who made up the returns testified that Marie told him the reason the property was in her name alone was because John's drinking might jeopardize it; that he suggested the joint return because it would minimize the tax; that in 1945 or 1946, they did file separate returns for tax savings purposes and that in 1949, he made out the entire return from the business as being for Marie A. Rodgers, doing business as Marie's Cafe, and that in the last statement made he showed all the property as being Marie Rodgers'. It appears from the evidence that from 1946, until two years before Marie's death, she gave him a check each month for $200, "because of his drinking habits" since she did not allow his name to be on the bank account for fear he might draw a check larger than the bank balance. There was testimony that both Mr. and Mrs. Rodgers referred to the property as "our property" and that Marie told the witnesses when John first came to her place that she had taken in a partner who had a little money.

On the witness stand Mr. Rodgers denied receiving any consistent payment of $200 per month from Marie, or that she placed any large amount of money at his disposal. His testimony was impeached by a showing of the regular payments of $200 per month made to him by checks over a period of years, and that Marie opened an account and deposited $6,000 in his own name in a loan association account, and a like amount in her name in another loan association account. It further appears that John's excess use of liquor again became a problem and in November, 1949, Marie commenced a second action for divorce against him and again alleged extreme cruelty and asked that the property here involved be declared her separate property. She became ill and died before any trial was had.

Mr. Rodgers thereafter filed a claim in Marie's estate claiming that from May, 1926, to May 28, 1951, he rendered services for decedent worth $200 per month, and sought $50,000 in payment therefor. In a second claim it is alleged that before May 28, 1926, decedent entered into an oral agreement to employ claimant up to May 28, 1951, as cook, waiter and manager for her place of business, and that $50,000 was due under that agreement. In the probate proceedings he claimed that all the property here described was community property. He now contends that she made an agreement to make a mutual will, as indicated. It does appear that these alleged claims are somewhat inconsistent with each other, and that at least one of them was not true. Defendants were without the benefit of the testimony of the decedent. In order to rebut the claimed oral conversation between her and her husband about the wills, they were compelled to rely upon the circumstantial evidence, and the frailties and inconsistencies in John's testimony. The trial court specifically found that it was untrue that Marie agreed orally, or at all, to make "mutual wills leaving all their property to the other or any mutual wills or any wills of any kind", and found that it was true that plaintiff made a "holographic will bequeathing all his property to Marie A. Rodgers; that it is true that said will was destroyed by plaintiff the day following the death of Marie A. Rodgers; that it is not true that such will was made in pursuance of an oral agreement or any agreement with said Marie A. Rodgers to make a will". It then found that plaintiff was not entitled to have a trust imposed upon the property.

It is plaintiff's contention that the uncontradicted evidence shows an agreement to devise the property to him by will, and that the trial court abused its discretion in failing to so find. In support thereof he cites Notten v. Mensing, 3 Cal.2d 469, 477, 45 P.2d 198, 202, holding that the mere fact of making reciprocal wills is not of itself sufficient evidence of an alleged oral agreement. "However, if such agreement is proved by full, clear, and convincing evidence, such agreement should be enforced according to its terms."

It is conceded that the burden of proof of such an oral agreement was upon the plaintiff and until the trial court was convinced of the making of such agreement by a greater weight of the evidence, plaintiff's claim must fall.

In Notten v. Mensing, supra, 3 Cal.2d at page 477, 45 P.2d at page 202, it is said;

> "We are well aware that in such cases the temptation is strong for those who are so inclined to fabricate evidence giving color to the claim that the parties entered into such an oral agreement as is here alleged. On the trial on the merits, the burden rests on the plaintiff to prove the oral agreement by full, clear, and convincing evidence. (Citing cases.)"

[1] While the purported undated will found in Marie's effects may indicate an intention to make a partial devise of her property to John, it, by its own terms, would not have been a full compliance with the claimed agreement because it would have distributed only a part of her estate to him. Also, it should be noted that there is no indication when that purported will was attempted to be executed. A valid will, devising her entire estate to John, may have been executed at the time of the alleged agreement and subsquently destroyed by the decedent when it was found that her marital difficulties had again arisen.

In Rolls v. Allen, 204 Cal. 604, 607, 269 P. 450, it was said that in regard to mutual wills, in the absence of a contract, the cases universally hold that either of the comakers may at any time revoke his will; that this principle has found expression in Civil Code Section 1279; that the mere concurrent execution of mutual wills with full knowledge of their contents by both testators is not enough.

In Lynch v. Lichtenthaler, 85 Cal.App.2d 437, 193 P.2d 77, it was held that there must not only be an agreement, founded upon an adequate consideration and established by the clearest and most convincing evidence, to make reciprocal or mutual wills, but there must also be an agreement *not to revoke* such wills if made.

It is true that the trial judge expressed his sympathy for the husband in his oral opinion, since the husband worked for several years in helping to build the estate which the wife kept in her name, and which she judicially established in 1941 as her separate property in the divorce proceedings. The judge's sympathy alone was not what plaintiff sought. The judge then concluded from a summarization of the evidence that it was "pretty weak", too vague, uncertain, and equivocal to convince him by a preponderance of the evidence that such an agreement was made. In addition, he stated that he did not feel that the "equitable circumstances" were sufficient to enable him to properly "get around" the rule requiring such an agreement to be in writing.

[2] He properly found that under the circumstances it was not necessary to determine in this action whether the property involved was community or separate property, although he did make an unnecessary finding that Marie and John acquired the property through their joint investment of capital and efforts.

In La Jolla Casa De Manana v. Hopkins, 98 Cal.App.2d 339, at page 346, 219 P.2d 871, at page 876, this court said:

> "A witness may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions or of his own conduct as to discredit his whole story. His manner of testifying may give rise to doubts of his sincerity and create the impression that he is giving a wrong coloring to material facts. * * * Where conflicting inferences may be drawn from testimony, this court is bound by the findings of the trial court as conclusively as in other cases of conflict."

In re Jost, 117 Cal.App.2d 379, 256 P.2d 71, we had before us the claim of an applicant for naturalization that he had met the burden placed upon him to show by clear and convincing evidence that he was entitled to an order of the court admitting him to citizenship. This court held that inasmuch as the trial court passed on the weight of the evidence and credibility of witnesses, its implied findings are conclusive even where the conflict in evidence is not sharp but only such as to create an uncertainty in the judge's mind.

[3] We conclude that no abuse of discretion appears from the finding that the trial court was not sufficiently convinced of plaintiff's claimed oral agreement.

[4] The last point is that although plaintiff may be barred by the Statute of Frauds, Civil Code, § 1624, subd. 6, providing that an agreement to devise or bequeath any property or to make any provision for any person by will is invalid unless in writing and subscribed by the party to be charged, nevertheless, under the doctrine of estoppel defendants may not interpose such statute where a fraud is involved. No fraud on the part of Mrs. Rodgers was found or established, and a finding on the question of estoppel was not necessary. Lynch v. Lichtenthaler, supra, disposes of this argument. There it was said, in 85 Cal.App.2d at page 443, 193 P.2d at page 80:

> "The alleged agreement, not being in writing, would have been unenforceable * * * unless the defendants were estopped to plead the statute of frauds. It is true, as stated by appellant, that the trial court made no finding on the issue of estoppel. In view of the finding of the trial court, how-

ever, that there was no oral agreement, which finding was supported by the evidence, the issue regarding estoppel is immaterial and it was not necessary to make a finding on that issue."

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

122 Cal.App.2d 627

FIRESTONE TIRE & RUBBER CO.
v.
INDUSTRIAL ACC. COMMISSION et al.

Civ. 20034.

District Court of Appeal, Second District, Division 1, California.

Jan. 19, 1954.

Hearing Denied March 17, 1954.

Proceedings on petition for review of award of compensation by Industrial Accident Commission. The District Court of Appeal, Drapeau, J., held that testimony was sufficient to support finding that employee had suffered an industrial accident causing a ruptured intervertebral disc.

Petition denied.

White, P. J., dissented.

1. **Workmen's Compensation 🔑1237**

In a compensation case, court will not hold an illiterate, frightened employee in reporting accident to the same meticulous standards of conduct which it would expect from a trained medical or legal mind.

2. **Workmen's Compensation 🔑1532**

In proceedings on compensation claim for ruptured intervertebral disc allegedly suffered by employee when he attempted to lift bale of old automobile tires which he was rolling, evidence was sufficient to support finding of Industrial Accident Commission that employee had suffered an industrial accident.

Kearney, Scott & Clopton, Los Angeles, for petitioner.

Everett A. Corten, San Francisco, Gordon W. Winbigler, Los Angeles, for respondent Industrial Accident Commission.

DRAPEAU, Justice.

In this case the employee testified that while he was rolling a bale of old automobile tires weighing two hundred pounds, he stooped over and tried to lift the bale; that when he stooped over he felt a snapping or pulling sensation in his back. The employee's doctor diagnosed his trouble as a herniated disc, for which he operated.

The Industrial Accident Commission found that the employee suffered an industrial accident causing a ruptured intervertebral disc. In the hearings of the Commission it developed that all of the employee's conduct and all of his statements after the accident pointed to a non-industrial accident. He even went so far as to accept payments of compensation for his injury from a non-industrial accident insurance plan, and the referee for the Commission, who heard and observed the witnesses, found against the employee and so recommended to the Commission.

[1] One of the cogent reasons for the Commission's reversal of the referee must have been the conduct of the employer's nurse. It is in testimony that she told the employee he would lose his job if this was an industrial accident. For an illiterate working man that sort of threat is about as bad as a threat of death.

Also, it is to be remembered, that we do not hold an illiterate, frightened employee to the same meticulous standards of conduct that we would expect from a trained medical or legal mind.

Finally it is a well-known fact that subjective symptoms of a ruptured disc are very often thought by patients to be nothing more than a common sprain or twist of the muscles of the back.

[2] The testimony is sufficient to support the findings and conclusions of the Commission.

The petition for writ of review is denied.

DORAN, J., concurs.

WHITE, Presiding Justice.

I dissent.

It is true that in this case the employee testified that on September 8, 1951, he was engaged in rolling a bale of auto tires for debeading; that they weighed about 200 pounds; that he stooped over and tried to lift them one way so as to swing them, on the ground, another way, to get them to roll, and that he felt a "snap" in his back later characterized as a "pulling sensation" there, or, as still later described, a "weakness" in his back which he thought "was a little old pain." He continued to work for a week, but that the pain extended down his right leg and when he found his work was falling off about 25% he quit and asked for a pass to the hospital (a plant dispensary), so as to get on the sick list. When applying for the hospital pass he was asked by his foreman whether it was "work injury", and the employee replied that it was not. He told no fellow employee that he had sustained an industrial accident. The employee never requested of his employer either medical or hospital service.

On September 26, 1951, he signed a claim for disability benefits under the California Unemployment Insurance Act. This claim contained the specific question, "Was this disability caused by your work?" to which he answered, "No".

In two statements to his union's group insurance company, he denied that his injury or disability arose out of or in the course of his employment. He collected $358 on the non-industrial policy and in addition, on a like disability policy with a similar provision excluding benefits for injury for which the insured had a right to compensation under any workmen's compensation law, he collected $27 a week from September 14th to the following March 13th.

When the employee went to the Veteran's Administration and was examined on September 25 and 29, 1951, he was asked, "In your opinion, is this disability the result of 'occupation' either as an industrial accident or as an 'occupational disease'?" To this interrogatory he unequivocally answered, "No". Motion pictures were put in evidence showing the employee, within two weeks prior to the hearing before the Commission, doing strenuous work, lifting and carrying heavy weights and pushing heavy doors.

In explanation of these admittedly false statements, the employee testified that his schooling did not go beyond the third grade, that his knowledge of English was meager and that he did not read some of the blank forms containing the foregoing interrogatories. Another explanation offered was that a nurse of the employer told him that the latter did not like him to have too many injuries and suggested that he seek employment elsewhere, but this does not explain away his manifold statements to the Veteran's Bureau, the union's insurance company and the California Unemployment Commission, that the claimed injury did not arise out of or in the course of his employment.

I am cognizant of the oft-quoted rule which forecloses an appellate tribunal from disturbing the conclusions and inferences arrived at by the duly constituted trier of facts upon conflicting evidence.

But it is axiomatic as well, that an appellate court may set aside the findings of the trier of fact when there is no substantial or credible evidence in the record to support them, or where the evidence relied upon by the prevailing party is apparently so improbable or false as to be incredible, or where it so clearly and unquestionably preponderates against the decision rendered as to convince the reviewing court that its rendition was the result of sympathy or prejudice upon the part of the trier of fact.

It is no answer to say that, in the face of the foregoing acts, conduct and declarations of the employee, he nevertheless, testified at the Commission hearing that his injury was occasioned by and through his employment. As was said by the supreme court in the case of Zibbell v. Southern Pac. Co., 160 Cal. 237, 241, 242, 116 P. 513, 515: "'It is a wild conceit that any court of justice is bound by the mere swearing. It is swearing credibly that is to conclude its judgment.' "

I am impressed that the case now engaging our attention does not present the usual and ordinary situation where credible and substantial evidence was in conflict, but on the contrary, tenders us a case where the evidence relied upon by the Commission was so thoroughly impeached and discredited as to fall short of that quantum of verity, reasonableness and substantiality necessary to sustain a finding based upon it.

I would grant the petition for a writ of review.

122 Cal.App.2d 578

PEOPLE v. PETRIN.

Cr. 2457.

District Court of Appeal, Third District, California.
Jan. 18, 1954.

Defendant was convicted of embezzlement. The Superior Court, Shasta County, Ross, J., entered judgment, and defendant appealed. The District Court of Appeal, Peek, J., held that where defendant, who undertook to sell advertising for fair souvenir program and to arrange for the printing of such program, paid chamber of commerce $300 to act as sponsor of project, chamber, as sponsor, became a "surety" for defendant's acts and, therefore, defendant, as a defaulting party by having failed to see that program was printed, could not be held to have embezzled funds of the chamber merely because, in its capacity as sponsor, chamber had made good to advertisers by arranging for the printing at its own expense.

Judgment reversed.

1. Embezzlement 🔑4

To sustain conviction for "embezzlement," it must be shown that accused was agent or bailee of prosecuting witness in holding alleged embezzled property that property actually belonged to alleged principal, the prosecuting witness, that it was lawfully in possession of accused at time of alleged embezzlement, that accused must have been guilty of the conversion which statute denounces and that there was an intent on part of accused to deprive prosecuting witness of his property unlawfully. Pen. Code, §§ 503, 506.

See publication Words and Phrases, for other judicial constructions and definitions of "Embezzlement".

2. Embezzlement 🔑10

Where defendant, who undertook to sell advertising for fair souvenir program and to arrange for the printing of such program, paid chamber of commerce only $165 of the $300 agreed upon in return for its sponsorship of project, chamber, as sponsor, became a "surety" for defendant's acts and, therefore, defendant, as a defaulting party by having failed to see that program was printed, could not be held to have embezzled funds of the chamber merely because chamber had made good to advertisers by arranging for the printing at its own expense. Pen. Code, §§ 503, 506.

See publication Words and Phrases, for other judicial constructions and definitions of "Surety".

3. Embezzlement 🔑8

One's own property cannot be intrusted to him, and one cannot be guilty of embezzling his own property. Pen. Code, §§ 503, 506.

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Carlton & Shadwell and Robert A. Haughwout, Redding, for appellant.

Edmund G. Brown, Atty. Gen., by Gail A. Strader, Deputy Atty. Gen., for respondent.

PEEK, Justice.

This is an appeal by defendant from a judgment of conviction of the crime of embezzlement.

By information, defendant was charged with violation of Penal Code section 506, in that he wilfully and fraudulently appropriated certain money which was entrusted to him and came into his possession and control for the use of one "Homer Bruce, the Anderson Valley News, and the Anderson Chamber of Commerce." Defendant pleaded not guilty to the crime as charged, and waived jury trial. Following the conviction judgment and sentence were suspended, and the defendant was given probation subject to certain conditions.

The facts show that defendant had been engaged in specialty advertising campaigns, particularly in northern California. In the course of this work he had become acquainted with Mr. Bruce, the publisher of the Anderson Valley News, whom he approached with the idea of preparing a souvenir program for the 27th District Agricultural Fair. Bruce discussed with him what would be necessary to promote such a program and subsequently agreed to do the printing. The defendant then secured the approval of the Anderson Chamber of Commerce as the sponsor thereof, with the agreement that he would pay the chamber a flat fee of $300 for the use of their name as sponsor.

Two salesmen were engaged by defendant to assist in the solicitation of advertisements. They were to be paid on a commission basis for all advertisements sold. The following form was prepared for use by those who subscribed to advertisements:

"No. ———

27th District Agricultural Fair, Shasta County, 1952

Advertising Contract—Souvenir Program

Sponsored by the Anderson Chamber of Commerce, Anderson, Calif.

We are happy to reserve space in the Souvenir Program of the Annual 27th District Agricultural Fair, Shasta County, to be held at Anderson, September 4, 5, 6, 7, to occupy ——— page, for which—

We agree to Pay the Sum of $———. (This includes the costs of cuts and mats.)

(A special discount of 10% for cash upon signing of order.)

This Agreement cannot be cancelled.

Sponsor

Accepted: By:

(Make all checks payable to 27th District Fair Souvenir Program, or, to Anderson Chamber of Commerce Souvenir Fair Program.)"

Except for two instances all checks made out by advertisers were made payable to the Anderson Chamber of Commerce Souvenir Fair Program, or to the 27th District Agricultural Fair Souvenir Program. A rubber stamp was prepared by defendant which read "Anderson Chamber of Commerce," and directly under those words, "Souvenir Fair Program". Defendant endorsed each check by placing this stamp on the back and by signing his own name thereto. Of the $1,250 collected, the Chamber of Commerce was paid $165. Sometime during the latter part of August, defendant prepared a complete layout of the program and sent it to Bruce for printing. Bruce, who was unable to print the program within the ten days or two weeks remaining before the fair opening, requested the chairman of the Chamber of Commerce to call a special meeting to discuss the problem. At that meeting it was decided that Bruce should have the program printed by a San Francisco printing company. This was done at a cost of $933; all of which the Chamber of Commerce paid. The program so printed was available at the opening of the fair, and all of the advertisements for which subscriptions had been taken appeared therein.

At the conclusion of the trial, the trial judge filed a memorandum opinion wherein he noted, "I find therefore that Petrin absconded with somewhere between $600 and $1,250 of cash to which he probably had a legal title subject to a trust to use it or so much of it as was needed for printing the programs and for paying the Chamber of Commerce the balance due to it on the contract." The trial court further stated that those who purchased advertising space in the program were not dealing with defendant personally, but were doing so because of the endorsement of the Chamber of Commerce, and were "receiving him as an agent of the said Chamber." Furthermore said the court, "The advertisers also knew Petrin as having been an agent for the well-known and good-reputed Homer Bruce and the Anderson Valley News in past campaigns. Therefore, although they parted with title to their money, they did so by creating a trust in all money collected by Petrin in favor of the Chamber and Bruce, first, that Bruce would get the printing job and be paid for it, and second, that the Chamber would get $300 *and* that the programs would be properly published and delivered to the fair for circulation."

[1] The crime of embezzlement has been defined in various ways. Penal Code section 503 defines it as being the "fraudulent appropriation of property by a person to whom it has been entrusted." 10 Cal. Jur. 241 states that the crime ordinarily "* * * is the breach of trust or confidence reposed in one intrusted with the property of another, it is essential to the commission of the offense that a relation of trust and confidence exist between the owner of the property alleged to have been embezzled and the person alleged to have appropriated it. If the relation is that of creditor and debtor merely, an appropriation by the latter does not constitute embezzlement." The Supreme Court of this State, in the case of People v. Borchers, 199 Cal. 52, at page 56, 247 P. 1084, at page 1085, has set forth the elements of the crime as follows: "In order to sustain a conviction upon such a charge it must at least be shown, first, that the accused was the agent or bailee of the prosecuting witness in holding the alleged embezzled property; second, the property must actually belong to the alleged principal, the prosecuting witness; third, it must be lawfully in the possession of the accused at the time of the alleged embezzlement; fourth, the accused must have been guilty of the conversion which the statute denounces; and, fifth, there must be shown an intent on the part of the accused to deprive the prosecuting witness of his property unlawfully." See also People v. Cannon, 77 Cal.App.2d 678 at page 689, 176 P.2d 409; and People v. Hewlett, 108 Cal.App.2d 358 at page 367, 239 P.2d 150.

[2] In the present case the respondent in support of the judgment relies almost entirely upon the form of the contract used, its argument being that the Anderson Chamber of Commerce appears thereon as sponsor, that as a space was left for a signature an agency was thereby created, that therefore the money so collected being the property of the chamber, the defendant was guilty of the crime of embezzlement. No argument is made by respondent in support of the charge contained in the information that defendant also embezzled funds of "Homer Bruce [and] the Anderson Valley News". While it cannot be denied that the Chamber of Commerce did agree to act as sponsor of the program, that fact alone did not establish the relationship of principal and agent. As sponsor, the chamber became a surety for the acts of Petrin (see Webster's New International Dictionary). Under such circumstances Petrin, as the defaulting party, could not be held to have embezzled funds of the chamber merely because in its capacity as sponsor it made good to the advertisers.

Furthermore respondent's contention is refuted by the testimony of the chairman of the chamber. He was asked, "* * * that if the Chamber of Commerce would sponsor the program he [Petrin] would pay you three hundred dollars cash, isn't that right? A. That is right.

"Q. And that you wouldn't be responsible in any manner whatsoever; all that they had to do was use your name as sponsor and pay you three hundred dollars, is that right? A. That is right.

"Q. You weren't supposed to do any work, any soliciting or anything? A. That is right.

"Q. He would do all the work, put the program together, take care of the printing, and that would be it; you wouldn't be out a thing and you would get three hundred dollars for that particular service, is that correct? A. That is right.

"Q. In other words, Mr. Petrin, when he went out soliciting ads, assuming he did, he wasn't working for the Chamber of Commerce, was he?"

At this point, following an objection by the prosecution, the court took over the interrogation of the witness and said, "In other words, you didn't consider he was working for the Chamber of Commerce as an employee? A. No, but he was using the Chamber of Commerce's name and, after all, the responsibility of using the Chamber of Commerce's name is what I was concerned about.

"The Court: Yes. In other words, you were endorsing him to the public, but he was on his own as far as the work was concerned? At least he wasn't working for you? A. He wasn't on his own. As I understood, he was to work through the Valley News, I thought, like most business people thought."

Mr. Shadwell, defendant's counsel, then asked, "But he wasn't working for the Chamber of Commerce; he was merely using your sponsoring name, isn't that correct? A. That is right.

"Q. For which he was going to pay three hundred dollars into your treasury, isn't that right? A. Yes."

Additionally there was testimony by Mr. Bruce to the effect that he had discussed the program with the defendant and had suggested that he talk with the Chamber of Commerce as a possible sponsor, and that in the course of the conversation the defendant had told him that he would give the Chamber of Commerce $300 as consideration for its sponsorship of the program, and that Bruce would get the printing job. Also it should be noted that none of the merchants, twenty-two in number, who were sold advertisements, and who testified for the prosecution, considered that the money paid by them was in any way to be held in trust so that Bruce might obtain and be paid for the printing of the program, or that defendant was in any way acting as agent for the Chamber of Commerce.

Examining the facts presented in light of the rule in the Borchers case, 199 Cal. 52, 247 P. 1084, we find nothing herein which would bring the acts of the defendant within the rule as therein set forth. Again we repeat, there is no evidence that any advertiser believed he was paying his money for the benefit of Bruce, his newspaper or the Chamber of Commerce. Likewise, there is no evidence that any merchant knew that either Bruce or the Anderson Valley News was to benefit by doing the printing of the program or that the Chamber of Commerce had sold the use of its name for $300.

The most that can be said of the evidence is that it showed (1) that defendant personally failed to see that the program was printed, but since the program was ultimately printed and distributed at the fair no damage resulted, (2) that he failed to deliver the copy to Bruce on time, but since that contract was executory and no damage was shown to have been suffered by Bruce, again such act was of no consequence, and (3) that since the chamber assumed the increased cost, defendant would not be obligated therefor but would be liable to the chamber for the balance of the $300 which he failed to pay for the use of its name as sponsor. The record being barren of any evidence either to establish a trust or to establish an agency, the most that can be said of it is that nothing more than a breach of debtor-creditor relationship has been shown. To hold otherwise would be to conclude that every person who breaches a civil contract wherein the payment of money is involved is guilty of embezzlement.

[3] In summary, the holding of the court in People v. Holder, 53 Cal.App. 45 at page 48, 199 P. 832, 833, is particularly apropos: "The moneys which it is claimed were embezzled were paid to appellant under his respective contracts with the lot owners. No part of the money thus paid to him was the property of another. It was appellant's own property, and his only. Appellant, therefore, could not justly be found guilty under section 503, which defines embezzlement as the 'fraudulent appropriation of property by a person to whom it has been intrusted.' In no true sense of the words can it be said that that which is absolutely one's own is property that 'has been intrusted' to him. As the crime of embezzlement is ordinarily understood and defined, one cannot be guilty of embezzling his own property."

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

122 Cal.App.2d 516

STEINBERG v. GOLDSTEIN.

Civ. 4691.

District Court of Appeal, Fourth District, California.

Jan. 13, 1954.

Action for partnership dissolution, for accounting, and for damages. Defendant appealed from an order approving a report and account filed by receiver. Plaintiff moved to dismiss appeal on grounds that defendant failed to timely pay estimated costs of transcript preparation and that order appealed from was interlocutory and not an appealable order. The defendant moved for relief from his default in connection with costs. The District Court of Appeal, Barnard, P. J., held that where defendant was directed to make substantial payments to receiver within five days, and receiver was directed to take steps to enforce the order, portions of order were final as against defendant and he was entitled to appeal, and also held that a sufficient showing was made to justify the relief requested in regard to costs.

Motion to dismiss appeal denied; motion for relief granted.

1. Appeal and Error ⚷371

Where party appealing from court order failed to pay estimated costs of preparing transcripts within required time because he had been absent from state, but within three days after returning to state he sent amount to counsel, which was deposited with clerk, party was entitled to relief from default.

2. Appeal and Error ⚷80(1)

Orders requiring the payment of money by party complaining, or doing of an act by or against him are usually regarded as final as against such party and may be appealed from by him.

3. Appeal and Error ⚷80(6)

In action for partnership dissolution and for accounting and for damages, an order which approved a report and account filed by receiver and which directed defendant to make substantial payments and to do certain things within five days and which directed receiver to take steps to enforce such provisions was final as against defendant and defendant was entitled to appeal.

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John D. Chinello, James M. Thuesen, Fresno, for appellant.

Stammer & McKnight, L. Nelson Hayhurst, Fresno, for respondent.

BARNARD, Presiding Justice.

This is an action for the dissolution of a partnership, for an accounting, and for damages. The defendant appealed from an order approving a report and account filed by the receiver. The plaintiff has moved to dismiss that appeal on the grounds that the defendant failed to pay the estimated costs of preparing the transcripts within the required time, and that the order appealed from is interlocutory and not an appealable order. The defendant has moved for relief from his default in connection with such costs, on the ground of inadvertence, surprise or excusable neglect; and further contends that portions of the order appealed from are final in nature.

[1] With respect to the default it appears that the clerk served notice of the estimated cost of preparing the transcripts on appellant's attorneys on September 22, 1953, that payment was not made within ten days, and that on October 26, 1953, counsel for appellant tendered to the clerk $696.50, the required amount. It further appears that upon receiving notice of the amount due the appellant's counsel wrote to him advising him of the necessity of making this payment; that because of the appellant's absence from the state he did not see this letter until October 19 or 20; and that within three days thereafter he sent the amounts to his counsel, which were by him deposited with the clerk. A sufficient showing is made to justify the granting of relief in this regard.

The main contention is with respect to the finality of the order appealed from. It appears in this connection that the receiver filed what was designated as a final report and account. The court modified the same by it findings, and allowed and approved it as an interim report and account. In its order the court allowed fixed sums as compensation for the receiver and for his attorney; ordered the appellant to deliver to the receiver within five days a large number of articles of personal property, fixing the value thereof as $3,002.94; fixing the annual rental value of these items as 27% of said market value; ordering the appellant to pay said rental value to the receiver within five days or to return said property to the receiver; ordering the appellant to pay to the receiver within five days a further sum of $9,857.09; ordering the receiver to sell certain personal property; ordering the receiver to pay his compensation and attorney's fees, and to pay further specified bills amounting to $2,667.41; and ordering the receiver to hold any money remaining in his possession subject to the further order of the court.

[2, 3] The general principle applicable here is thus stated in Fish v. Fish, 216 Cal. 14, 13 P.2d 375: "Orders requiring the payment of money by the party complaining, or the doing of an act by or against him are usually regarded as final as against such party and may be appealed from by him." The respondent relies on such cases as Bakewell v. Bakewell, 21 Cal.2d 224, 130 P.2d 975; Shirley v. Cook, 119 Cal.App.2d 220, 259 P.2d 25; Swarthout v. Gentry, 73 Cal.App.2d 847, 167 P.2d 501; and Heck v. Heck Bros., 57 Cal.App.2d 599, 134 P.2d 853. The principle above cited was recognized in the Bakewell case, but it was there held that it sufficiently appeared from the judgment that a payment amounting to about $11,000 was directed to be made upon the entry of the final judgment thereafter to be rendered. In the other cases it sufficiently appeared that no final order was made. In the instant case, it appears that the appellant was directed to make substantial payments and to do certain things within five days, and the receiver was directed to take steps to enforce those provisions of the order. It sufficiently appears that portions of the order were final as against the appellant, and that he would be bound thereby in the absence of an appeal.

The motion for relief is granted and the clerk is directed to proceed with the preparation of the transcripts if the estimated costs are paid within ten days of the time this decision becomes final. The motion to dismiss the appeal is denied.

GRIFFIN and MUSSELL, JJ., concur.

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122 Cal.App.2d 699

PEOPLE v. RAVEY.

Cr. 2504.

District Court of Appeal, Third District, California.

Jan. 20, 1954.

Rehearing Denied Feb. 2, 1954.

Hearing Denied Feb. 17, 1954.

Defendant was convicted of operating a motor vehicle while under influence of intoxicating liquor, and with three prior convictions for same offense. The Superior Court, Merced County, Sischo, J., rendered judgment, and defendant appealed. The District Court of Appeal, Schottky, J., held, inter alia, that the evidence sustained the conviction.

Affirmed.

1. Criminal Law 🔑457

Opinion evidence as to intoxication may be given by layman as well as by expert.

2. Criminal Law 🔑1169(9)

Error, if any, in receiving evidence of allegedly unqualified witness as to percentage of alcohol in blood necessary to indicate influence of intoxicating liquor, could not have been prejudicial in view of fact that defendant's counsel used, in cross-examining such witness, chart showing relation between alcohol in blood and degree of intoxication, and offered same in evidence.

3. Automobiles ⇨355(6)

Conviction for driving while under influence of intoxicating liquor was sustained by evidence. Vehicle Code, § 502.

Philip O. Solon, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., by Gail Strader, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

An information was filed against appellant charging him with a violation of Vehicle Code Section 502, to wit: operating a motor vehicle while under the influence of intoxicating liquor, and also charging him with three prior convictions under the same section. Upon being arraigned in the Superior Court he entered a plea of "Not Guilty" to the offense charged and "Guilty" to the prior convictions. Prior to the commencement of the trial, appellant made a motion to withdraw his original plea and to plead (1) not guilty; (2) former conviction on included offense; and (3) former jeopardy. The court denied said motion and the trial proceeded before a jury which returned a verdict of guilty. The court ordered the matter referred to the Probation Officer and upon the hearing of his report granted appellant probation for a three-year term on the following conditions: "Serve 90 days in the County Jail; pay a $350.00 fine; when released keep honorably employed; obey all laws; refrain from the use of intoxicating liquor; and report regularly to the Probation Officer."

Appellant has filed a notice of appeal in which he states that he is appealing from the order denying change of plea, order denying determination of double jeopardy and the judgment and sentence made and entered. However, neither in his brief nor oral argument has appellant made any mention of his appeal from orders denying change of plea or determination of double jeopardy, so we may assume that appellant has rightfully concluded that there is no merit in those phases of his appeal and has abandoned them.

Appellant does, however, urge a number of grounds for a reversal of the judgment, and before discussing them we shall summarize briefly the evidence as shown by the record.

About 1:15 p. m. on May 23, 1953, appellant was driving an automobile along a city street in the City of Merced when he was stopped by Officer Shankland, a member of the city police force. The officer testified that appellant had failed to stop at a stop sign at the intersection of 15th and R Streets in that city, but appellant claims that it was another car, similar to his, which the officer saw. In any event, the officer stopped appellant, talked with him, had him get out of his car and walk back to the patrol car, arrested him and then took him to the police station. Shankland said he made the arrest because appellant had the odor of alcohol on his breath and was swaying and unsteady on his feet while walking back to the patrol car.

Appellant was questioned at the police station, and during the interrogation he gave his name and his address and stated that he had been drinking at a bar known as "Lake Yosemite", but had only had two drinks. His speech was jerky, but understandable, and his eyes were bloodshot. While sitting in a chair at the station, he either fell asleep or passed out and had to be aroused so that the officer could finish the report. He was given another walking test at the station and was unsteady on his feet. He was asked whether he wanted a blood test and when he said that he did he was taken to the General Hospital in Merced where a blood sample was taken from his arm. The sample was placed in a small vial which was sealed and, in turn, placed in a cardboard container which was given to Shankland who took it to the police station, addressed it to the Bureau of Criminal Identification and Investigation in Sacramento and mailed it. While being returned to the county jail from the hospital appellant fell asleep or passed out in the car. When he walked from the car to the jail, he was unsteady on his feet. The above recital of facts is based upon Shankland's testimony at the trial.

Appellant's condition was also observed by officers Grove and Grace and by Captain Buckingham of the city fire department, each of whom saw that appellant was unsteady on his feet. In addition, Grove and Buckingham each detected the odor of alcohol on appellant's breath.

Roger S. Green, a criminologist with the Bureau, was qualified as an expert witness. He testified that he received the blood sample and made two separate tests which showed that the alcoholic content of the blood was .29 of one percent by weight. This, he said, is roughly equivalent to the consumption of twelve bottles of beer or twelve one-ounce drinks of whiskey. He also testified, over appellant's objection, that a person having that much alcohol in his blood would necessarily be under the influence of alcohol.

Shankland, Grove and Buckingham each testified that he had observed many persons who were under the influence of intoxicants and each expressed the opinion, based on his observation of appellant, that the latter was under the influence of intoxicating liquor. Grace was not certain whether appellant's condition was due to intoxicants or drugs, but then Grace had not detected the odor of alcohol on appellant's breath. Shankland's opinion was given over appellant's objection. He was the first of the four to testify.

Appellant testified that he worked for the Southern Pacific Railroad as a signalman and that he was a disabled war veteran. He stated that he had a knee injury which affected his walking and made him sway; that he suffered from a nervous condition for which he took some pills called V. A. goof balls, prescribed by a doctor of the Veterans' Administration. He testified that he had taken four pills during the hour before 11:00 a. m. that day; that he had drunk only two bottles of beer and was not intoxicated; that uncertainty in his gait was due to his knee condition. He attributed his falling asleep to the effect of the pills.

Appellant called Dr. Max Brannan as a witness and the doctor testified that a man who had an alcoholic content of .29 in his blood would be drunk to the point that it would be difficult for him to stand or to think clearly. On cross-examination the doctor stated that appellant had been in his office several weeks before and told him he had one knee that had been hurt but that in watching him walk from the office he had not been able to observe any limp.

Appellant's wife testified that appellant suffered from a nervous condition for which he took some pills; that he seemed a little jittery that morning and at her suggestion took four of the pills; that he left the house about 12:15 p. m. and appeared to be driving normally; that he had a definite sway when he walked, more definite sometimes than others.

During its deliberations, the jury returned to the courtroom and the foreman told the judge that they had a problem. When asked wat the problem was, the foreman replied: "The question is in taking that blood test, is that the usual procedure that the officer be given the specimen to send out?" The judge advised the jury that there was no evidence as to what the usual procedure was and that he could not tell them.

The first claim of error is that the court erred in admitting the testimony of Officer Shankland on the issue of intoxication. The officer had testified that during his four years as a member of the Merced Police Department he had observed many persons under the influence of intoxicating liquor. He was then asked:

> "Q. Now, Sergeant, bearing in mind what you observed of Mr. Ravey's conduct on the 23rd day of May, 1953, did you form an opinion as to whether or not he was under the influence of intoxicating liquor?"

Counsel for appellant objected upon the ground that it "is incompetent, irrelevant and immaterial and he is asking the witness to invade the function of the jury." The court overruled the objection and the witness answered: "Yes, sir, he was drunk."

[1] Counsel for appellant then moved to strike out the answer, and in denying the motion the court stated: "Well, now, wait a minute. The Court recognizes this man as an expert witness and he is the only type of witness who can give his opinion in a

matter of this kind. Your objection is overruled." The ruling was correct but in giving his reason for the ruling the court, no doubt inadvertently, misstated the law. What the court undoubtedly meant was that the question of whether a person was intoxicated is not necessarily a matter of expert testimony as any layman can give his opinion based upon his own observation. However, we do not believe that upon the record here appellant suffered any prejudice by reason of the remark of the court. For it is now well settled that opinion evidence as to intoxication is not limited to expert testimony but is a matter about which any witness may express an opinion. People v. Clark, 106 Cal.App.2d 271, 279, 235 P.2d 56; People v. Hernandez, 70 Cal.App.2d 190, 192, 160 P.2d 564; People v. Moore, 70 Cal.App.2d 158, 164, 160 P.2d 857.

Appellant's next contention is that the court erred in admitting the testimony of witness Green with respect to the degree of intoxication as evidenced by a percentage of alcohol in the blood. At the trial, Roger S. Green testified as a witness for the prosecution that he is a criminologist employed with the State Department of Justice. He has been so employed since 1931, with the exception of three years' service in the armed forces. During this period he has made many tests of blood specimens to determine the alcoholic content of the blood, and has had years of experience and observation in determining such percentage of alcohol in the blood, and observing the degree of intoxication evidenced by various percentages of alcohol. He was then asked: "Mr. Green, could you tell the jury, based upon your studies and tests, what is the percentage of alcohol by weight that would mean that the person's blood that that came from would be under the influence of intoxicating liquor?" Appellant's counsel objected upon the ground that it was incompetent, irrelevant and immaterial and it was allowing an expert to usurp the function of the jury. The court overruled the objection and the witness replied: "The authorities generally accept .15 of one percent by weight, and over, as representing the point where a person is under the influence of alcohol." He was then asked the further question: "Mr. Green, would you be able to say from your tests whether or not the person from whose blood that was taken, that sample there, was under the influence of intoxicating liquor at the time tha sampling was taken?" A similar objection was made and overruled and he gave the following answer: "Yes, they should have necessarily have been under the influence of alcohol."

[2] Appellant argues that the witness Green, being only a chemist, was not qualified to give his opinion in answer to the question asked. On page 9 of the opinion in the case of Lawrence v. City of Los Angeles, 53 Cal.App.2d 6, 127 P.2d 931, at page 932, there is a chart showing the relation between alcohol in the blood and degree of intoxication. During the cross-examination of Green appellant's counsel examined him at length regarding this chart, displayed the chart to the jury and even offered it in evidence, so it is difficult to understand how appellant could be prejudiced by the answers of Green which were in accordance with the conclusions in the chart.

A large portion of appellant's brief is devoted to a general discussion having no bearing upon the specific issues involved in this appeal. Appellant's counsel refers eloquently to the sacred right of trial by jury, the Magna Carta, the glory of the English law, judicial brain washing of the jury, and other subjects, but as we read the record they are not involved in this appeal. Likewise, appellant's claim, running all through his brief, that he did not have a fair trial and is the victim of oppression is not borne out by the record, but is contradicted by the comparatively light sentence he received.

[3] We are satisfied from a careful study of the record that the appellant received a fair and impartial trial, that he was vigorously and ably defended, that no prejudicial error was committed, that the evidence as to his guilt was overwhelming, and that the judgment should be and is hereby affirmed.

PEEK, J., and PAULSEN, J. pro tem., concur.

122 Cal.App.2d 573

BAKER v. FLOTO.

Civ. 8329.

District Court of Appeal, Third District, California.

Jan. 18, 1954.

Action for dissolution of partnership and for an accounting. The Superior Court, San Joaquin County, Woodward, J., granted plaintiff a new trial on grounds of newly discovered evidence and insufficiency of evidence, and defendant appealed. The District Court of Appeals, Paulsen, J. pro tem., held that there had been no abuse of discretion in granting the order on either ground.

Affirmed.

1. New Trial ⚷150(4)

From affidavits showing, inter alia, that plaintiff had been suffering great pain from effects of surgery at time of trial, trial court to which motion for new trial on ground of newly discovered evidence was addressed, could reasonably have concluded that plaintiff and his attorney had exercised as much diligence as could be expected under circumstances and that without fault on their part vital evidence had not been produced.

2. Appeal and Error ⚷981
New Trial ⚷99

A wide latitude is given trial court in determining motion for new trial on ground of newly discovered evidence, and its ruling will not be disturbed unless it is manifest that there has been a gross abuse of discretion.

3. New Trial ⚷70

On record, trial court was justified in granting plaintiff a new trial, for insufficiency of evidence to support verdict, in his suit for dissolution of partnership and an accounting.

4. Appeal and Error ⚷989

It is not function of appellate court to compare conflicting testimony.

5. Appeal and Error ⚷948

Appellant has burden of showing an abuse of discretion on part of trial judge in granting new trial.

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Covey & Covey, Los Angeles, for appellant.

Lafayette J. Smallpage and Harold J. Willis, Stockton, for respondent.

PAULSEN, Justice pro tem.

Respondent commenced this action alleging that he and appellant orally entered into a partnership agreement to conduct a horse-racing stable and to train and race horses at recognized tracks; that the parties agreed to share equally in the profits and losses and equally to contribute capital and advances to the partnership; that respondent had contributed more capital and made more advances than appellant. He asked for a dissolution of the partnership and an accounting. Appellant denied the existence of a partnership and by way of a separate defense alleged that he had made loans to respondent and as security for said loans respondent had delivered to appellant written documents purporting to assign and transfer his one-half interest in three thoroughbred horses and all earnings, less expenses, received from the racing or the sale of such horses until such obligations were paid. The trial resulted in a judgment for appellant in the sum of $8,650, together with costs. Respondent moved for a new trial, which was granted, on the ground of newly-discovered evidence material to the respondent, and which could not, with reasonable diligence, have been discovered and produced at the trial; and also on the ground of insufficiency of the evidence to justify the verdict. This appeal is from that order.

In support of his motion for a new trial on the first ground, respondent offered numerous affidavits alleging the existence of public records and setting forth many statements of friends of the parties bearing directly on the question of the existence of a partnership—the only real question in the case. Appellant earnestly contends that there was absolutely no showing of due diligence or excuse for the failure to produce this evidence at the trial.

An examination of the affidavits discloses that some of the new evidence at least could easily have been produced at the trial if any reasonable effort had been made to procure it. On the other hand, respondent's affidavit shows that he is a veteran of World War II with a 100 per cent rating of disability; that within thirty days prior to the trial he had undergone surgery for the removal of a part of his stomach and intestines and during the trial and at the times when he was conferring with his attorney in course of preparation for it, he was in great pain and suffering from the effects of the surgery.

The affidavit of Joseph T. Moschella stated that shortly after the trial he heard of the court's finding that there was no partnership and after expressing his surprise he informed respondent of numerous statements made by appellant in which he had referred to the partnership and its operations.

[1] From these facts the trial court could reasonably conclude that respondent and his attorney had exercised as much diligence as could be expected under the circumstances and without fault on their part vital evidence had not been produced.

[2] A wide latitude is given the trial court in determining a motion for new trial on the ground of newly discovered evidence and its ruling will not be disturbed unless it is manifest that there has been a gross abuse of discretion. Carvalho v. Lusardi, 114 Cal.App.2d 733, 251 P.2d 37.

[3] Appellant contends that the evidence was "so inherently improbable, conflicting and contradictory as to constitute lack of any evidentiary support of the trial court's order granting said motion". In Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 358, 170 P.2d 465, 467, the court stated:

> "This court has recently reiterated the settled rule that the granting of a motion for a new trial rests within the discretion of the trial judge to such an extent that an appellate court will not interfere unless an abuse of discretion clearly appears. All presumptions are in favor of the order and it will be affirmed if it is sustainable on any ground. Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 169, 153 P.2d 338, and cases cited. The trial court in considering a motion for new trial is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party. Estate of Green, 25 Cal.2d 535, 542, 154 P.2d 692; Hames v. Rust, 14 Cal.2d 119, 124, 92 P.2d 1010. The only conflict may be the opposing inferences deducible from uncontradicted probative facts. In such case the trial court may draw inferences opposed to those accepted by the jury and may thus resolve the conflicting inferences in favor of the moving party, for 'It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court.' Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 307, 163 P.2d 689, 690; Malloway v. Hughes, 125 Cal.App. 573, 580, 13 P.2d 1062."

The following testimony given by respondent at the trial was sufficient as the basis of the exercise of the trial court's discretion:

> "Q. What was the conversation? A. Mr. Floto said 'Homer, let's go into partnership and race horses together.'
>
> * * * * * *
>
> "The Court: Q. What was to happen to them—I don't understand.
>
> "The Witness: A. We were to race the three horses and go into partnership.
>
> * * * * * *
>
> "Q. Just answer this question, Mr. Baker: were books kept by the partnership? A. There were books kept —check books.
>
> * * * * * *

"Q. Was there any conversation between you and Mr. Floto regarding your personal expenses during the period that you were acting for the partnership? A. Our agreement was—

"Mr. Covey: (Interrupting). Just a moment—say yes or no.

"Mr. Greenburg: Q. Yes or no. A. Yes.

* * * * * *

"Q. What was the conversation regarding the termination of your partnership—what did you say and what did he say? A. I met Mr. Floto and asked him for the money he owed me.

* * * * * *

"Q. Mr. Baker, in addition to the three horses that you originally put into the partnership, did you put any cash in at any time during the period of the partnership? A. Yes.

"Q. What was the first time you put money in and how much? A. The first time I contributed $4500.00 as the first part of our partnership. You have a record of it there.

* * * * * *

"Q. Did you put any other cash into the partnership? A. I put $8000.00 —I claimed Torella.

* * * * * *

"The Court: Q. What valuation did you place on them at the time you went into partnership?

"The Witness: A. They were worth about seven or eight thousand dollars.

* * * * * *

"Q. Coming back to my question about $8000.00, when did you put that into the partnership? A. November 5, 1949."

[4, 5] Appellant requests this Court to compare the testimony of respondent with that of appellant. This is not the function of an appellate court. Green v. Soule, 145 Cal. 96, 78 P. 337; Guderitz v. Boadway Bros., 39 Cal.App. 48, 177 P. 859. The burden of proving the existence of a partnership is not involved. The only burden is that which is on the appellant of showing an abuse of the discretion resting in the trial court. Thompson v. Pioneer Laundry Co., 54 Cal.App.2d 360, 128 P.2d 915.

There was no abuse of discretion in granting the order on either ground.

The order is affirmed.

SCHOTTKY and PEEK, JJ., concur.

122 Cal.App.2d 535

SMITH et al. v. RENZ.

Civ. 15660.

District Court of Appeal, First District, Division 1, California.

Jan. 18, 1954.

Action for declaratory judgment to determine how advance payment of principal on promissory note before installment payments were due should be applied. The Superior Court, San Francisco County, Herbert C. Kaufman, J., rendered judgment that advanced payment should be applied toward an equal amount of monthly installments, and the administratrix of the estate of the payee appealed. The District Court of Appeal, Finley, J. pro tem., held that advance payment must be considered as an advance payment of the first installment due only and did not affect remaining schedule of installment payments except to lessen principal sum by that amount and reduce number of installments remaining to be paid.

Reversed with directions to enter judgment in accordance with opinion.

1. Payment 🔑45

When payment is made on an obligation, unless there is some indication to the contrary, ordinarily the payment is to be applied to the part first coming due. Civ. Code, § 1479, subd. 3.

2. Contracts ⚷214

Where installment contracts provide for the payment of a specific amount or more at fixed intervals, an excess payment made prior to or on one installment date is not effective to reduce the amount of or obviate the necessity of paying subsequent installments as they fall due according to the agreed schedule.

3. Bills and Notes ⚷129(1)

Where note provided for monthly installment payments of $500, or more, advance payment of $23,500 made five years before any installments were due, was considered as an advance payment of the first installment payment of $500 or more and it did not affect remaining schedule of payments other than to reduce principal and to lessen number of installments to be paid.

◆

Young, Rabinowitz & Chouteau, Walter Chouteau, San Francisco, for appellants.

Hancock, Elkington & Rothert, San Francisco, for respondent.

FINLEY, Justice pro tem.

This action in declaratory relief concerns the application of a substantial advance payment of principal made on a promissory installment note nearly five years before any of the installments became due. The question of interest is not involved. The point to be decided is how this advance payment is to be applied on the principal amount. Appellant contends that it should be applied to the last installments which would otherwise have fallen due under the note, and not to the first installments, or, if this position is untenable, then application cannot extend beyond the first installment, leaving all those following to come due according to schedule and amount until the principal sum is paid. Respondents on the other hand contend, and the trial court found, that this advance payment should be applied "* * * toward the first forty-seven maturing $500 monthly installments * * *"

Appellant is administratrix of the estate of Walter J. Renz, deceased, the payee named in the note, and respondents are successors in interest to the assets of the Hotel Corporation of America, the obligor.

Prior to his death, Walter J. Renz and respondents were stockholders, officers and directors in the Hotel Corporation of America. Renz was offered the equity in an apartment building in Los Angeles in exchange for a ranch then owned by him. He agreed with the other directors that title should be taken in the name of the corporation. This was done and Renz took from the corporation the following installment note secured by a third deed of trust on the apartment building:

"$148,000.00 San Francisco, California,
June 20, 1947.

"In installments as herein stated, for value received, I promse to pay to Walter J. Renz, or order, at San Francisco California, the sum of—One Hundred Forty-Eight Thousand & no/100—Dollars, with interest from the date hereof on unpaid principal at the rate of—five—per cent per annum, payable monthly; principal payable in installments of—Five Hundred & no/100—Dollars *or more* on the first day of each and every month, beginning on the first day of July, 1952, and continuing until said principal and interest have been paid.

"Should interest not be so paid it shall thereafter bear like interest as the principal. Should default be made in payment of any installment of principal or interest when due the whole sum of principal and interest shall become immediately due at the option of the holder of this note. Principal and interest payable in lawful money of the United States. If action be instituted on this note I promise to pay such sum as the Court may fix as attorney's fees. This note is secured by a Deed of Trust to Southern California Escrow Company, a California corporation.

"Hotel Corporation of America
"By John R. Bickel and Norman Elkington
"Its Vice-President Its Secretary"
(Emphasis added.)

In September, 1947, Renz subscribed in writing for 235 shares of stock in the Hotel Corporation of America at $100 per share, totaling $23,500, and the following receipt was executed:

> "Receipt is acknowledged by the undersigned Walter J. Renz of *payment* by the Hotel Corporation of America in the amount of Twenty-Three Thousand Five Hundred & no/100 Dollars ($23,500.00) *on* the certain promissory note of Hotel Corporation of America to Walter J. Renz dated June 20, 1947 in the amount of One Hundred Forty Eight Thousand Dollars which said promissory note is secured by deed of trust dated ——— recorded in Volume ——— Official Records of Los Angeles County, page ——.
> "Dated: September 15, 1947
> "Walter J. Renz" (Emphasis added.)

Renz died in 1949, and through correspondence exchanged between the parties to this action it developed that there was a difference of opinion as to how the $23,500 credit should be applied on the note. The filing of this action followed.

In their briefs the parties devote considerable attention to the correspondence which had passed between them and its influence upon the problem here. We do not deem it necessary to discuss the points raised pertaining to it, for the solution is not affected thereby. The parties do not contend that we must look beyond the instruments upon which the indebtedness and credit are founded if by their own terms they provide the answer.

The note provides that principal is "payable in installments of—Five Hundred & no/100—Dollars *or more* on the first day of each and every month, beginning on the first day of July, 1952" and continuing until paid. (Emphasis added.) The subscription agreement provides for the $23,500 "to be paid for by cancellation of portion of corporation's indebtedness to me." The receipt by Walter J. Renz acknowledges payment of $23,500 "*on* the certain promissory note * * *" (Emphasis added.)

[1] When payment is made *on* an obligation, unless there is some indication to the contrary, the practical and ordinary interpretation must undoubtedly be that payment is to be applied to the part first coming due to be paid. No rule or logical reason has been offered as to why, in the ordinary course of events, it should be approached the other way around. It certainly would not seem to be the ordinary thing to do, and it must be assumed that if the parties intended to depart from the ordinary they would have specifically so provided. Section 1479, subdivision 3, of the Civil Code may be deemed to bespeak such public or legislative policy as may exist on the point though it is conceded that installment obligations are not specifically mentioned. It provides in effect that if several obligations exist between a debtor and creditor and a payment is made by the debtor without designation as to the obligation on which it is to be credited, and if the creditor does not made an election within a reasonable time, the law will apply the payment to the obligation earliest in date of maturity.

It would seem also to be stretching rules of construction and reason a bit to say that just because a payment was made in advance of the due date of the first of a number of installments it cannot be considered payment of the installment first coming due, but must, on the contrary, be credited directly to a number of installments which would not fall due for years to come. Appellant contends that this advance payment cannot be credited to an installment first coming due because the note does not provide that payments can be made on *or before* the dates specified. It would seem that this reasoning would apply with equal force to the last 47 installments to which appellant seeks to have the $23,500 applied.

If appellant's reasoning is sound, the note could be paid in full *on* any of the installment dates because it provides for payments of $500 *or more,* but because it does not provide that payments may be made on *or before* the installment dates, no payment at all can be credited to any *installment* unless paid *on* the actual due date. If it be said that this construction is too strict, then where in point of time is the line of distinction to be drawn? How long prior to the actual due date can a payment be made and still have legal standing as payment of an installment? Would it be a day, a week, or longer? The case of Hanson v. Fox, 155 Cal. 106, 99 P. 489, 20 L.R.A., N.S., 338, cited by appellant, is not in point and does not help us.

[2] In the absence of agreement to the contrary, it is undoubtedly the rule in installment cases providing for the payment of a specific amount *or more* at fixed intervals, that an excess payment made prior to or on one installment date is not effective to reduce the amount of or obviate the necessity of paying subsequent installments as they fall due according to the agreed schedule.

The case of Harman v. Walsh, 102 Cal. App.2d 608, 228 P.2d 333, 334, involved an agreement for the sale of real estate calling for payments of "$100.00 *or more* dollars, per month on the 1st day of September, 1945, and the first day of each succeeding month thereafter, until such time as the principal has been reduced the amount of * * * $1,605." Payments in excess of $100 were made for several months and then fell below that amount. Notice of default was given to the buyer and the right of the seller to declare the buyer in default was upheld, even though the total amount which had been paid to the seller exceeded the amount which would have been paid in required monthly payments. In discussing the point, the court said: "Appellants' only privilege was to pay 'more' than the stipulated sum on the first of any month; no privilege to pay 'less' than $100 in any one month is granted." 102 Cal.App.2d at page 611, 228 P.2d at page 335.

It will be noted in that part of the opinion just quoted, the court uses the language "* * * only privilege was to pay * * * *on* the first of any month * * *." The only question before the court was whether if the payor made an excess payment on one installment he was entitled to have the excess credited on those next successively following. It was held that he was not. The question of payor's right to make advance payment to apply only on the one installment next to become due was not involved. So even if the court there intended, by the use of this language, to restrict the payor's privilege to paying "*on*" the actual due date, it would be dicta and not binding as precedent here. Such a rule would be highly impractical, particularly in those instances where payments are sent by mail or from a distance. Law is reason and as far as is possible it should be tailored to practical living. It is not the purpose of the law to unnecessarily magnify technicalities into practical difficulties, where preferring the practical involves no substantial invasion of legal rights.

What was intended by the parties is manifest by the language in the receipt for stock executed by Walter J. Renz and accepted by the corporation. The $23,500 was acknowledged as "*payment * * * on* the note" which is singular, not plural. (Emphasis added.) Had the term *payments* been used it might then have been logically argued that the $23,500 was intended to be applied to a number of installments rather than only one.

[3] We are aware of no law or binding precedent to the contrary, and therefore hold that consistent with what we deem to be the intent of the parties the $23,500 must all be considered as an advance payment of the first installment of $500 *or more,* but that it does not in any wise affect the remaining schedule of installments provided in the note, other than to lessen the principal sum by that amount and consequently reduce the number of installments remaining to be paid.

Since the judgment of the trial court directed application of the $23,500 to the first 47 installments, instead of only the first, it must be, and it is, reversed with directions to the trial court to amend its findings and conclusions and to enter judgment in accordance with the views herein expressed.

PETERS, P. J., and BRAY, J., concur.

122 Cal.App.2d 636

McMURTRY v. LUCERO.

Civ. 8523.

District Court of Appeal, Third District, California.

Jan. 19, 1954.

Action on open book account. The Superior Court, Yolo County, McDonald, J., entered order dismissing plaintiff's appeal from judgment for defendant in justice's court, on ground that bond required to perfect such appeal had not been timely filed, and plaintiff appealed. Defendant moved to dismiss appeal. The District Court of Appeal, Van Dyke, P. J., held that the District Court of Appeal has no appellate jurisdiction in an action arising in a justice's court wherein an appeal lies to Superior Court, and hence could not review order dismissing appeal, entered by Superior Court in exercise of its appellate jurisdiction.

Motion granted.

Courts ⚷212

District Court of Appeal has no appellate jurisdiction in an action arising in a justice's court wherein an appeal lies to the Superior Court, and hence could not review order, entered by Superior Court in exercise of its appellate jurisdiction, dismissing plaintiff's appeal from judgment for defendant in justice's court on ground that bond required to perfect such appeal had not been timely filed. Const. art. 6, § 5.

Thomas E. Reynolds, Davis, for appellant.

Warren K. Taylor and Alice R. Taylor, Davis, for respondent.

VAN DYKE, Presiding Justice.

Respondent Lucero has moved to dismiss an appeal purportedly taken from an order of the Superior Court of Yolo County, by which order that court dismissed an appeal taken to it from a judgment rendered in the Justice's Court of the Davis Judicial District. The action was based upon an open book account in the sum of $85.81 and was, therefore, within the original jurisdiction of the justice's court under Section 112(a) of the Code of Civil Procedure. The case was tried in the justice's court, resulting in a judgment for defendant and the plaintiff, appellant here, attempted to take an appeal to the superior court on questions of both law and fact. Upon the ground that the bond required to perfect such an appeal had not been filed within the time allowed therefor the superior court granted a motion to dismiss the appeal. Appellate jurisdiction in respect to the judgment rendered in the justice's court was vested in the superior court. Sec. 5, Art. VI, Calif.Const. When the superior court made its order dismissing the appeal it was exercising its appellate jurisdiction. This Court does not have appellate jurisdiction in an action arising in a justice's court wherein an appeal lies to the superior court. Bartnett v. Hull, 19 Cal. App. 91, 95, 124 P. 885; Pool v. Superior Court, 2 Cal.App. 533, 84 P. 53; Unemployment Reserves Commission v. St. Francis Homes Ass'n, 58 Cal.App.2d 271, 137 P.2d 64; Harris v. Moore, 102 Cal.App. 413, 283 P. 76. The motion to dismiss the appeal attempted to be taken to this Court, therefore, must be granted. Appellant cites two cases in support of his claimed right of appeal. They are Heinlen v. Phillips, 88 Cal. 557, 26 P. 366, and Weill v. Light, 98 Cal. 193, 32 P. 943. These authorities are inapplicable. In both cases the appeal was taken from an order made by the superior court in the exercise of original jurisdiction in certiorari, whereby that court vacated orders of a justice's court made in excess of jurisdiction. The distinction is noted in Raisch v. Sausalito Land & Ferry Co., 131 Cal. 215, 216, 63 P. 346, where in dismissing an appeal attempted to be taken from a judgment of the superior court rendered in an action arising in the justice's court which had been appealed to the superior court on questions of both law and fact the Supreme Court said:

> "The constitution gives original jurisdiction to the superior court and appellate jurisdiction to this court in all cases at law in which the title or right of possession of real estate is involved, but denies such jurisdiction in those

cases at law in which the demand, exclusive of interest, is less than $300. The appellate jurisdiction of this court over the judgments of the superior court is limited to the cases in which that court is entitled to exercise original jurisdiction, and does not extend to a review of its action in which it exercises only an appellate jurisdiction."

The motion to dismiss the appeal herein is granted.

SCHOTTKY and PEEK, JJ., concur.

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122 Cal.App.2d 322

THOMASIAN
v.
SUPERIOR COURT IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO et al.

No. 15340.

District Court of Appeal, First District, Division 1, California.

Dec. 30, 1953.

Proceeding involving the jurisdiction of a municipal court to allow an amendment of a complaint increasing the demand beyond the jurisdictional limit of that court, validity of a superior court judgment annulling upon writ of review the municipal court order allowing amendment and the jurisdiction of the district court of appeal to review the action of the superior court in an original proceeding. The District Court of Appeal, First Appellate District, Division One, Fred B. Wood, J., held that the municipal court had jurisdiction to allow the amendment, that the superior court judgment was invalid and that the district court of appeal had jurisdiction to review the action of the superior court.

Judgment in accordance with the opinion.

1. Judgment 🔑501

A mere error of law if committed in a proceeding of which a court has jurisdiction does not of itself divest the court of jurisdiction to pronounce judgment.

2. Certiorari 🔑5(1)

Prohibition 🔑3(2)

A judgment rendered in the exercise of the general powers of the superior court would be appealable and reviewable only upon appeal and not by certiorari or prohibition. Code Civ.Proc. §§ 473, 1068.

3. Judgment 🔑276

A judgment if not entered in a judgment book of the superior court would require that petitioner make an appropriate application in the superior court for such an entry.

4. Courts 🔑190(8)

Where superior court rendered judgment in its appellate department annulling upon writ of review a municipal court order allowing an amendment increasing the demand beyond the jurisdictional limit of the municipal court, the judgment was in excess of the jurisdiction of the appellate department and was void. Const. art. 6, § 5; Code Civ.Proc. §§ 77a, 77b.

5. Courts 🔑190(8)

Appellate department of the superior court on appeal from the municipal court does not have jurisdiction so as to require a retrial in the superior court and hence may not render same or a different order of judgment of its own but is confined to an affirmance, modification, or reversal of the judgment of the municipal court. Code Civ.Proc. §§ 77a, 77b; Const. art. 6, § 5.

6. Courts 🔑50, 52

The judges of the superior court whether sitting separately or together hold but one and the same court and a transfer from one department to another is not a transfer of the jurisdiction of the cause which remains in the court as a single entity. Code Civ.Proc. §§ 77a, 77b; Const. art. 6, § 5.

7. Courts 🔑50

Where one department of a superior court is exercising jurisdiction, the other departments thereof are distinct therefrom as other superior courts and may not interfere with the exercise of jurisdiction of the other department. Code Civ.Proc. §§ 77a, 77b; Const. art. 6, § 5.

8. Certiorari 🔑28(2)

Certiorari is available to review a judgment rendered without jurisdiction or in excess of jurisdiction as distinguished from an erroneous judgment rendered in the exercise of jurisdiction. Code Civ. Proc. § 1068.

9. Mandamus 🔑31

Mandamus is appropriate to require the superior court in exercise of its general powers to assume jurisdiction to determine an original proceeding which was initiated by petition for a writ of review of an order of the municipal court allowing an amendment increasing the amount of demand beyond the municipal court's jurisdictional limit. Code Civ. Proc. §§ 77a, 77b, 473, 1068; Const. art. 6, § 5.

10. Mandamus 🔑31

Where municipal court allowed an amendment of a complaint increasing the demand beyond the jurisdictional limit of that court, mandamus was appropriate remedy to require the superior court in exercise of its general powers to assume jurisdiction of the original proceeding. Code Civ.Proc. §§ 77a, 77b, 473, 1068; Const. art. 6, § 5.

11. Prohibition 🔑30

Even if petitioner asked only for a writ of prohibition he would be entitled to relief warranted by the facts shown.

12. Prohibition 🔑27

Prohibition was not necessary to restrain a municipal court from vacating its order allowing an amendment increasing the demand beyond its jurisdictional limit and from proceeding with a trial of the action, since the superior court was not authorized to assume that the municipal court would not await a final determination of a petition for writ of review.

13. Courts 🔑170, 190(8)

A municipal court had power to allow an amendment increasing the amount of a plaintiff's claim to a sum in excess of that court's jurisdiction and the superior court in a review proceeding before it could properly act in such a manner only as would recognize and uphold that power. Code Civ.Proc. §§ 77a, 77b; Const. art. 6, § 5.

14. Pleading 🔑235

The statute giving courts power to permit amendments in furtherance of justice is to be liberally construed. Code Civ.Proc. § 473.

15. Pleading 🔑225(2)

The liberal policy of permitting amendments in the furtherance of justice is not affected by the fact that a general demurrer for failure to state a cause of action has been sustained. Code Civ.Proc. § 473.

16. Courts 🔑170

There is no lack of power in a municipal court to allow an amendment to a complaint which will deprive it of jurisdiction or which will give it jurisdiction it does not have over an action pending before it. Code Civ.Proc. § 473.

17. Courts 🔑170, 483

Under the statute as amended allowing transfer of an action to a court of competent jurisdiction where the court in which the action is pending lacks jurisdiction, an amendment increasing the ad damnum clause of the complaint in a municipal court to an amount above the jurisdictional limit of $3,000 is not prevented. Code Civ.Proc. § 396.

18. Courts 🔑483

The amendment to the statute respecting transfer of a cause when it appears from the pleadings that determination of the action will involve questions not within jurisdiction of the court, and providing that nothing in the statute should "preclude" or "affect" the right to amend pleadings as provided in the code, means that nothing in the statute prevents the exercise of the right to amend. Code Civ. Proc. § 396.

See publication Words and Phrases, for other judicial constructions and definitions of "Affect" and "Preclude".

19. Courts 🔑170, 484

Where petitioner in the municipal court found that his injuries were more serious than first believed, municipal court had jurisdiction to grant an amendment of the ad damnum increasing the amount beyond the jurisdiction of the municipal court in the furtherance of justice, and the consequent transfer of the cause to the superior court. Code Civ.Proc. §§ 77a, 77b, 89, 396; Const. art. 6, § 5.

◆

Lange & Rockwell, San Francisco, for petitioner.

Cooley, Crowley & Gaither, San Francisco, for respondent.

FRED B. WOOD, Justice.

This proceeding involves (1) the jurisdiction, if any, of a municipal court to allow an amendment of a complaint which increases the amount of the demand beyond the $3,000 jurisdictional limit of that court, (2) the validity of the judgment rendered by the superior court, or of its appellate department, annulling, upon writ of review, the municipal court order which allowed the amendment, and (3) the jurisdiction of this court to review the action of the superior court in an original proceeding as distinguished from an appeal from the superior court judgment.

A brief summary of the significant events as they occurred in the municipal and superior courts will facilitate the discussion of these questions. August 14, 1952, petitioner Thomasian filed in the municipal court, San Francisco, a complaint against Crowe Glass Company, a corporation, alleging that he was injured March 10, 1952, while on defendant's premises as a business invitee, and that his injury was caused by the negligence of the defendants to his damage in the sum of $3,000.

March 30, 1953, the plaintiff filed a notice of motion for leave to file an amended complaint increasing the amount of the ad damnum clause to $15,000 for general damages, in addition to special damages, and for an order to transfer the cause to the superior court. His affidavit in support of the motion stated that when he filed the original complaint the exact nature, extent, and permanency of his injuries were not known; that since that date it had developed that the injuries were more serious in nature, some of them permanent in character and that medical treatment would be required for an indefinite future time and could not reasonably be expected to afford a complete recovery.

April 3, 1953, these motions were heard by and submitted to the municipal court which, on April 28th, announced its decision granting them.

April 30, 1953, the defendant filed with the superior court of the city and county of San Francisco a petition for a writ of review alleging that the municipal court had made and entered its order granting said motion to amend and that such was an act in excess of the jurisdiction of the municipal court. That petition, upon filing in the superior court, was given a civil appeal number (No. 2271½).[1] Thereupon an order for the writ to issue was signed and filed by a judge of the superior court who was also a judge of the appellate department thereof. The order directed that a writ issue commanding the municipal court "to certify and return to this Court (Appellate Dept)" the pleadings, papers and other matters on file therein for review "by this Court" and requiring respondent meanwhile to desist from further proceedings including but not limited to the transfer of the cause. The writ was issued pursuant to this order, returnable May 8, 1953, requiring the respondent court to "certify and return to this Court (Appellate Dept)" the indicated pleadings, papers and other matters on file. May 1, 1953, defendant gave plaintiff written notice that the writ of review, served therewith, would be returned and the hearing would be had therein "in the court room of the above entitled Court, Appellate Department thereof."

May 4, 1953, a written order of the municipal court, signed by a judge of that court, was filed granting plaintiff's motion for leave to file his proposed complaint and ordering that the cause be transferred to the superior court, costs of transfer to be borne by the plaintiff. This order then concluded with this statement, "Motion granted and order made the 28th day of April, 1953, and presented for signature and signed this 4th day of May, 1953."

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[1] All subsequent orders made and the writ issued in that proceeding bore that number.

May 13, 1953, a document designated "Memorandum Opinion in re Petition for Writ of Review," signed by the presiding judge of the appellate department (the other two judges of that department concurring and signing) was filed. In this document the court discussed the issue of law presented by the petition for the writ; held that the municipal court had no jurisdiction to make the order in question and that there was no appeal from the order or other appropriate remedy other than by writ of review; and concluded "that the petition for writ of review should be and it is hereby granted. It is therefore ordered that the order of the Municipal Court granting the amendment to the complaint so as to increase the amount of the prayer beyond the jurisdiction of the said court be and the same is hereby annulled."

This document although labelled "memorandum opinion" has all of the characteristics of a final judgment in the review proceeding. No findings of fact were necessary. There was no issue of fact to be tried.

It further appears from a copy of the register of actions of the appellate department, superior court, San Francisco (certified May 26, 1953), that all of these review proceedings were entered in the register of the appellate department, namely: petition filed 4/30/53; writ issued 4/30/53; notice of return of writ of review filed 5/1/53; submitted 5/8/53; order of lower court annulled 5/13/53; remitittur issued and receipt filed 5/13/53. There is no entry indicating that this judgment has been entered in the judgment book.

Thereafter the clerk gave Thomasian written notice of the decision in the review proceedings. This notice was entitled "In the Superior Court of the State of California, in and for the City and County of San Francisco, Appellate Department" and was identified by the case name and the designation "On appeal from Municipal Court, No. 2271-½." It read as follows: "In the above entitled matter order amending complaint annulled on the 13th day of May, 1953."

I. The Validity and Reviewability of the Judgment Rendered in the Superior Court.

[1-4] The petition for writ of review in the superior court instituted an original proceeding which was within the jurisdiction of that court. As such, it invoked the general powers of the superior court, not the powers of the appellate department thereof. If that proceeding was conducted in the exercise of the general powers of the superior court and its judges, the judgment rendered would not be subject to collateral attack. A mere error of law, if committed in a proceeding of which a court has jurisdiction, does not of itself divest the court of jurisdiction to pronounce judgment. Cellulose Package Mfg. Co. v. Calhoun, 166 Cal. 513, 515-516, 137 P. 238, attempt of debtor to impeach a judgment, in a suit brought upon the questioned judgment; Gray v. Hall, 203 Cal. 306, 313-317, 265 P. 246, mandamus unavailable to review a judgment which had become final, even though the judgment would have been reversible upon appeal and the defect appeared upon the face of the record; Wells Fargo & Co. v. City, etc., of S. F., 25 Cal.2d 37, 40-44, 152 P.2d 625, motion to vacate judgment, made after expiration of the six-month period allowed by § 473, C.C.P., and in the absence of extrinsic fraud or mistake. Furthermore, certiorari is not available for the review of an appealable judgment or order, C.C.P., § 1068 and the "writ of prohibition cannot be used to review proceedings already completed." Big Jim Mines, Inc. v. Superior Court, 9 Cal.2d 503, 504, 71 P.2d 67. Accordingly, if the judgment here in question was rendered in the exercise of the general powers of the superior court, it would be appealable, and reviewable only upon appeal. Petitioner states in one of his briefs that it has not yet been entered in the judgment book of the superior court. If he is correct in this, his remedy would seem to lie first in the superior court by appropriate application for the making of such an entry.

However, the judgment in question was actually rendered by the appellate department of the superior court in the purported exercise of the jurisdiction of the appellate department; hence, in excess of the jurisdiction of that department and void.

The appellate department of the superior court was established pursuant to express constitutional sanction: "The superior courts shall have appellate jurisdiction in such cases arising in municipal and in justices and other inferior courts in their respective counties or cities and counties as may be prescribed by law. The Legislature may, *in addition to any other appellate jurisdiction of the superior courts, also provide for the establishment of appellate departments* of the superior court in any county or city and county wherein any municipal court is established, *and for the constitution, regulation, jurisdiction, government and procedure of such appellate departments*." Art. VI, § 5; last amended, 1928; Emphasis added.

The legislature exercised this authority by adding sections 77a and 77b to the Code of Civil Procedure, Stats.1929, ch. 475, p. 836. Section 77a declared that in the superior court of every county having three or more superior court judges wherein any municipal court is established "there shall be a department thereof to be known and designated as 'Appellate department of the superior court,' and which shall consist of three judges of such superior court, who shall be designated by the chairman of the judicial council, and who, in addition to their other duties, shall serve as such for the period specified in the order of designation, and one of whom shall be designated by the chairman of the judicial council as presiding judge thereof." As amended by Stats.1949, ch. 1516, p. 2698, effective at and after November 7, 1950, operative in January, 1952; later carried into the Government Code as § 69540 without substantial change by Stats.1953, ch. 206, p. 1238 at 1252, effective Sept. 9, 1953.

The jurisdiction of the appellate department is defined by section 77b: "The appellate department * * * shall have appellate jurisdiction on appeal from municipal and justice courts established within the county * * * wherein such appellate department is established, in all cases in which an appeal may be taken to the superior court, as is now or may hereafter be provided by law, except on such appeals as require a retrial in the superior court. The powers of such appellate department shall be the same as are now or may hereafter be provided by law relating to appeals to the superior courts. The presence of two judges of such department shall be necessary to transact any business, except such as may be done at chambers, and the concurrence of two judges shall be necessary to pronounce a judgment. The presiding judge of such appellate department may convene the court at any time and shall supervise the business of the department. Rules governing practice and procedure and the disposition of the business of such department shall be made by the judicial council." (Last amended by Stats.1951, ch. 1737, p. 4080 at 4082–4083; amendment operative Jan. 1, 1952.)

Pursuant to this authority, the judicial council has adopted a special set of rules governing the "Appellate Departments of a Superior Court," dealing with the frequency of its sessions, the powers of the presiding judge, and the acting presiding judge of the department, calendars, notices and motions, briefs, decisions, rehearings, judgments for costs, and the issuance, stay of issuance and recall of the remittitur. (Rules adopted in 1929; last amendments effective September 15, 1945.)

[5] "The appellate department of the superior court does not have jurisdiction 'on such appeals as require a retrial in the superior court' (Code Civ.Proc. sec. 77b), and hence may not render the same or a different order, judgment or decree of its own, but is confined to an affirmance, modification or reversal of the judgment etc. of the trial (in this case municipal) court. If the superior court does not conduct a new trial, but merely affirms or reverses a judgment its appellate jurisdiction is similar to that of any appellate court. Portnoy v. Superior Court, 20 Cal.2d 375, 125 P.2d 487." Unemployment, etc., Comm. v. St. Francis,

etc., Ass'n., 58 Cal.App.2d 271, 275, 137 P.2d 64, 66.

We have here a picture of a distinct and separate department of the superior court (a species of entity) with jurisdiction and powers defined by statute pursuant to express constitutional sanction, limited to the consideration of "appeals" from the municipal court not requiring a retrial, hence not embracing jurisdiction to review a municipal court judgment through the medium of an original proceeding.[2]

[6] This presents a situation quite different from that presented in those cases which hold that from the standpoint of jurisdiction and power to act, the superior court is not divided into separate and distinct "departments." Those cases appropriately hold, in the situation to which they apply: "Jurisdiction is vested by the Constitution in the court, not in a particular judge or department. It further provides that there may be as many sessions of the court as there are judges. Whether sitting separately or together, the judges hold but one and the same court. The division into departments is for the convenient dispatch of business. Ransome-Crummey Co. v. Wood, 40 Cal.App. 355, 180 P. 951. A transfer from one department to another is not a transfer of the jurisdiction of the cause, which remains at all times in the court as a single entity. Graziani v. Denny, 174 Cal. 176, 162 P. 397."

Tubby v. Tubby, 202 Cal. 272, 276, 260 P. 294, 296. See also White v. Superior Court, 110 Cal. 60, 66–68, 42 P. 480; Gunn v. Giraudo, 48 Cal.App.2d 622, 630–631, 120 P.2d 177; Macmillan Petroleum Corp. v. Griffin, 99 Cal.App.2d 523, 222 P.2d 69, and People v. Connolly, 103 Cal.App.2d 245, 248, 229 P.2d 112. Even as to the "department" concerning which the courts in the cited cases were speaking, there are certain limitations. Thus, where a particular proceeding has been duly assigned to one department by the presiding judge and has not been finally disposed of therein or legally removed therefrom, "it is beyond the jurisdictional authority of another department of the same court to interfere with the exercise of the power of the department to which the proceeding has been so assigned. [Citation.] In other words, while one department is exercising the jurisdiction vested by the Constitution in the superior court of that county, the other departments thereof are as distinct therefrom as other superior courts." Williams v. Superior Court, 14 Cal.2d 656, 662, 96 P.2d 334, 338. The superior court acting as a juvenile court upon a petition which invokes the juvenile court's jurisdiction over a minor under 18 years has no authority to place him on probation because it has no jurisdiction to try him for a public offense and the power to grant probation comes after conviction of a public offense. In re Hulbert, 123 Cal.App. 362, 365, 11 P.2d 50. Where the limits of the special powers of the juvenile court are reached, it is the duty of the judge thereof to transfer to an appropriate department for hearing and determination the issues which are beyond the jurisdiction of the juvenile court. People v. Superior Court, 104 Cal. App. 276, 279–282, 285 P. 871. In People v. Sanchez, 21 Cal.2d 466, 132 P.2d 810, the reviewing court said of a certain minor and the jurisdiction of the juvenile court department over him: "When defendant was declared a ward of the juvenile court, he became subject to its continuing jurisdiction. Whatever power the superior court had over him was thereby vested in the juvenile court, and until the latter remanded his case for disposition under the general law no other department of the superior court acting in a general capacity had the jurisdictional authority to act upon the matter." 21 Cal.2d at page 471, 132 P. 2d at page 813.

That reasoning applies with special force to action taken by the "appellate department" in a proceeding not within the subject matter of its jurisdiction.

Although each of the judges assigned to an appellate department, just as any other judges of the superior court, may exercise the general powers of the court, it would not seem competent for them in their appellate department capacity to entertain and act upon an original proceeding, as was done in the instant case. The fact that the proceeding in which they thus acted was the review of a municipal court order did not make it any the less an *original* proceeding than if it had been a criminal action instituted by indictment or information in the superior court or the trial of a civil action instituted by complaint in the superior court and in no way connected with or bearing upon any judgment or order of the municipal court.

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[2] The constitutional grant of power to issue writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus still runs to the "superior courts" and "their judges," not to the appellate department. Art. VI, § 5.

In the instant case the petition for writ of review as prepared for presentation to the superior court was, as to its form, its caption and its contents, a petition which properly invoked the general jurisdiction and powers of the superior court, not those of the appellate department. But from the moment of its filing it was treated as if an appellate department matter in the same full sense as if it were an appeal from the municipal court which did not involve a retrial in the superior court. The conclusion seems inescapable that the judges participating in the decision were acting in the exercise of the jurisdiction and powers of the appellate department, not in the exercise of the general jurisdiction and powers of the superior court, and that the resultant judgment was rendered by the appellate department in excess of its jurisdiction and void.

Thus, it clearly appears that the superior court of the city and county of San Francisco has before it the petition for writ of review which Crowe Glass Company presented for filing on April 30, 1953; that the action taken thereon by the appellate department is nugatory and of no effect; and that the superior court should be directed to assume jurisdiction over said petition and duly and regularly proceed with the consideration and disposition of the petition in the exercise of the general powers of the superior court.

[8] Certiorari is available for the review of a judgment rendered without jurisdiction or in excess of jurisdiction, as distinguished from an erroneous judgment rendered in the exercise of jurisdiction. Williams v. Superior Court, 14 Cal.2d 656, 658, 96 P.2d 334; Fortenbury v. Superior Court, 16 Cal.2d 405, 106 P.2d 411, and cases therein cited.

[9] Mandamus is appropriate to require the superior court, in the exercise of its general powers, to assume jurisdiction over and to hear and determine the original proceeding which was initiated by the petition of Crowe Glass Company for a writ of review. Katenkamp v. Superior Court, 16 Cal.2d 696, 698, 108 P.2d 1; Harrison v. Superior Court, 3 Cal.App.2d 469, 471, 39 P.2d 825.

[10, 11] The facts shown herein warrant both forms of relief, and petitioner asks for a "Writ of Prohibition or such other extraordinary writ as may be proper in the premises" and "for such other, further and different relief as may be deemed meet, just and proper in the premises." Even if he had asked only for a writ of prohibition, he would be entitled to the relief warranted by the fact shown. Sekt v. Superior Court, 24 Cal.2d 73, 77, 147 P.2d 568.

[12] Petitioner urges that a peremptory writ of prohibition should issue to restrain the municipal court from vacating its order which allowed his amendment, and from proceeding with the trial of the action. He alleges that upon the rendition of the appellate department judgment, Crowe Glass Company moved the municipal court to vacate the order which allowed the amendment; that upon submission of the motion the judge of the municipal court stated he considered himself bound by the decision of the appellate department of the superior court and had no alternative but to vacate the order in question; and that the municipal court "has ruled that unless prohibited that it will enter its order annulling its order of April 28, 1953, * * * on Friday, the 22nd day of May, 1953." The situation has obviously changed in view of the annulment of the appellate department judgment. We have no basis for assuming that the municipal court will not await final determination of the Glass Company's peti-

tion for writ of review. No writ need issue to the municipal court. The alternative writ of prohibition heretofore issued herein should be discharged.

[13] We have considered the municipal court jurisdictional question and have come to the conclusion that the municipal court has power to allow an amendment which increases the amount of a plaintiff's claim to a sum in excess of that court's jurisdiction, and that the superior court in the review proceeding before it, may properly act in such a manner only as will recognize and uphold that power. Therefore, in furtherance of justice and in fairness to the parties and the respondent court, we should and do decide that question. See Rescue Army v. Municipal Court, 28 Cal.2d 460, 467, 171 P.2d 8.

II. The Power of the Municipal Court To Allow an Amendment of a Complaint Which Increases the Demand to an Amount in Excess of the Jurisdictional $3,000 Limit of That Court.

The right to amend a pleading finds expression in sections 469, 472, 472a and 473 of the Code of Civil Procedure. Leave of court is not required under section 472 (amendments as of course) but is required under section 469 (to conform to proof), section 472a (upon sustaining a demurrer), and section 473, upon application, to add or strike the name of a party, to correct a mistake, or to amend "in other particulars", allowable by the court "in furtherance of justice, and on such terms as may be proper".

[14, 15] "This statutory provision [§ 473] giving the courts the power to permit amendments in furtherance of justice has received a very liberal interpretation by the courts of this state. [Citations.] This position is clearly in accord with the modern theories of code pleading, which would permit amendment in the discretion of the court unless an attempt is made to present an entirely different set of facts by way of the amendment. [Citation.] Nor is this liberal policy of permitting amendments in furtherance of justice any different merely because a general demurrer for failure to state a cause of action has been sustained. 'For the most common kinds of amendments are those in which complaints are amended that do not state facts sufficient to constitute a cause of action.' [Citations.]" Klopstock v. Superior Court, 17 Cal.2d 13, 19–20, 108 P.2d 906, 910, 135 A.L.R. 318. "Liberality in the allowance of an amendment to a pleading is the rule rather than the exception; and in a case where such an amendment can be made in furtherance of justice without jeopardizing the rights of an adverse party, it should be allowed. This, of course, assumes that neither the cause of action nor the issues involved therein will be radically changed by the proposed amendment. [Citation.]" Abbott v. Limited Mut. Comp. Ins. Co., 30 Cal.App.2d 157, 161–162, 85 P.2d 961, 963. "Great liberality is allowed with respect to amendments at the trial if the defendant is not prejudiced thereby and the ends of justice will be subserved provided the issues to be decided are not wholly changed." Genger v. Albers, 90 Cal.App.2d 52, 55, 202 P.2d 569, 571.

[16] Neither the statutes nor the reported decisions of this state that have come to our attention indicate a lack of power in a court to allow an amendment which will deprive it of jurisdiction or which will give it jurisdiction it does not have over an action pending before it.

Indeed, in one case the Supreme Court affirmed a judgment in an action in which the superior court had allowed the plaintiff to amend his complaint by converting his cause from an action at law for damages of less than the jurisdictional $300 minimum to a suit in equity for an accounting of trust funds, thus bringing it within the jurisdiction of the court in which pending. Porter v. Fillebrown, 1897, 119 Cal. 235, 51 P. 322. In another case the Supreme Court approved the action of the superior court in denying leave to amend the demand of a complaint upwards from $625 to $1,500 because of an insufficient basis in fact, not for lack of power in the court to allow it in a proper case: "On the face of the proffered amendment, which asked nearly three times the amount in suit, the court was justified in holding it was clearly an attempt to retain the cause in the superior court without regard to the substantiality of the amendment. In this ruling the court did not err." Philpott v. Superior Court, 1934, 1 Cal.2d 512, 526, 36 P.2d 635, 642, 95 A.L.R. 990. In neither case was there specific discussion of the power of the trial court to allow an amendment that would bring the action within its jurisdiction, but the possession of such a power seems implicit from the treatment accorded the action of the trial court.

Then there are two cases of amendments which demonstrated lack of jurisdiction of the action, resulting in a duty of the court to dismiss. In Smith v. Chin Chew, 1927, 81 Cal.App. 704, 254 P. 599, the original complaint alleged that defendant had become indebted in the sum of $427.55 but failed to allege the amount still due and owing, a lack which plaintiff was given leave to fill by amendment. His amendment showed payments which reduced the debt to $139.30, less than the court's jurisdictional $300 minimum. The case was tried. Judgment against plaintiff was rendered upon the ground that he had accepted part payment in full satisfaction. The reviewing court indicated some doubt whether that was a proper ground in fact, but affirmed because the trial court did not have jurisdiction, saying, "by amending the complaint, which did not state a cause of action, the plaintiff stated a cause of action showing jurisdiction only in the justices' court. The motion of the defendant Chun Hee Tong to dismiss should have been granted, but, as the court entered judgment that the plaintiff take nothing against said defendant by reason of his action, it follows that the judgment of the trial court should be, and the same is hereby, affirmed." Page 708 of 81 Cal.App., page 600 of 254 P. This is not an express holding that a court may allow an amendment which ousts it of jurisdiction, but the existence of such a power seemed implied. In A. Hamburger & Sons, Inc. v. Kice, 1933, 129 Cal.App. 68, 18 P.2d 115, a demurrer to the complaint was sustained with leave to amend. The amended complaint alleged a sufficient cause of action for an amount less than $2,000, hence within the jurisdiction of the municipal court, not the superior court. A demurrer to the amended complaint was sustained on the sole ground of lack of jurisdiction. The judgment entered thereon was affirmed. Again, the existence of a power in the trial court to allow an amendment which ousts it of jurisdiction seems implicit from the decision rendered.

Crowe Glass Company, the real party in interest herein, relies upon Wells Fargo Bk. & U. T. Co. v. Broad, 3 Cal.App.2d 45, 39 P.2d 241, and Gardiner v. Royer, 167 Cal. 238, 139 P. 75, neither of which is applicable. In the Wells Fargo Bank case the court did say that "determination of the question of jurisdiction depends upon the amount claimed in the *ad damnum* clause of the complaint [citations] at the time of the commencement of the action [citation], and does not depend in any way upon the amount found upon trial to be due [citations]." Page 46 of 3 Cal.App.2d, page 241 of 39 P.2d. The court was answering the erroneous contention that a court which initially had jurisdiction, upon a complaint demanding more than $300, lost jurisdiction when it found less than $300 due and owing. Also, the question of power to allow an amendment was not involved. The situation in the Gardiner case was similar. The reviewing court held that if the amount of the demand in the complaint (made in good faith and reasonably supported by the allegations of the complaint) exceeded $300, the superior court had jurisdiction and did not lose jurisdiction "by the establishment to the satisfaction of the court of a defense to the whole or any portion of the claim, whether by demurrer, or by evidence on the trial." Page 244 of 167 Cal., page 78 of 139 P. Again, no amendment of a pleading was involved.

Decisions in other states are of no real assistance. They vary greatly, due it would seem to the varying provisions of applicable statutes and the facts peculiar to each case. See the cases cited in 21 C.J.S., Courts, § 69, at pp. 90–103, and in 15 C.J., Courts § 55, at pp. 759–760, and Courts § 73, at pp. 776–779.

Crowe Glass Company relies upon three cases[3] from other states, but they are not persuasive. Each involved a judgment rendered in an amount exceeding the trial court's jurisdiction, after the allowance an amendment in an excessive amount. In each case the reviewing court remitted the excess over the jurisdictional amount. In none was there any analysis of constitutional or statutory provisions concerning jurisdiction, power to amend, or power to allow amendments, and no mention of any power to transfer a cause to a court that would have jurisdiction. The mere statement of these factors shows the inapplicability of those cases.

Thus far we have considered the scope of the power of amendment without reference to section 396 of the Code of Civil Procedure. It was amended in 1933 to allow the transfer of an action to a court of competent jurisdiction when it appears that the court in which pending lacks jurisdiction, whether it so appears at the commencement of the action or thereafter.

[17] The first paragraph of § 396 deals with such a transfer when an action is "commenced" in a court lacking jurisdiction of the subject matter "as determined by the complaint".

The second paragraph provides for the transfer of an action commenced in a court having jurisdiction of the subject matter, "as determined by the complaint", when it thereafter appears from the "verified pleadings" or "at the trial, or hearing," that the determination of the "action" or of a counterclaim or of a cross-complaint "will necessarily involve the determination of questions not within the jurisdiction of the court" in which the action is pending. The word "pleadings" includes the complaint as well as counterclaim or cross-complaint. If in the type of case to which the second paragraph of the section applies, subject matter not within the jurisdiction of the court appears in the "verified complaint," it could get there only by amendment of the original complaint because the original complaint showed no lack of jurisdiction. Therefore the second paragraph seems to sanction an amendment which increases the *ad damnum* clause of the complaint in a municipal court to an amount above the jurisdictional $3,000. It certainly does not prevent such an amendment.

Greater reason for such an interpretation appears when we compare this paragraph with the provisions of the antecedent statute, former section 838[4] of the Code of Civil Procedure. We find a marked enlargement in scope. Section 838 provided that "if it appear, from the *answer* of the defendant, *verified* by his oath, that the determination of the action will necessarily involve" certain questions beyond the jurisdiction of the justice's court, "the justice must suspend all further proceedings * * * and certify the pleadings * * to the clerk of the superior court of the county * * *." (As amended by code amendments 1880, ch. 34, p. 18; emphasis added.) The enlargement from "answer * * *, verified by his oath" (§ 838) to "verified pleadings" (2nd paragraph of § 396) lends emphasis to the view we have expressed.

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[3] Avery v. Ginsburg, 1917, 92 Conn. 208, 102 A. 589; Wilson v. White, 1906, 77 Neb. 351, 109 N.W. 367; and Siedel v. Muehlenbrink, 1927, 220 App.Div. 69, 220 N.Y.S. 621.

[4] Section 838 was repealed by the very act which amended section 396 to provide for transfer. Stats.1933, ch. 744, p. 1836, at p. 1904. The bill which became chapter 744 amended various portions of the Code of Civil Procedure, including § 396. It was prepared by the California Code Commission.

The Commission in its notes to that bill as prepared and distributed prior to the 1933 session, said, in part, concerning sections 396 and 838:

"Section 396 is new. At present if an action is begun in a court which lacks jurisdiction the action must be *dismissed.* (The provision for transfer of certain mechanics' liens cases when begun in municipal courts, and for transfer from justices' courts when defendant's answer brings in questions of title to real estate (see § 838, C.C.P.—*probably impliedly repealed by the 1929–1931 Amendments to § 112,* C.C.P.) constitute, it is believed, the only exceptions.) It is submitted that the court in which the action is commenced in such cases should be able to transfer it to the proper court, the costs to be borne by the plaintiff. Such transfer should, of course, be mandatory.

"In cases where, due to developments subsequent to the commencement of the action, it appears that the court in which the action is pending lacks jurisdiction, provision is made for transfer to the proper court. Such a provision has been in our code since 1880 (838, C.C.P.), limited, however, to justices' courts. It should, it is submitted, be made generally applicable."

[18] However, we must consider the possible effect of a certain amendment to § 396 made in 1935, one which inserted the following as the fourth paragraph of the section: "Nothing herein shall be construed to preclude or affect the right to amend the pleadings as provided in this code." The use of the word "preclude" means that nothing in the section prevents the exercise of the right to amend. If "affect" is used in the sense of "adversely affect," it means the same. In that case the other provisions are left free to enlarge the right of a party to amend and the power of the court to allow amendments.[5] But if "affect" is used in the sense of "directly affect" it would seem to prevent the other provisions from operating as an enlargement of the right to amend, leaving that right to depend for its creation upon other provisions of the law. Even if so, the practical result is substantially the same, for the 1935 insert places no limitation upon the "jurisdiction" which the other provisions of the section confer, the most significant of which is the power to transfer an action if the court in which it is pending lacks or loses jurisdiction of the subject matter. The existence of that power operates to remove a barrier to the exercise of the right to amend in a given situation; e. g., the removal of a legal barrier if a proposed amendment and the resultant dismissal of the action would jeopardize the rights of the opposite party; the removal of a practical barrier, when a plaintiff discovers his demand is too small and the statute of limitations has run against his filing anew in a court having jurisdiction of the larger amount. The latter is the type of case here involved.

In the municipal court petitioner Thomasian, in behalf of his proposed amendment, represented that developments since the filing of his complaint demonstrated that his injuries were far more serious than they at first seemed to be. No counter affidavit was presented, insofar as the record herein

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In that same note the Code Commission cited the statutes of 2 states and the rules of one state which allowed transfers in similar situations. They also quoted from a decision in one of those states (Mass.) which upheld the constitutionality of the statute and recognized it as adopted "in furtherance of a policy frequently exemplified in legislative acts to enable a party who has brought a cause seasonably to try it upon its merits, notwithstanding defects in the form or substance of pleadings, or error in the remedy asked, or mistake in the tribunal invoked, rather than to compel him to begin it anew. * * *" Browne v. Browne, 215 Mass. 76, 102 N.E. 329, 330.

That note concludes with this statement: "It should be noted that § 838, C.C.P. (in the code since 1880) provides for transfer from a justices' to the superior court in cases where certain questions beyond the jurisdiction of justices' courts arise. This provision has never been questioned."

[5] The word *affect* is "often used in the sense of acting injuriously upon persons and things * * *." Ryan v. Carter, 93 U.S. 78, 84, 23 L.Ed. 807. Of a proviso in a certain statute that nothing contained in the act shall "'* * * be construed to *affect or impair* the rights of any individual * * *, which are derived from any grant of the French or Spanish Governments,'" the court in Tyler v. Wells, 2 Mo.App. 526, at page 538, said, "clearly nothing was forbidden by this act that did not tend to 'affect or impair the rights,' etc., of any prior claimant. If the necessary or accidental operation of the section to which this proviso was annexed were to *validate and strengthen* the rights of a prior claimant, no one, we think, would dream that such operation was hindered by the proviso."

discloses. The judge believed that those representations were made honestly and in good faith. Should he deny the application and thereby forever preclude plaintiff from recovering more than $3,000 even though at the trial it might develop that plaintiff suffered damages in a much greater amount? The time had gone by within which plaintiff could dismiss this action and file anew in the superior court without facing the bar of the statute of limitations. The judge, in granting the motion, impliedly found that the amendment would be "in furtherance of justice" and that its allowance and the consequent transfer to the superior court would not jeopardize the rights of the opposite party.

[19] We conclude that the municipal court has power to allow the amendment of a complaint which increases the demand to an amount greater than the $3,000 which under § 89 of the Code of Civil Procedure that court has jurisdiction to consider and determine. Such an amendment must of course meet the tests applied in other types of cases; e. g., its allowance must be in furtherance of justice. We are not here reviewing the order made in the municipal court in this case. That is the function of the superior court in the proceeding still pending before it, initiated by the petition of Crowe Glass Company for a writ of review.

The alternative writ of prohibition is discharged. The judgment rendered by the appellate department of the superior court in May, 1953, is annulled. Let a peremptory writ of mandamus issue directing the respondent superior court, not the appellate department thereof, to assume and exercise jurisdiction over the original proceeding in certiorari which was initiated by the petition of Crowe Glass Company for a writ of review of the municipal court order which granted petitioner leave to amend his complaint.

PETERS, P. J., and BRAY, J., concur.

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122 Cal.App.2d 680

PEOPLE
v.
ONE 1951 FORD SEDAN, NO. BIRH110022 et al.

Civ. 15676.

District Court of Appeal, First District, Division 1, California.

Jan. 20, 1954.

Hearing Denied March 17, 1954.

Proceeding to forfeit the interest of an automobile used in the unlawful transportation of narcotics wherein the registered and legal owner intervened claiming the automobile. From an adverse judgment in the Superior Court in and for the County of Alameda, Ledwich, J., the intervenor and claimant appealed. The District Court of Appeal for the First Appellate District, Division One, Peters, P. J., held that where the owner of an automobile rented it to a bailee who in turn entrusted it to a malefactor who used the automobile illegally to transport narcotics the interest of registered owner was properly forfeited.

Judgment affirmed.

1. Appeal and Error ⟹717

While the opinion of a trial court cannot be used to impeach findings, it can be used to explain them.

2. Appeal and Error ⟹717

Where in memorandum opinion the trial judge stated that in violation of automobile rental agreement the bailee "loaned the automobile to a friend of hers," such phrase did not contradict the phrase "loaned and permitted a third party" to use the automobile appearing in the settled statement, but explained it so that the reviewing court would assume that the borrower was not employee of the bailee.

3. Forfeitures ⟹2

The statutes forfeiting interest of innocent owners or lienholders in vehicles used to transport narcotics are constitutional. Health and Safety Code, § 11610.

4. Forfeitures ⟹5

In proceeding to forfeit an automobile for use in the unlawful transportation of narcotics burden of proof to show lack of consent is on the owner of the automobile. Health and Safety Code, § 11610.

5. Forfeitures ⚷3

In proceeding to forfeit an automobile for use in the unlawful transportation of narcotics a limited or qualified consent of the owner of the automobile or the fact that bailee exceeded the limitations of the permission granted is not sufficient to avoid forfeiture. Health and Safety Code, § 11610.

6. Automobiles ⚷339

To constitute a felony under the Vehicle Code in the unauthorized taking or stealing of an automobile, there must exist a specific intent to deprive the true owner of title to or possession of the automobile, and while an intent to steal need not exist, intent to permanently or temporarily deprive the owner of title or possession of vehicle must be shown. Vehicle Code, § 503.

7. Forfeitures ⚷9

In proceeding to forfeit a rented automobile used in the unlawful transportation of narcotics, fact that the rental agreement prohibited the bailee from allowing anyone other than bailee or her employee to drive the automobile without the consent of the bailor and fact that borrower drove the automobile with consent of bailee and that bailor had not consented did not establish that borrower was guilty of a felony in operating automobile so as to justify remission of forfeiture where it did not appear that borrower acted with intent to deprive bailor of title or possession to automobile. Health and Safety Code, § 11610; Vehicle Code, § 503.

8. Constitutional Law ⚷70(1)

It is not for the courts to revise a statute by creating exceptions not provided by the legislature or compelled by constitutional restraint.

9. Forfeitures ⚷3

Where an owner entrusts an automobile to a borrower, who uses the automobile contrary to the terms of the bailment, for an illegal purpose, the interest of the owner will be forfeited. Health and Safety Code, § 11610.

10. Forfeitures ⚷3

The taking from the owner without his consent, or possession of narcotics by a passenger unknown to the owner or borrower of his vehicle do not authorize a forfeiture of the automobile. Health and Safety Code, § 11610.

11. Forfeitures ⚷3

Where the owner of an automobile rented it to a bailee who in turn entrusted it to a malefactor who used the automobile illegally and contrary to the terms of the rental agreement to transport narcotics the interest of legal and registered owner was properly forfeited notwithstanding lack of consent of the owner to the illegal use. Health and Safety Code, §§ 11610, 11619, 11620; Vehicle Code, § 503.

◆

Sullivan, Roche, Johnson & Farraher, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Ralph Scott, Dep. Atty. Gen., Charles A. Barrett, Atty. Gen., and Malcolm Barrett, San Francisco, for respondent.

PETERS, Presiding Justice.

This appeal presents the following question: Can the state forfeit the interest of an owner of an automobile where the owner rents the automobile to a bailee, who, in turn, entrusts it to a malefactor, who uses the car, illegally, and contrary to the terms of the rental agreement, to transport narcotics? The trial court answered this question in the affirmative and forfeited the interest of the registered and legal owner, who is the intervener. The intervener appeals.

The appeal comes to us on a settled statement. In addition, the trial court wrote a memorandum opinion that is included in the record. The settled statement shows that the intervener, Barrett Garages, Inc., is in the business of renting automobiles to the public. On August 21, 1951, it rented the car in question, pursuant to the terms of a written agreement, to one Lena Stockton. The rental agreement provided that Lena was to return the car by 10 a. m. of August 22, 1951, and that failure to do so amount to an "*unauthorized use and* *fraudulent concealment* of the motor vehicle." It was also provided that "Permission to drive and use the motor vehicle is limited exclusively to Rentee, or his duly authorized employee, unless written consent of Owner is endorsed hereon." The rentee further agreed that the vehicle should not be used "For any illegal purpose," or "In violation of any law or ordinance."

Lena, without the knowledge or consent of the owner, loaned the car to one Quincy Proctor. On August 25, 1951, while the vehicle was still subject to the rental agreement, Proctor used it to transport marihuana, and was arrested.

[1, 2] The precise status of Proctor does not appear in the settled statement where it is merely declared that Lena "loaned and permitted a third party," Proctor, to operate the vehicle. The state argues that Proctor may have been an "employee" of Lena's within the terms of the contract. In his memorandum opinion the trial judge stated that in violation of the rental agreement Lena "loaned the car to a friend of hers." While the opinion of the trial court cannot be used to impeach the findings, it can be used to explain them. Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 47 P.2d 273. Here the "loaned the car to a friend" phrase in the opinion does not contradict or impeach the phrase "loaned and permitted a third party" to use the car appearing in the settled statement, but explains that phrase. Thus we must assume that Proctor was not the employee of Lena.

The trial court found all of the requisite facts in reference to Proctor being in control of the vehicle and in possession of narcotics when he was arrested on August 25, 1951, and the facts in reference to intervener being the registered and legal owner. The court then found that intervener on August 21, 1951, did "voluntarily entrust the possession of the defendant vehicle to one Lena Mae Stockton who, in turn, voluntarily entrusted the possession of said vehicle to * * * Quincy Proctor without the knowledge or the consent of the said intervener." The court concluded that under such circumstances the interest of the intervener in the vehicle should be forfeited. We agree with this conclusion.

[3] The constitutionality of statutes forfeiting the interest of innocent owners or lienholders in vehicles used to transport narcotics even where used by the borrower contrary to the instructions of the owner, is now beyond question, and is not seriously challenged on this appeal. See Van Oster v. Kansas, 272 U.S. 465, 47 S. Ct. 133, 71 L.Ed. 354. The only question presented is whether our statutes, properly interpreted, purport to forfeit the interest of the registered owner in a case where he entrusts the vehicle to a bailee, who, in turn, in violation of the bailment agreement, entrusts it to a malefactor, who uses the vehicle to transport narcotics.

There can be no doubt that the California statutes provide that the interest of the owner shall be forfeited whenever the vehicle is used to transport narcotics illegally. Section 11610 of the Health and Safety Code provides: "A vehicle used to unlawfully transport any narcotic, or in which any narcotic is unlawfully kept, deposited or concealed, or in which any narcotic is unlawfully possessed by an occupant thereof, shall be forfeited to the State."

The next few sections provide for the procedural steps necessary to be followed to secure a forfeiture, and for notice to owners and others, and then provides in section 11619 for the defenses that may be asserted by owners in such a proceeding. That section provides: "At the hearing, any owner who has a verified answer on file may show by competent evidence that the vehicle was not used to transport narcotics, or that narcotics were not unlawfully possessed by an occupant of the vehicle."

[4, 5] It should be noted that this section referring to owners is substantially different from section 11620 which provides for the special defenses available to a lienholder. If the interest of the lienholder was created after "reasonable investigation" of the "moral responsibility, character, and reputation" of the purchaser, the lienholder's interest is not subject to forfeiture. The "reasonable investigation" defense allowed lienholders, is, by necessary

implication, denied to owners. As to them, the only defenses allowed by the statutes are that the vehicle was not in fact used to transport narcotics or that narcotics were not unlawfully possessed by an occupant. People v. One 1937 Buick Coupe, 89 Cal. App.2d 556, 560, 201 P.2d 402. In addition, the courts, in order to preserve the constitutionality of these statutes under due process, have read into them an additional defense, namely, that the owner is protected if the vehicle is taken from him without his knowledge or consent. People v. One 1941 Ford 8 Stake Truck, 26 Cal.2d 503, 159 P.2d 641; People v. One 1941 Chrysler Tudor, 71 Cal.App.2d 312, 162 P.2d 653; People v. One 1937 Buick Coupe, 89 Cal. App.2d 556, 201 P.2d 402. The burden of proof to show lack of consent is on the owner. People v. One 1939 La Salle 8 T. Sedan, 45 Cal.App.2d 709, 115 P.2d 39; People v. One 1937 Plymouth 6, etc., 37 Cal.App.2d 65, 98 P.2d 750. A limited or qualified consent, or the fact that the bailee exceeded the limitations of the permission granted, is not sufficient to raise this exception. People v. One 1941 Chrysler Tudor, 71 Cal.App.2d 312, 162 P.2d 653; People v. One 1941 Ford 8 Stake Truck, 26 Cal. 2d 503, 159 P.2d 641; People v. One 1937 Buick Coupe, 89 Cal.App.2d 556, 201 P.2d 402.

The appellant in the instant case tries to bring itself within the lack of consent exception by a somewhat ingenious argument. It admits that it voluntarily entrusted possession of the vehicle to Lena, but it contends that the use of the car by Proctor was without its consent, and that such use by him constituted the felony of taking a car without the owner's consent as defined by section 503 of the Vehicle Code. That section provides that "Any person who drives or takes a vehicle not his own, without the consent of the owner thereof, and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same, or any person who is a party or accessory to or an accomplice in any such driving or unauthorized taking or stealing is guilty of a felony * * *."

Appellant argues that, since the rental agreement prohibited the bailee, Lena, from allowing anyone other than Lena or her employee from driving the car without the consent of appellant, when Proctor, not an employee, drove the car with the consent of Lena, since appellant had not consented and did not know that the vehicle had been loaned to him, Proctor was guilty of a felony in operating the vehicle. It is argued that if the car had been stolen from Lena and the thief had used it to transport narcotics, the owner would have a defense to the forfeiture action, and that Proctor was legally a thief under section 503, supra. Appellant seeks to fortify this argument by the provisions of the contract of rental that if Lena kept the car beyond 10 a. m. on August 22, 1951, her continued possession would be "unauthorized," would constitute a "fraudulent concealment" of the vehicle, and by those provisions prohibiting Lena from using the car for illegal purposes.

[6] The argument is unsound. There is nothing in the record to show that Proctor acted with "intent to either permanently or temporarily deprive the owner" of his title to or possession of the vehicle. There is no showing that Proctor knew of the terms of the rental agreement. A breach of the rental agreement by Lena does not prove an intentional criminal act on the part of Proctor, who drove the car with her permission. In the absence of knowledge of the terms of the rental agreement Proctor cannot be held guilty of a felony because Lena violated the terms of that contract. In order to constitute a felony under section 503 of the Vehicle Code there must exist the specific intent to deprive the true owner of title to or possession of the vehicle. People v. Sanchez, 35 Cal.2d 522, 219 P.2d 9. While an "intent to steal" need not exist, the intent to "permanently or temporarily deprive" the owner of title to or possession of the vehicle must be shown. The two concepts are not identical. There is nothing in the record to show that Proctor knew that he was interfering with the right of possession of the owner. Certainly, therefore, the record does not show that he could have had the

intent to interfere with that possession. It therefore follows that the provisions of the contract between appellant and Lena have no relevancy at all to the basic problem here presented, which is whether a vehicle may be forfeited under our statutes where the owner entrusts it to a bailee, who, in turn, entrusts it to a malefactor, who uses the car to transport narcotics.

[7] The problem is one of interpretation, not of constitutionality. By no reasonable interpretation of the statutes can the exception claimed by appellant be found in the language of the statutes. But what appellant is really asking is that this court extend the court-created defense of lack of consent, to include a case where consent is given to A, who entrusts B, who uses the car illegally. The same reasons do not exist that made it necessary to imply the consent exception as to A. It was felt that it would be a denial of due process to forfeit the interest of the owner where the malefactor was using the car without the consent of the owner. But once the owner grants permission to someone to use his automobile, he knows or should know that such person may allow someone else to drive the car. By parting with possession voluntarily he has placed the automobile in circulation and made it possible for it to be used to transport narcotics. As was said in People v. One 1937 Buick Coupe, 89 Cal.App.2d 556, at page 561, 201 P.2d 402, at page 404: "The owner parts with *possession* at his peril." Where the owner has parted with possession voluntarily the Legislature has seen fit to provide that if the car is used illegally the interest of the owner shall be forfeited. The Legislature has determined that the use of a motor vehicle to transport narcotics is such an evil, and is so socially undesirable, that an owner surrenders possession at his peril. It has provided that if the *taking* is with the owner's consent, his interest will be forfeited if the car is *used* illegally regardless of whether the owner consents to such *use* or even directs that it not be so *used*. It is not for the courts to revise this statute by creating exceptions not provided by the Legislature or compelled by constitutional restraints.

There is no doubt some confusion in the cases as to how forfeiture statutes shall be applied in the sub-borrower situation. The confusion seems to stem from some ambiguous language used by the United States Supreme Court in Goldsmith Jr.-Grant Co. v. United States, 254 U.S. 505, 41 S.Ct. 189, 65 L.Ed. 376. There the United States successfully sought to forfeit the interest of a conditional vendor where the vehicle was used to transport whiskey on which no tax had been paid. In meeting certain objections made by the appellant to this rule, the court stated 254 U.S. at page 512, 41 S.Ct. at page 191: "And we also reserve opinion as to whether the section can be extended to property stolen from the owner or otherwise taken from him without his privity or consent." It will be noted that the court carefully used the word "taken" from the owner without his consent, and did not employ the word "used" without his consent. It will also be noted that this case did not involve the problems arising out of the use of a vehicle by a sub-borrower, but involved illegal use by a conditional vendee. The quoted language simply kept open for consideration the question as to what the rule might be if the vehicle were "taken" from the owner without his consent, and then used illegally. At most, the language might indicate a doubt that a vehicle taken by a sub-user from a borrower without the knowledge or consent of the owner or borrower could be forfeited if the sub-user used it illegally. Subsequent to this decision, the courts created the lack of consent exception under which the owner's interest could not be forfeited if the vehicle was taken from the owner without his consent. Some courts, following the broadest implications of the language quoted, supra, from the Goldsmith Jr.-Grant Co. case, have extended the consent exception to situations where the owner consents to the use of the vehicle by A, and the car is used illegally by B, who took it from A without his knowledge or consent, or without the knowledge and consent of the owner. This would seem to be a proper extension of the doctrine. Thus, in United States v. One Buick Roadster, 280 F.

517, a District Court case, a conditional vendee, not entitled to possession, surreptitiously took a vehicle from the vendor's repairman and used it illegally. It was held that the conditional vendor's interest could not be forfeited, because the taking from the bailee was without his knowledge or consent and the user was, therefore, a trespasser. See, also, United States v. One 1938 Chevrolet Coach Automobile, D.C., 78 F.Supp. 676.

There is at least one case, however, that is directly in point in supporting appellant's contentions, and that is the case of United States v. One Reo Speed Wagon, 5 F.2d 372, a District Court decision. There a father entrusted a vehicle to his son for a definite purpose. The son, contrary to instructions, loaned the vehicle to a friend who was arrested while transporting contraband. The court held that since the father had not entrusted the vehicle to the malefactor and had not authorized his son to so entrust it, the vehicle was not being *"used"* with the knowledge and consent of the father, and that the lack of consent exception applied. Thus was the term "taken," employed in the Goldsmith Jr.-Grant Co. case, converted into the word "used." The District Court was affirmed by the Circuit Court of Appeals under the title of United States v. Almeida, 1 Cir., 9 F.2d 15, 16, in an ambiguous opinion, in which the court first held that it did "not regard the question as before us" that is here involved, gave an alternative ground for refusing a forfeiture, and then went on to approve the rule that where a borrower entrusts the vehicle to a sub-borrower without the knowledge of the owner, the latter's interest cannot be forfeited. The sub-borrower in such a situation is referred to as a "trespasser" and as a "thief," so far as the owner is concerned. This portion of the opinion is weakened by the fact that the cases cited by the court involved situations where the *original* user took the vehicle improperly from the owner, and did not involve the problem of the use by a sub-borrower at all. Strangely enough, one of the principal cases cited and relied upon by the Circuit Court in its opinion is United States v. One Saxon Automobile, 4 Cir., 257 F. 251, a Circuit Court decision, in which it was held that the interest of a lienholder could be forfeited where the purchaser in possession loaned the car to a friend who used it to transport liquor on which no tax had been paid—a holding directly contrary to the rule for which it is cited in the Almeida case. The strangest part of the Almeida decision is that it quotes the following from the Saxon case 9 F.2d at page 16: "'This rule of construction has been extended without dissent to protect the innocent owner of property from forfeiture, even when provided by a statute which expresses no limitation or exemption of any kind, where the property has been taken by a trespasser or a thief, or the owner has been deprived of the possession by forces of nature beyond his control. This is for the reason that no right of possession or custody can be acquired by or from a trespasser or thief, or by virtue of the forces of nature against the will of the owner. In such case, the owner of the property has never in a legal sense parted with any right of custody or possession, and hence no statute can operate against his title by reason of the use or custody or possession of the thief or trespasser, or his deprivation of it by the forces of nature.'" But the court failed to mention the very next sentence which contains the actual holding of the Saxon case. It reads as follows, 257 F. at page 252: "This reasoning obviously does not apply when the owner voluntarily parts with his possession and intrusts his ship or vehicle to another, for in that case the owner is charged with knowledge that the person to whom he has relinquished possession, or some one acquiring the possession from him, may so use the property as to defeat the collection of the revenue, and thus bring it under the condemnation of forfeiture." Thus, the Almeida case is, at best, a most questionable authority.

There are at least two other Federal cases that have refused to follow the rule of the Reo-Almeida cases. Both of these cases involved situations where the owner entrusted the vehicle to his child, who contrary to instructions, loaned it to a malefactor, who used it for an illegal purpose. The first of these cases is United States v. One Lincoln Touring Car, 11 F.2d 551, a District Court decision, that expressly held that the court in the Reo case had misinterpreted the reservation of the Goldsmith Jr.-Grant Co. case, and further held that a vehicle loaned to a sub-borrower by a borrower, even contrary to instructions of the owner, was not "taken" from the owner without his consent but merely was being "used" without his consent. The second case is United States v. One Dodge Truck, 9 F.Supp. 157, in which another District Court, in a carefully considered decision reviewing most of the federal authorities, expressly refused to follow the Circuit Court decision in the Almeida case. The court carefully, and at length, discusses the reservation in the Goldsmith Jr.-Grant Co. case and holds that it only applies to a case where the vehicle is "taken" from the owner or the borrower without consent. But if the vehicle is loaned to a borrower, who in turn entrusts it to a sub-borrower, even contrary to the owner's instructions, the interest of the owner will be forfeited. These cases are far more persuasive than the opinions in the Reo-Almeida cases.

[8–10] There is no California case directly in point. There can be no doubt at all that, where the owner entrusts the vehicle to a borrower, who uses the car, contrary to the terms of the bailment, for an illegal purpose, the interest of the owner will be forfeited. People v. One 1937 Plymouth 6, etc., 37 Cal.App.2d 65, 98 P.2d 750; People v. One 1941 Ford 8 Stake Truck, 26 Cal.2d 503, 159 P.2d 641; see, also, People v. One 1949 Cadillac Conv. Coupe, 113 Cal.App.2d 115, 247 P.2d 848. It is also clear that a taking from the owner without his consent, or the possession of narcotics by a passenger unknown to the owner or borrower are beyond the pale of permissible forfeiture. People v. One 1941 Buick Sport Coupe, 28 Cal.2d 692, 171 P.2d 719. It is also true that the Reo case was cited with approval in People v. One 1937 Plymouth 6, etc., 37 Cal.App.2d 65, at page 70, 98 P.2d 750, but that case simply involved an unauthorized taking of a car from the owner by her son. There was no problem of a sub-borrower involved at all. There, the taking of the car by the son, under the facts, was a direct violation of section 503 of the Vehicle Code.

The California cases have strictly limited the consent exception to cases where the *taking* from the owner, not the *use* of the vehicle, was unauthorized, and have emphasized that forfeiture must result where there was an original entrustment by the owner. In such cases the owner surrenders his control of the vehicle at his peril. This theory was stated as follows in People v. One 1941 Ford 8 Stake Truck, 26 Cal.2d 503, at page 507, 159 P.2d 641, 642:

"But there are no constitutional impediments to a forfeiture where the owner entrusts his vehicle to another who uses it illegally, even though the owner does not know of or acquiesce in such use. The distinction between such a situation and the plight of an automobile owner who failed to give possession of his car or consent to its operation is based upon the means by which the one found transporting the contraband obtained the vehicle. An owner who entrusts the possession of his vehicle to another thereby accepts the risk that it will be used contrary to law, but, in the operation of an automobile without the owner's consent to do so in any manner or at all, there is no element of choice or volition and a complete lack of permission, express or implied, on the part of the owner. * * *

"Applying the same reasoning in the present case it follows that no constitutional prohibition requires that the Health and Safety Code be construed as contended for by the appellant. Clearly shown by the terms of section 11610 et seq. is a legislative policy that the vicious traffic in narcotics, with its disasterous effect upon the unfortunate members of society, is so great an evil as to justify the drastic penalty of confiscation of vehicles used to transport the contraband. The public interest to be protected against the drug and its victims outweighs the loss suffered by those whose confidence in others proves to be misplaced, and although, in some cases, hardship may result from the enforcement of the statute, no constitutional guarantees are invaded." See also, People v. One 1941 Buick Sport Coupe, 28 Cal.2d 692, 171 P.2d 719; People v. One 1940 Chrysler, 77 Cal.App.2d 306, 175 P.2d 585; People v. One 1937 Buick Coupe, 89 Cal.App.2d 556, 201 P.2d 402.

[11] Under these authorities, and for the reasons already stated, the entrustment rule must be held to extend to a taking by a sub-borrower with the consent of the borrower, even where the sub-use is contrary to the instructions of the owner, and the consent exception must be limited to an unauthorized taking from the owner or borrower.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; CARTER, J., dissenting.

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122 Cal.App.2d 466

FOLLANSBEE

v.

BENZENBERG et al. (two cases).

Civ. 19686.

District Court of Appeal, Second District,
Division 3, California.

Jan. 7, 1954.

Hearing Denied March 3, 1954.

Action for alleged wrongful death of automobile purchaser, who was fatally injured while an occupant in defendant' automobile salesman's automobile, which collided with automobile of defendant motorist while salesman and purchaser were enroute to place where they could obtain license plates for automobile sold to purchaser, and all parties except defendant Superior Court of Los Angeles County, Robert H. Scott, J., entered judgment for purchasers' wife, who brought action as an individual and as purchaser's executrix, but denied her relief for expenses paid by her for medical treatment rendered to purchaser, and all parties except defendant motorist appealed. The District Court of Appeal, Vallée, J., held that wife, as an individual, was entitled to recover moneys expended by her prior to husband's death for medical expenses after husband had been injured through negligence of defendants.

Judgment affirmed in part and reversed in part.

1. Automobiles 🔑242(1)

In wrongful death action arising out of automobile accident, burden of proving that decedent was a passenger and not a guest was upon plaintiff since it was not claimed that death resulted from intoxication or wilful misconduct of host driver. Vehicle Code, § 403.

2. Automobiles 🔑181(2)

Question whether person riding with another in an automobile is a passenger or a guest is to be determined on basis of answer to the factual question whether rider conferred a benefit upon driver for the ride. Vehicle Code, § 403.

3. Automobiles 🔑245(24)

Under guest statute, it is for trier of fact to determine whether rider confers benefit upon driver or whether ride was merely of a social nature. Vehicle Code, § 403.

4. Appeal and Error 🔑989

Under guest statute, once trier of fact has determined that rider has conferred a benefit upon driver, province of reviewing court is simply to examine record to determine whether this factual finding is substantially supported. Vehicle Code, § 403.

5. Automobiles 🔑181(2)

Under guest statute, a "passenger" is one who gives compensation for a ride, and such term is not limited to person paying for his transportation in cash or its equivalent but includes within scope a person who gives such recompense for a ride as may be regarded as compensation therefor. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Passenger".

6. Automobiles ⇨181(2)

Under guest statute, "compensation" required to be given by passenger need not be established as that received by driver "for such ride" in sense that rider obtained transportation for some independent purpose of his own, but where trip is not primarily for a social purpose, it is sufficient to show that driver was to derive a benefit from the transportation. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Compensation".

7. Automobiles ⇨181(2)

Under guest statute, an anticipated or prospective profit is a "benefit" and may be as effectual as an immediate or direct compensation for purpose of entitling rider to qualify as a passenger. Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Benefit".

8. Automobiles ⇨181(2)

Under guest statute, to enable automobile occupant to qualify as a passenger it is enough that there is any consideration for the ride. Vehicle Code, § 403.

9. Automobiles ⇨244(20)

In action for alleged wrongful death of automobile purchaser, who was fatally injured while occupant in defendant salesman's automobile, which collided with automobile of defendant motorist while salesman and purchaser were enroute to place where they could obtain license plates for automobile sold purchaser by defendant automobile dealer, evidence was sufficient to sustain finding that occupant was a passenger. Vehicle Code, § 403.

10. Death ⇨32, 85

An action for wrongful death is one for damages caused to heirs, and damages recoverable are a pecuniary loss sustained by heirs by reason of decedent's death, not expenditures made for an injured person because of the injury. Civ.Code, § 956; Code Civ.Proc. § 377; Probate Code, § 573; Vehicle Code, § 402(g).

11. Death ⇨84

In action for alleged wrongful death arising out of automobile accident, medical expenses paid by decedent's wife were not recoverable as damages for the wrongful death. Civ.Code, § 956; Code Civ.Proc. § 377; Probate Code, § 573; Vehicle Code, § 402(g).

12. Parties ⇨88(3)
Pleading ⇨406(8)

Where, in wrongful death action, defendants did not demur on ground of misjoinder of parties plaintiff or on ground that several causes of action had been improperly united or not separately stated, defendants waived such objections which appeared on face of complaint.

13. Husband and Wife ⇨209(3)

A husband can recover damages sustained by him for expense of caring for his injured wife. Code Civ.Proc. § 427.

14. Husband and Wife ⇨19(11)

The wife is liable for necessaries of life furnished to husband while parties are living together. Civ.Code, § 171.

15. Husband and Wife ⇨1

Generally, a husband and wife have, in the marriage relation, equal rights which should receive equal protection of the law.

16. Husband and Wife ⇨209(4)

Wife, as an individual, was entitled to recover moneys expended by her prior to husband's death for medical expenses after husband had been injured through negligence of defendants. Code Civ.Proc. §§ 377, 427; Civ.Code, §§ 171, 956, 3281, 3282, 3510, 3520, 3523.

Wellborn, Barrett & Rodi, Karl B. Rodi and Owen F. Goodman, Los Angeles, for appellant and respondent Viviane M. Follansbee.

Bauder, Gilbert, Thompson & Kelly, Los Angeles, for appellants and respondents Philip G. H. Benzenberg and J. E. Coberly, Inc.

No appearance for respondent Fred A. Excobasa.

VALLÈE, Justice.

Defendants Benzenberg, an individual, and Coberly, Inc., a corporation, appeal from a judgment in favor of plaintiff, as executrix of the estate of William U. Follansbee, III, deceased, in an action for his alleged wrongful death. Defendant Escobasa did not appeal. Plaintiff appeals from that part of the judgment denying her relief for expenses paid by her for medical treatment rendered to her deceased husband.

Defendant Coberly is a corporation engaged in business in Los Angeles as a new car dealer of Mercury and Lincoln automobiles. It maintains a service and repair department for these makes of cars; and with every new car sold, a service policy for various recheck periods is furnished the buyer.

Defendant Benzenberg was salesman employed by Coberly. His duties were to take care of prospective customers of Mercury automobiles who were referred to him. He handled sales until deliveries were effected. He also acquainted the purchasers with Coberly's service and repair facilities.

A few days prior to the accident, decedent telephoned Coberly with respect to the purchase of a new Mercury. The call was referred to Benzenberg. The latter thereupon undertook to sell decedent a new Mercury. He took him for a demonstration ride and showed him the available models and colors at the Coberly showroom. On Wednesday, February 14, 1951, decedent made a deposit of $500. Arrangements were made to complete delivery on the following Saturday.

On Saturday, February 17, decedent went into the Coberly showrooms. Except for registration and licensing, the automobile he expected to purchase was ready for delivery. License plates cannot be secured for an automobile without the signature of the purchaser of the vehicle upon the license registration application. After looking at the automobile, decedent went into the business office and gave the office attendant a check for the balance of the purchase price. The purchase price included the charge made by the state for license and registration. A bill of sale was given decedent. Decedent signed the license plate application. It was customary for Coberly to attend to registrations. Benzenberg testified it was the practice of Coberly to secure license plates for and registration of the automobiles, and the procurement of plates "is handled routinely" by dealers. He also said an automobile sale is not complete, title does not pass, and "a buyer cannot move the car [from the dealer's premises] without the car being registered with the State." In nine-tenths of the cases, Coberly gives the customer paper plates, and asks him to come back later for the metal ones. In one-tenth of the cases, the plates are procured right away.

Decedent was offered the temporary paper plates; however, he expressed a desire to have permanent plates immediately attached to the automobile. Benzenberg offered to procure the metal plates. The office attendant furnished Benzenberg with the necessary papers and funds to enable him to obtain them. Before leaving the Coberly premises for the Automobile Club of Southern California—which, through arrangements with the Department of Motor Vehicles, issued permanent plates—Benzenberg informed decedent that the process would take about half an hour and suggested that he (decedent) accompany him rather than wait around the nearly vacant showroom. Decedent accepted the offer and the two proceeded in Benzenberg's car, the latter driving, to file the registration application and secure the license plates. A few moments later the accident occurred in an intersection collision between the automobile driven by Benzenberg and one driven by defendant Escobasa. Mr. Follansbee died on February 26, 1951.

Plaintiff, widow of Mr. Follansbee, brought the action as an individual, as one of his heirs, and as executrix of his will.

The court found: at the time of the accident the decedent was riding as a passenger, not as a guest, in the automobile driven by Benzenberg; Benzenberg and Coberly received benefit from the decedent for the ride during which the collision occurred; death resulted from injuries received in the accident; Benzenberg and Escobasa were negligent, and the negligence of each of them was a proximate cause of the injuries and death; Benzenberg was acting within the scope and course of his employment at the time of the accident.

Defendants' Appeal

Coberly and Benzenberg do not attack the finding that both drivers were negligent and that the negligence of each driver was a proximate case of decedent's injuries and death. Their only contention is that the court's findings that at the time of the accident the decedent was riding as a passenger, not as a guest, and that they received benefit from the decedent for the ride, are contrary to the evidence as a matter of law.

[1] Under section 403 of the Vehicle Code, one who is a guest in an automobile of another cannot recover against the driver for injury or death unless he establishes that the injury or death proximately resulted from the intoxication or willful misconduct of the driver; whereas one who is a passenger can recover if the driver was simply negligent and the negligence was a proximate cause of the injury or death. The burden of proving that decedent was a passenger and not a guest was on plaintiff since it was not claimed that the death resulted from the intoxication or willful misconduct of Benzenberg. Gosselin v. Hawkins, 95 Cal.App.2d 857, 860, 214 P.2d 110; Whittemore v. Lockheed Aircraft Corp., 65 Cal.App.2d 737, 740, 151 P.2d 670.

[2–4] Whether a person riding with another was a passenger or a guest is to be determined on the basis of the answer to the factual question: Did the rider confer a benefit on the driver for the ride? Malloy v. Fong, 37 Cal.2d 356, 376–378, 232 P.2d 241. It is for the trier of fact to determine whether the rider conferred a benefit or whether the ride was merely of a social nature. Darling v. Dreamland B. & U. Co., 44 Cal.App.2d 253, 257, 112 P.2d 338; Sullivan v. Richardson, 119 Cal.App. 367, 371, 6 P.2d 567; Gosselin v. Hawkins, 95 Cal.App.2d 857, 861, 214 P.2d 110. Once the trier of fact has determined the fact of benefit, the province of the reviewing court is simply to examine the record to determine whether this factual finding is substantially supported.

[5–7] Section 403 of the Vehicle Code, in effect, defines a guest as a person who "accepts a ride * * * without giving compensation for such ride". A passenger is one who gives compensation for a ride. The term passenger is not limited to a person paying for his transportation in cash or its equivalent, but includes in its scope a person who gives such recompense for a ride as may be regarded as compensation therefor—that is, a return which may make it worth the other's while to furnish a ride. Malloy v. Fong, 37 Cal.2d 356, 377, 232 P.2d 241; Crawford v. Foster, 110 Cal.App. 81, 84, 293 P. 841. To constitute compensation, it is not necessary that it be established that the compensation received by the driver was given "for such ride" in the sense that the rider obtained transportation for some independent purpose of his own. Where the trip was not primarily for a social purpose, it is sufficient to show that the driver was to derive a benefit from the transportation. Kruzie v. Sanders, 23 Cal.2d 237, 242, 143 P.2d 704. An anticipated or prospective profit is a benefit and may be as effectual as an immediate or direct compensation. Piercy v. Zeiss, 8 Cal.App.2d 595, 598, 47 P.2d 818; Crawford v. Foster, 110 Cal.App. 81, 84–88, 293 P. 841; Sumner v. Edmunds, 130 Cal.App. 770, 778–780, 21 P.2d 159.

[8] If a driver receives a benefit through the acceptance of a ride, the fact that a like benefit might have been obtained in some other place or manner can make no difference. The acceptance of the ride furnished Benzenberg with an opportunity to create good will with decedent which might otherwise not have been accorded. An opportunity thus obtained is a direct and substantial benefit, and may well be as beneficial to the driver where he is selling something not necessarily connected with the ride as where he is demonstrating the car itself to a prospective purchaser or using it to take a prospect to look at a piece of

land. The hope of future business is present, and such an opportunity is a real benefit to a salesman even though another place for his labors might have been chosen. Piercy v. Zeiss, 8 Cal.App.2d 595, 599, 47 P.2d 818. It is enough that there is "any" consideration for the ride. Haney v. Takakura, 2 Cal.App.2d 1, 6, 37 P.2d 170, 38 P.2d 160.

It is admitted that decedent did not pay anything for the ride, but defendants must be deemed to have received compensation if decedent was taken along because it was considered by them to be to their business advantage that he be taken to the Automobile Club. Piercy v. Zeiss, supra. It was the general practice of Coberly to attend to the registration of the automobiles it sold. In one-tenth of the cases, it procured metal plates "right away" and did not give the customer paper plates. Benzenberg testified that a sale is not complete and a buyer cannot move the car without it being registered with the state. There is nothing to suggest a social relationship between decedent and Benzenberg or that decedent or Benzenberg looked upon the former's trip in the automobile as one to be taken merely for pleasure. The ride was one in which Benzenberg was promoting Coberly's business interests.

While it may not have been any part of the agreement of sale that decedent was to accompany Benzenberg to the Automobile Club, it does clearly appear that he was attending to the business of concluding the purchase and acceptance of the automobile. Coberly maintains a service and repair department for Mercury and Lincoln automobiles. The service checkups given with every new car sold is to entice customers to bring their cars to Coberly's garage and thereby acquaint them with its facilities so they will patronize it later. Something more was involved than the sale of the automobile: there was the element of continued patronage. It cannot be said that it is any less important to maintain the good will of, and to continue business with, a customer than it is to give a demonstration of an automobile to a prospective new customer. Whittemore v. Lockheed Aircraft Corp., 51 Cal.App.2d 605, 612, 125 P.2d 531.

[9] There are several tenable reasons why the court was warranted in concluding that the business transaction had not terminated; that a business rather than a social purpose was the motivating influence of the trip; and that there was a tangible benefit to Coberly. Darling v. Dreamland B. & U. Co., 44 Cal.App.2d 253, 112 P.2d 338; Duclos v. Tashjian, 32 Cal.App.2d 444, 450, 90 P.2d 140; Whittemore v. Lockheed Aircraft Corp., 51 Cal.App.2d 605, 125 P.2d 531. There is substantial evidence to support the finding that plaintiff was a passenger.

Plaintiff's Appeal

Plaintiff appeals from that part of the judgment denying her relief for expenses paid by her for medical treatment rendered to her deceased husband.

Mr. Follansbee died on February 26, 1951, nine days after the accident. From the time of the accident to the time of death he was unconscious. The court found that because of the injuries sustained by decedent, plaintiff, individually, incurred and paid reasonable expenses for ambulance, medical care, nursing care, and hospital services rendered to decedent prior to his death as follows: ambulance, $12.50; medical care, $550; nursing care, $189; hospital services, $456.05; total $1,207.55. It concluded: "On the basis of the pleadings herein, the plaintiff is not entitled to recover for moneys expended by her for ambulance service, medical care, nursing care and hospitalization of the decedent, William U. Follansbee III." We refer to these items as medical expenses or medical services.

There is some discussion in the briefs as to whether plaintiff has a right of action against defendants for the medical expenses under section 956 of the Civil Code or section 377 of the Code of Civil Procedure. Neither section is applicable. Civil Code section 956, enacted in 1949, insofar as pertinent, provides that a thing in action arising out of a wrong which results in physical injury to the person shall not abate by reason of the death of the person injured, and that "When the person entitled to maintain such an action dies before judgment, the damages recoverable for such injury shall be limited to loss of earnings and expenses sustained or incurred as a result of the injury by the deceased prior to his death, and shall not include damages for pain, suffering or disfigurement, nor punitive or exemplary damages, nor prospective profits or earnings after the date of death. The damages recovered shall form part of the estate of the deceased." At the time section 956 was enacted, section 573 of the Probate Code was amended to make such actions maintainable by administrators or executors of the deceased person who would have been plaintiff had he lived (See, also, Vehicle Code, § 402(g).) Thus, the right of action given by section 956 is in plaintiff as the executrix of the will of decedent, and the damages are limited to loss of earnings and expenses sustained or incurred as a result of the injury by the *decedent* prior to his death. Section 956 provides for the survival of a right of action that the decedent had for expenditures made by him for medical expenses. Here plaintiff is seeking to recover medical expenses which she individually incurred and paid. These medical expenses do not come within section 956.

[10, 11] Code of Civil Procedure section 377 gives a right of action for wrongful death to the heirs or personal representatives of the decedent. At the time Civil Code section 956 was enacted, section 377 was amended to provide that the damages recoverable thereunder "shall not include damages recoverable under Section 956 of the Civil Code." An action for wrongful death is for damages caused to the heirs. Fiske v. Wilkie, 67 Cal.App.2d 440, 444, 154 P.2d 725. The damages recoverable are the pecuniary loss sustained by the heirs by reason of the decedent's death. Morgan v. Southern Pacific Co., 95 Cal. 510, 516, 30 P. 603, 17 L.R.A. 71; Luis v. Cavin, 88 Cal.App.2d 107, 116, 198 P.2d 563. Expenditures made for an injured person because of the injury are not, in an action brought by his heirs, elements of their damage. Fitzgerald v. Quinn, 131 Cal.App. 457, 461, 21 P.2d 656; See Salmon v. Rathjens, 152 Cal. 290, 301, 92 P. 733; 25 Cal. L.Rev. 170, 174. The medical expenses paid by plaintiff are not recoverable in the action insofar as damages are sought for the wrongful death of the decedent.

[12] The court apparently felt that "[o]n the basis of the pleadings" plaintiff, as an individual, is not entitled to recover the moneys expended by her for medical expenses. We think this is too narrow and too technical a view of the pleadings. As we have said, plaintiff brought the action as an individual, as an heir, and as executrix. The complaint contains five counts: the first for damages against Benzenberg and Excobasa; the second for damages against Benzenberg; the third for damages against Escobasa; the fourth for damages against Coberly, Benzenberg, and Escobasa; the fifth for damages against Coberly and Benzenberg. Each count contains an allegation that the medical services were required by decedent and that plaintiff, in her individual capacity and not as executrix, paid the amounts found by the court to have been expended by her to her damage in the sum of $1,207.55. Coberly did not demur. Benzenberg did not demur on the ground there was a misjoinder of parties plaintiff, or on the ground that several causes of action had been improperly united or not separately stated. These objections appeared on the face of the complaint, and defendants waived them by failing to raise them by demurrer. The only fault in the complaint is that plaintiff mingled an alleged cause of action in her individual capacity for the medical expenses with causes of action in her representative capacity under Civil Code section 956 and as an heir under Code of Civil Procedure section 377. If plaintiff has a right of action for the medical expenses she should not be denied relief for this defect in the complaint.

Can a wife who pays for medical services for her husband which she is legally obligated to pay, recover the amount thereof from a person whose negligence was a proximate cause of the injury necessitating the services?

Nitta v. Haslam, 138 Cal.App. 736, 33 P. 2d 678, was an action by a husband and minor children for the wrongful death of his wife and their mother. There, as here, the pleader mingled allegations of expenditures for medical care, hospital expense, and nurse's services incurred by the husband (here the wife) prior to death, with the cause of action for wrongful death. The judgment included the medical expenses. On appeal the defendants objected to the inclusion of these items in the judgment because they were incurred prior to death and were not recoverable in an action for damages resulting from the death of the wife. The court said the items complained of were borne by the husband individually and he had a separate cause of action against the defendants to recover them. It was held that the items were not recoverable in an action for wrongful death; that the husband should have set up in a separate count of the complaint a cause of action for these damages; but that since there had been no special demurrer or motion to strike, the judgment would not be reversed "because two causes of action are commingled in a single count and are not separately stated." The law as thus stated was not affected by the enactment of Civil Code section 956 or the 1949 amendments of Code of Civil Procedure section 377, as argued by defendants. As we have noted, section 956 provides for survival of certain tort actions and for the recovery of damages suffered by the deceased prior to death, and section 377 provides for actions for wrongful death. There is no survivability involved in the phase of the case relating to plaintiff's individual medical expenses nor are they recoverable damages for wrongful death.

[13, 14] A husband can recover damages sustained by him for the expense of caring for his injured wife. Code Civ.Proc. § 427; Walling v. Kimball, 17 Cal.2d 364, 371, 110 P.2d 58; 25 West's Cal.Digest, Husband and Wife, 🔑 209 (3), page 384. The expenses paid by plaintiff are common necessaries of life. Odone v. Marzocchi, 34 Cal.2d 431, 439, 211 P.2d 297, 212 P.2d 233, 17 A.L.R.2d 1109; Heaton v. Justice's Court, etc., 19 Cal.App.2d 118, 123, 64 P.2d 1004; Evans v. Noonan, 20 Cal.App. 288, 292, 128 P. 794. The wife is liable for the necessaries of life furnished to the husband while the parties are living together. Civ. Code, § 171; Wisnom v. McCarthy, 48 Cal.App. 697, 701–702, 192 P. 337.

[15] There is no valid reason apparent for not allowing a wife to recover damages sustained by her for the expense of caring for her injured husband when he is unable from infirmity to pay such expenses himself. The law should not deny to the wife the redress which it affords to the husband. The old common law rule that a wife had no right of action of this character obtained on the theory that the wife's personality merged in that of the husband's, that she had no right to hold property separate and apart from her husband, and had no right to sue in her own name. This hollow, debasing, and degrading philosophy, which has pervaded judicial thinking for years, has spent its course. These archaic notions no longer obtain. "So prone are the courts to cling to consuetudinary law, even after the reason for the custom has ceased or become a mere memory, that it has required hundreds of years to obtain the meed of justice for married women." Bernhardt v. Perry, 276 Mo. 612, 208 S.W. 462, 470, 13 A.L.R. 1320. The legal status of a wife has changed. Her legal personality is no longer merged in that of her husband. A husband has no longer any domination over the separate property of his wife. A wife may sue in her own name without joining her husband in the suit. Generally a husband and wife have, in the marriage relation, equal rights which should receive equal protection of the law. When the reason for the rule ceases, so should the rule. Civ.Code, § 3510. No one should suffer by the act of another. Civ.Code, § 3520. For every wrong there is a remedy. Civ.Code, § 3523. Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money. Civ.Code, § 3281. Detriment is a loss or harm suffered in person or property. Civ. Code, § 3282. The rule which gives a husband a right of action for damages sustained by him for the expense of caring for his injured wife, in view of the present legal status of the wife, should apply to her

equally with the husband. Plaintiff's loss arose directly from the tort of defendants.

The rule as stated in Corpus Juris Secundum is that "Where the wife has been compelled to expend money from her personal estate, as a proximate result of injuries negligently inflicted on her husband by a third person, for which he cannot recover, she may recover such sums under statutes giving her the right to sue in her own name." 41 C.J.S., Husband and Wife, § 404, page 901.

In McDaniel v. Trent Mills, 197 N.C. 342, 148 S.E. 440, it was held that where a husband was injured through the negligence of a third party, the wife was not a volunteer in expending money out of her personal estate as a proximate result of such injury, and that she could recover such expenditures from the negligent third party, the court saying (148 S.E. 441): "The family in its integrity has been the foundation, as well as the bulwark, of American institutions from the beginning of our history. In fact, it is the very cradle of civilization, with the future welfare of the commonwealth dependent, in large measure, upon the success of its administration. Hence, when a wife, under such impulsion and in obedience to its command, comes to the aid of her husband with the expenditure of her separate funds, she is not to be regarded as a volunteer, but as one acting within her conjugal rights, and it is but meet that, under such circumstances, the wrongdoer who has forced her to part with her means should respond in damages to the extent of the reasonable obligations thus assumed and paid by her as a direct result of his tortious acts.

"While the common-law principle of unity of husband and wife and the modern doctrine of complete duality of personalities may clash somewhat in yielding to this result, still, we think the conclusion is supported by the logic of life, if not by the logic of syllogism; and it should be remembered that law is bigger than logic, life is bigger than law, and the function of judicial decision is to state, as near as possible, in terms of law, the meaning of life in action. This middle course, as it may be called, is perhaps a hybrid between the old and the new doctrines just mentioned, or a mixture of the two, but, if so, it comes from holding fast to that which is good in the old and pressing forward to that which is helpful in the new, a practice heretofore commended by an authority on domestic relations, a great lawyer, and one of the apostles."

The facts in Hansen v. Hayes, 175 Or. 358, 154 P.2d 202, were identical with those in the case at bar except that there the personal representative of the deceased's estate brought an action for wrongful death and later the widow brought the reported action for medical expenses which she had incurred prior to the death of her husband in an effort to save his life and for funeral expenses. The court said (154 P.2d 205, 206, 207, 209, 218.): "The legal theory of the plaintiff is that under the family expense statute the plaintiff widow became liable for the medical and funeral expenses and that such liability was tortiously imposed upon her by the defendant's negligence which had made the expense necessary. It is true that the negligent force of the defendant was directed only at the deceased, but a previous decision of this court suggests by analogy that the negligence of a defendant may give rise to tort liability in favor of one who acts to his damage by reason of an injury directly done to another. * * *

"Having concluded that by reason of the family expense statute the plaintiff became liable for the amount of her husband's medical and funeral expenses and that the negligence of the defendant was the proximate cause of direct damage to the plaintiff in the amount of such expenses paid by her, it would seem to follow that he should respond in damages on the general principles of the law of torts, not for a wrong done to the deceased, but for the direct damage to the plaintiff. Although there are some authorities to the contrary, the general rule appears to be as follows: 'In actions for injury to the person, necessary and reasonable expenses for medical attention, medicine, and nursing may be recovered for, and this rule applies to expenses which may have been incurred because of injuries to a person for whom plaintiff is legally responsible.' 17 C.J., Damages, § 128, p. 801; 25 C.J.S., Damages, § 47, subd. b, p. 526.

"Since the statutory liability of the wife for the husband's medical and funeral expense is similar to the common law liability of a husband for such expense incurred for the wife, we find a persuasive analogy in the authorities which permit the husband to recover against the negligent tortfeasor for expense caused him by the injury of the wife. * * *

"At common law a parent and guardian has a similar right to recover from the negligent wrongdoer for expenses incurred by the reason of the injury of a minor child. * * *

"Excluding from our consideration any question relative to the effect of the death statute and the action which was brought under it, we think the better reasoned authorities would sustain the right of the wife in the case at bar to recover for both medical and funeral expense. * * *

"If, as we have held, the defendant became liable in tort to the plaintiff, the mere existence of a right on the part of the plaintiff to reimbursement from another source (the estate of her husband) would not wash out the defendant's direct liability to her. She would be under no obligation to gratuitously free the defendant from liability by pressing her claim against her husband's estate and thereby perhaps decreasing the inheritance of the heirs. * *

"Since medical expenses incurred previous to death were not recoverable in the action brought by the administrator under O.C.L.A. § 8–903, it follows that plaintiff was entitled to recover them in the present action as previously set forth." It will be observed that mention was made that the action was for funeral expenses as well as medical expenses. The court held that the funeral expenses were recoverable in the action for wrongful death and therefore could not be recovered in the reported action. See, also, Hipp v. E. I. Dupont de Nemours & Co., 182 N.C. 9, 108 S.E. 318, 18 A.L.R. 873; Thompson v. City of Bushnell, 346 Ill.App. 352, 105 N.E.2d 311; Hitaffer v. Argonne Co., 87 U.S.App.D.C. 57, 183 F.2d 811, 23 A.L.R.2d 1366.

[16] We conclude that plaintiff, as an individual, is entitled to recover the moneys expended by her prior to the death of decedent for medical expenses found by the court to be $1,207.55.

In view of the finding of the court, a reversal of that part of the judgment appealed from by plaintiff with directions is appropriate.

The judgment, insofar as it denies plaintiff relief for moneys expended by her for medical care, ambulance service, nursing care, and hospital services, is reversed with directions to the superior court to render judgment for plaintiff, as an individual, for said expenses in the sum of $1,207.55. In all other respects the judgment is affirmed.

SHINN, P. J., and WOOD, J., concur.

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PEOPLE v. AMBROSE et al.

C. A. 16.

Appellate Department, Superior Court,
Fresno County, California.

Dec. 31, 1953.

Defendants were convicted of violating city ordinance forbidding the conducting of gambling games. The Municipal Court, Fresno Judicial District, George W. Huffman, J., entered judgment, and defendants appealed. The Superior Court, County of Fresno, Conley, J., held that where game conducted by defendants was one in which players played against all the others and defendant had no interest in outcome of game, trial court properly determined that game was not a banking or percentage game, and instruction which left it to jury to find whether game was, in fact, played, and whether it was played for money, and which did not limit charge by specifically excluding banking or percentage games referred to in gaming statute was proper.

Judgment affirmed.

1. Municipal Corporations ⟹640

In prosecution for conducting gambling games in violation of city ordinance, evidence respecting playing of game of panguingui in defendants' establishment was sufficient to support conviction.

2. Municipal Corporations ⟹641

In prosecution for conducting gambling games in violation of city ordinance, it was duty of trial court to decide as a matter of law whether game described was banking or percentage game.

3. Gaming ⟹68

A "banking game" is one where there is a fund against which everybody has the right to bet, the bank taking all that is lost by the betters and paying out all that is won by them, or all save a percentage which it keeps, and supreme test of such game is dependent on whether banker or exhibitor pays all winnings and suffers all losses and is the one against the many, and game is not banking game where players bet against each other and settle with each other, and mere payment of rental by players for use of table, cards and chips, or acting by proprietor or dealer as stakeholder does not convert game into banking game. Pen.Code, § 330.

See publication Words and Phrases, for other judicial constructions and definitions of "Banking Game".

4. Gaming ⟹68

Where, in playing the game of panguingui, the pot was controlled by dealer and the establishment had no interest in outcome of game, and establishment did not set up a bank against which all participants played, nor did they take fixed percentage of winnings, the game was not a "banking game" within gaming statute. Pen.Code, § 330.

5. Municipal Corporations ⟹641

In prosecution for conducting gambling games in violation of city ordinance, where trial court determined that panguingui, as purportedly played in defendants' card room, was not a banking or percentage game, instruction which left it to jury to find whether game was, in fact, played, and whether it was played for money, and which was not limited by specifically excluding banking or percentage games, which are forbidden by statute, was proper. Pen. Code, § 330.

James M. Thuesen, Fresno, for appellants.

C. M. Ozias, Denver C. Peckinpah and Chas. F. Hamlin, Fresno, for respondent.

CONLEY, Judge.

The defendants appeal from a judgment convicting them of the violation of an ordinance of the City of Fresno, which forbids the conducting of gambling games. Two points were raised on the appeal; first, it is contended that the evidence does not justify the verdict of guilty; and, secondly, it is urged that one of the instructions was erroneous.

[1] The first point is not well taken, for the evidence amply supports the verdict. The record shows that the defendants operated premises at 1021 Broadway in the City of Fresno; that on June 24, 1953, at one of the card tables in their establishment, supervised by a dealer employed by them, a game of panguingui was played by seven persons who bought chips from the dealer, and who used the chips in the game; whenever a player quit the game he cashed in his remaining chips and was paid in money by the dealer; whenever a new player joined the game he paid the dealer in money for his stack of chips. There was only one witness, a police officer of the City of Fresno, who, in plain clothes, observed the game in the defendants' card room, and testified in detail as to what he saw. None of the defendants took the stand, and they called no witnesses.

Panguingui is defined by Webster's New International Dictionary, Second Edition, as "A Tagalog gambling game". The uncontradicted evidence was that the game played was panguingui; the account of the game contained in the record checks with the description of panguingui as set forth in works of reference. (See Culbertson's Hoyle, "The New Encyclopedia of Games with Official Rules", p. 47; Scarne on Cards, p. 150.) With the added proof that the game was played for chips convertible into money through the dealer, the guilt of the defendants was established beyond a reasonable doubt.

The appellants argue that the following instruction was prejudicially erroneous:

> "You are instructed that if you are convinced beyond a reasonable doubt that the defendants conducted, or allowed to be conducted, a game played with cards for money, either directly or indirectly, or for checks, credit, chips or any other article exchangeable for or redeemable in money, it is your duty to convict the defendants."

The basis of the attack on this instruction is that the Court did not limit the charge by specifically excluding banking or percentage games referred to in Section 330 of the Penal Code. That section of the Penal Code prohibits the playing of a number of specified card and dice games, and also all other "banking or percentage" games:

> "Every person who deals, plays, or carries on, opens, or causes to be opened, or who conducts, either as owner or employee, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge-et-noir, rondo, tan, fan-tan, stud-horse poker, seven-and-a-half, twenty-one, hokey-pokey, *or any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or other representative of value,* and every person who plays or bets at or against any of said prohibited games, is guilty of a misdemeanor, and shall be punished by a fine not less than one hundred dollars nor not more than five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment." (Emphasis added.)

The City of Fresno attempted to cover the field of gaming, not already thus preempted by the State of California, by enacting an ordinance forbidding gambling, through the playing for money, with cards, dice or other devices, of all other games besides those specifically prohibited by the state enactment. In re Portnoy, 21 Cal.2d 237, 239, 131 P.2d 1.

Section 232 of Ordinance No. 1076 of the City of Fresno, as amended, reads as follows:

> "It is hereby declared to be unlawful for any person within the City of Fresno to rent, open up, carry on, or conduct, or have charge or control of, any room, apartment, or place in the City of Fresno either as an owner or employee, whether for hire or not, wherein or whereat any game played with cards, dice or any other instrument, thing, device, or machine, which game is not prohibited by any law of the State of California, is played, dealt, conducted, carried on, permitted to be played or dealt, for money, either directly or indirectly, or for checks, credit, chips, or any other article exchangeable for or redeemable in money."

Appellants contend that the instruction was entirely too broad in that by its terms it might be thought by a jury to cover any banking or percentage game forbidden by the mandate of Section 330 of the Penal Code. This contention is accompanied by the argument that the game described by the witness might have been a banking or percentage game, hence violative of Section 330 of the Penal Code and excluded from coverage by the Fresno City ordinance.

[2] But the answer to this contention seems clear and conclusive: under the laws of this state, it is the duty of the trial judge to determine whether a game involved in a prosecution for gambling is, according to its description, a banking or percentage game; and, inasmuch as the game of panguingui, as played in the establishment of the defendants, was not a banking or percentage game and could not possibly have been found to be such, the instruction was not erroneous in failing to exclude by its terms any banking or percentage game.

In People v. Carroll, 80 Cal. 153, 157, 22 P. 129, 130, it is said:

> "The question whether the game played was a banking game or not was one of law for the court * * *."

In this case the sole witness testified that the game played was panguingui, and he further described the game in considerable detail. Under the authority of the Carroll case, which has never been overruled in this state, it was the duty of the court to decide as a matter of law whether the game described was a banking or percentage game; the court presumably carried out its duty in this respect and determined that the game was not a banking game, leaving it to the jury to find whether the game was, in fact, played, and whether it was played for money.

[3] A banking game is one "where there is a fund against which everybody has the right to bet, the bank taking all that is lost by the betters and paying out all that is won by them or all save a percentage which it keeps." 38 C.J.S., Gaming, § 1, p. 38; People v. Carroll, supra; Ex parte Lowrie, 43 Cal.App. 564, 185 P. 421; Ex parte Williams, 7 Cal.Unrep. 301, 87 P. 565.

In a banking game the banker or exhibitor pays all the winnings and suffers all the losses; he is the one against the many, which is the supreme test of a banking game. Bell v. State, 32 Tex.Cr. 187, 22 S.W. 687; Faucett v. State, 46 Tex.Cr. 113, 79 S.W. 548.

In State v. Rabb, 130 La. 370, 57 So. 1008, 1009, 1010, it is said:

> "Where the players bet against each other and settle with each other, the game is not a banking game * * *."

See also Cummings v. State, Tex.Cr. App., 72 S.W. 395; State v. Bradley, 51 R.I. 4, 149 A. 863.

The mere payment of rental by the players for the use of the table, cards and chips, or the acting by the proprietor or dealer as stake-holder, do not convert a game into a forbidden banking game. State v. Bradley, supra; Tully v. State, 88 Ark. 411, 114 S.W. 920; 27 C.J., p. 970; 38 C.J.S., Gaming, § 1.

[4, 5] Panguingui, as played in defendants' card room, was not a banking or percentage game, but one in which each of the players played against all of the others. The fact that the "pot" was manually controlled by the dealer does not affect this conclusion, for the establishment had no interest in the outcome of the game; the defendants did not set up a bank against which all of the participants played, nor did they take a fixed percentage of the winnings. If any player won, such winning was offset by losses on the part of some of the numerous other players. The collection by defendants' employee of rental for the table and equipment did not change the game to a banking or percentage game. The trial court was right in determining that the game played was not a banking or percentage game and in instructing the jury as it did.

It Is, Therefore, Ordered that the judgment of conviction as to each defendant be, and it hereby is, affirmed.

SHEPARD, P. J., and DE WOLF, J., concur.

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122 Cal.App.2d Supp. 957

BAINES v. BRADY.

C. A. 13.

Superior Court of California, Fresno County, Appellate Department.

Nov. 12, 1953.

Action was brought by citizen against police officer to recover damages for alleged false imprisonment. The Municipal Court, Fresno Judicial District, County of Fresno, State of California, Leonard I. Meyers, J., entered judgment for citizen for $25, and police officer appealed. The Superior Court, Appellate Department, Conley, J., held that placing of citizen in police patrol wagon, though citizen was not charged with any offense, constituted false imprisonment and that award was not excessive.

Judgment affirmed.

1. Courts ⚿190(8)

Where findings of fact in action in municipal court were waived, through failure of either party to request them, it was required to be assumed by Superior Court, Appellate Department, on appeal that municipal court decided every essential factual issue in favor of the successful plaintiff, and Superior Court, Appellate Department, was required to view conflicting evidence in light most favorable to plaintiff. Code Civ.Proc. § 632.

2. False Imprisonment ⚿4

Where defendant police officer entered pool room and saw plaintiff's friend apparently committing assault, and plaintiff stated to officer that apparent assault was "all in fun" and requested officer not to arrest friend, and police officer did not intend to arrest plaintiff or to charge him with any offense, but nevertheless placed plaintiff in police patrol wagon and detained plaintiff against his will when patrol wagon came to take friend to police station, there was "false imprisonment" of plaintiff entitling him to recovery of damages. Pen.Code, § 236.

See publication Words and Phrases, for other judicial constructions and definitions of "False Imprisonment".

3. Arrest ⚿63(1)

Citizen may not be arrested or detained by police because of failure to talk when police investigate a crime.

4. Arrest ⚿63(1)

A citizen, who is not charged with, or suspected of, a crime, cannot be arrested or detained by a policeman in course of policeman's duties in investigating a crime.

5. False Imprisonment ⚿33

Measure of damages for false imprisonment is that amount, which will compensate a plaintiff for all detriment proximately caused by wrong done, whether such detriment could have been anticipated or not.

6. False Imprisonment ⚿34

Physical inconvenience and mental suffering resulting from false imprisonment are proper elements of damage.

7. False Imprisonment ⚿33

Trier of facts has considerable discretion in determining amount of damages for false imprisonment, where illegal restraint is accompanied by circumstances causing humiliation, shame, and public disgrace.

8. Appeal and Error ⚿1013

Reviewing court should not interfere with award of damages for false imprisonment, unless allowance is so grossly disproportionate to sum reasonably warranted by facts as to shock the sense of justice and raise a presumption that it was the result of passion or prejudice.

9. False Imprisonment ⚿36

Award of $25 damages for false imprisonment of citizen by police officer when citizen was placed in police patrol wagon which traveled about three-fourths of a city block before citizen was released, was not excessive.

◆

C. M. Ozias and James M. Thuesen, Fresno, for appellant.

Hugh W. Goodwin, Fresno, for respondent.

CONLEY, Judge.

This is an appeal by the defendant from a judgment against him in the sum of $25 for false imprisonment. The appellant raises two points in his brief: first, he contends that the record fails to establish any false imprisonment; and secondly, he argues that the proof does not justify the amount of the award.

[1] Findings of fact were waived, through the failure of either party to request them, Code Civ.Proc. § 632; consequently, it must be assumed that the trial court decided every essential factual issue in favor of the plaintiff; furthermore, this Court must view conflicting evidence in the light most favorable to the respondent. Mastrofini v. Swanson, 114 Cal.App. 2d Supp. 848, 250 P.2d 764.

The defendant is a police officer of the City of Fresno. In the course of his duties, he and a fellow-officer entered the pool room of the "Lucky House"; there they saw a man named Anderson, apparently committing an assault with a knife. The officers questioned several people in the crowded room but received no helpful information from anyone, except the plaintiff; he stated that the apparent assault was "all in fun", and that he was willing to take Anderson home; he requested them on at least two occasions not to arrest his friend. Officer Brady testified that he advised the plaintiff "to desist in his attempts to prevent the investigation" and "to go out and get some fresh air". Officer Davila called the patrol wagon, driven by Officer Kelly, and Anderson was placed in the wagon in the presence of fifteen or twenty on-lookers; the plaintiff again protested the arrest of Anderson, stating that Officer Brady was "picking on the colored people."

Officer Brady then said to the plaintiff that he had previously advised him to leave, but that he desired to talk further with him with reference to the suspected assault. The defendant further testified positively that he never intended to file charges against the plaintiff, or to place him in jail. He said to the plaintiff:

> "Since you want to help your friend, you can get in with him."

Baines was placed in the patrol wagon, after being searched for weapons, and the wagon drove from the scene; when the patrol wagon had traversed approximately three-quarters of a city block, the officers received a radio call requiring early attention, and upon the defendant's orders, the plaintiff was released from custody. Anderson was later booked at the jail for drunkenness.

[2] The record, therefore, discloses a situation in which a police officer, not intending to arrest the plaintiff or to charge him with any offense, nevertheless, placed him in a police patrol wagon in the presence of a crowd of on-lookers, and there detained him against his will. That this constituted false imprisonment is perfectly clear.

"False imprisonment is the unlawful violation of the personal liberty of another." Penal Code, § 236. In People v. Agnew, 16 Cal.2d 655, 659, 107 P.2d 601, 603, the Supreme Court quotes with approval the following excerpt from 22 Am. Jur., p. 359:

> "In order to constitute a case of false imprisonment, it is essential that there be some restraint of the person; but it is not necessary that there be confinement in a jail or prison. Any exercise of force, or express or implied threat of force, by which in fact the other person is deprived of his liberty or is compelled to remain where he does not wish to remain, or to go where he does not wish to go, is an imprisonment. The wrong may be committed by acts or by words, or by both, and by merely operating upon the will of the individual or by personal violence, or both. * * *" See also Vandiveer v. Charters, 110 Cal. App. 347, 355, 294 P. 440; Coyne v. Nelson, 107 Cal.App.2d 469, 237 P.2d 45.

[3, 4] The case of Gisske v. Sanders, 9 Cal.App. 13, 98 P. 43, relied upon by the appellant turned on two facts not present in the instant case: (1) The plaintiff, who was himself suspected of committing a crime, voluntarily accompanied the defendant police officer to the jail; and (2) The actual detention thereafter was ordered and carried out by police officials other than defendant. It is true, as stated in Miller v. Fano, 134 Cal. 103, 66 P. 183, that, it is the duty of every good citizen, when called upon, to give all information in his power to the proper officers of the law as to persons connected with crimes and good citizens usually willingly carry out this injunction. In passing, it should be observed that the plaintiff herein did answer the questions of the investigating officers and doubtless he maintains that he gave a full and correct account of the facts. If a person does not willingly talk with an investigator, there is no law that permits his arrest or detention by the police on that ground. A citizen who is not

charged with, or suspected of, a crime, cannot be arrested or detained by a policeman in the course of his duties, and any alleged inconvenience caused to the investigating authorities by this principle is far outweighed by the rights of citizens to be protected in their personal liberty.

[5–7] Appellant also contends that there is no adequate proof of damages.[3] The measure of damages for false imprisonment is the amount which will compensate a plaintiff for all detriment proximately caused by the wrong done, whether such detriment could have been anticipated or not. Physical inconvenience and mental suffering following upon a false arrest are proper elements of damage. The trier of facts has considerable discretion in determining the amount of damages where the illegal restraint is accompanied by circumstances causing humiliation, shame and public disgrace. Gomez v. Scanlan, 155 Cal. 528, 533, 102 P. 12; Nelson v. Kellogg, 162 Cal. 621, 624, 123 P. 1115; Riffel v. Letts, 31 Cal.App. 426, 160 P. 845; Miller v. Turner, 49 Cal.App. 653, 194 P. 66; Collins v. Jones, 131 Cal.App. 747, 754, 22 P.2d 39.

[8, 9] A reviewing court should not interfere with an award of damages unless "* * * the allowance is so grossly disproportionate to a sum reasonably warranted by the facts as to shock the sense of justice and raise a presumption that it was the result of passion or prejudice." Coyne v. Nelson, 107 Cal.App.2d 469, 475, 237 P.2d 45, 48.

For the foregoing reasons, it is ordered that the judgment appealed from be, and it hereby is, affirmed.

SHEPARD, P. J., and DE WOLF, J., concur.

42 Cal.2d 71

CUCINELLA et al.

v.

WESTON BISCUIT CO., Inc. et al.

L. A. 22355.

Supreme Court of California.
In Bank.
Jan. 12, 1954.

Action by pedestrian and her husband against owner and driver of automobile for injuries sustained by pedestrian who was struck while attempting to cross street near intersection. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., rendered judgment for owner and driver, and plaintiffs appealed. The Supreme Court, Schauer, J., held that failure to give pedestrian's requested instructions dealing with standard of care required in situation presented was not prejudicial in view of other instructions and the evidence.

Judgment affirmed.

Carter, J., dissented.

Prior opinion 257 P.2d 454.

1. Evidence 🔑121(12)

In action for injuries sustained by pedestrian who, while attempting to cross street near intersection, was struck by motorist who admitted driving at speed in excess of posted limits, testimony as to estimated average speed usually traveled by motorists on such street was evidence of custom bearing on issue of contributory negligence and was admissible as part of res gestae.

2. Appeal and Error 🔑1056(1)

Where injured pedestrian was given opportunity to prove by other witnesses that marked crosswalk formerly existed at place where she was struck by automobile while attempting to cross street, pedestrian could not complain of trial court's refusal to permit pedestrian to testify that street had formerly been marked by a crosswalk.

3. Automobiles 🔑243(1)

In action against owner and driver of automobile for injuries sustained by pedestrian who was struck while attempting to cross street near intersection, refusal to admit testimony that marked crosswalk had been authorized and directed at the point by competent city authority was not error.

4. Automobiles 🔑217(1)

Unless an authorized marked crosswalk is actually marked, mere fact that it has been authorized cannot affect duties of persons using that street.

5. Negligence 🔑65

Degree of care required of a person for his own safety is ordinary care, although in some circumstances quantum or amount of care required to reach degree of ordinary care is greater than in others.

6. Trial 🔑253(1)

Inasmuch as trial took place subsequent to date of amendment of jury instruction from "California Jury Instructions, Civil", plaintiff's request for instruction would be considered as request for instruction as it read subsequent to amendment. Rules for Superior Courts, rule 16(a).

7. Automobiles 🔑146

Driver of motor vehicle when ordinarily careful will be alertly conscious of fact that he is in charge of machine capable of projecting into serious consequences the driver's negligence, and his caution must be adequate to that responsibility as related to all surrounding circumstances.

8. Automobiles 🔑216

Pedestrian has only his physical body to manage and with which to set in motion a cause of injury, and while that fact limits his capacity to cause injury as compared with a motor vehicle driver, pedestrian must be alertly conscious of mechanical power on public roadway, and possible serious consequences from any conflict between him and such forces, and caution required of him is measured by possibilities of injuries apparent to him in conditions at hand or that would be apparent to a person of ordinary prudence in same position.

9. Appeal and Error 🔑1170(7, 9)

No judgment shall be set aside on ground of misdirection of jury or of improper admission or rejection of evidence unless after an examination of entire cause, including evidence, appellate court shall be of opinion that error complained of has resulted in a miscarriage of justice. Const. art. 6, § 4½.

10. Appeal and Error ⚷1170(7, 9)

Burden is on appellant in every case to show that claimed error in respect to direction of jury and admission or rejection of evidence is prejudicial and that it has resulted in a miscarriage of justice. Const. art. 6, § 4½.

11. Trial ⚷260(8)

In action against owner and driver of automobile for injuries sustained by pedestrian who was struck while attempting to cross street near intersection, refusal to give pedestrian's requested instructions concerning amount of caution required did not result in miscarriage of justice and was not prejudicial in view of other instructions and the evidence. Const. art. 6, § 4½; Rules for Superior Courts, rule 16(a); Vehicle Code, §§ 510, 511, 671.

◆

William W. Waters and Henry F. Walker, Los Angeles, for appellants.

Hunter & Liljestrom and Harold J. Hunter, Los Angeles, for respondents.

SCHAUER, Justice.

Plaintiffs, who are husband and wife, appeal from an adverse judgment entered upon a jury verdict in their action to recover damages resulting when plaintiff wife was struck by an automobile while she was attempting to walk across San Fernando Road in the City of Los Angeles. We have concluded that no prejudicial error or miscarriage of justice is shown and that the judgment should be affirmed. (Cal.Const., art. VI, § 4½.)

The accident occurred about 9:30 in the morning of April 25, 1950. The weather was clear and dry and visibility was good. Plaintiff[1] had walked in an easterly direction halfway across San Fernando Road, a north-south highway at the point involved, some 24 feet south of its intersection with Lacy Street, and had paused at the double white line in the center of the highway, waiting for traffic to "give me a chance" to complete the crossing. She testified that she suddenly became frightened by an oncoming truck and, without looking further at traffic, turned around in a clockwise direction and attempted to return to the westerly curb from which she had started. At a point eight or nine feet from such curb she was struck by an automobile traveling south on San Fernando and driven by defendant Smith in the course of his employment by defendant Weston Biscuit Company, Inc. Plaintiff did not remember taking any steps after her turn in the center of San Fernando, and the next she knew was when she was lying in bed in the hospital.

Defendant Smith testified that he first saw plaintiff when he was some seventy or eighty feet away from the point at which she attempted to return to the curb; that he was then traveling thirty or thirty-five miles an hour, and no cars were ahead of him; plaintiff "ran out into the center of the street and appeared to take two or three steps past the center, then she whirled to her right and ran back towards the west curb * * * in approximately a straight line." Defendant was startled and "slammed on my brakes." He continued "to hold the brakes on" until his car stopped, and stated he was going approximately three miles an hour when he struck plaintiff. Defendant's tires "laid down" seventy-two feet of "skid-marks" in the street, from which an expert witness computed that the minimum speed the car was traveling "when it first started to lay down skid-marks" was thirty-six miles an hour.

The drivers of two cars which were traveling immediately behind defendant and in the same (right hand or "curb") lane of traffic both testified that all three cars were traveling approximately thirty to thirty-five miles an hour, and both drivers saw plaintiff suddenly turn to her right in the center of San Fernando and start to run back in a straight line to the curb. One of the drivers testified that "There was a lot of heavy traffic * * * there on San Fernando Road that morning." Other evidence established that morning traffic on San Fernando is "heavy" during the period from 8:00 to 10:00 o'clock.

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[1] Unless otherwise stated the designation "plaintiff" refers to the injured wife.

[1] Plaintiff's first contention on appeal is that the trial court erred in admitting evidence of the "average speed" traveled by vehicles in the area of the accident, in the face of testimony by a police officer working in the area that San Fernando Road was posted with 25-mile-an-hour speed limit signs at points approximately one and one-half miles north and one and one-quarter miles south of the Lacy Street intersection. On cross-examination by counsel for defendant the officer was permitted to also testify, over objection by plaintiff, that he would "estimate" that "the average speed usually traveled at that time by motorists" was "about 30 miles an hour along there." Other evidence in the record discloses that for some five years immediately preceding the accident plaintiff had been intermittently employed in a laundry at the San Fernando and Lacy intersection, and that defendant drove "up and down San Fernando" on an average of several times a week and thus was also familiar with the area in which the accident occurred. Plaintiff's arguments appear to be predicated upon the assumption that the evidence as to average speed of traffic in the area was offered by defendant solely to excuse his own conduct in driving at a rate admittedly in excess of the posted limits. However, as in Fowler v. Key System Transit Lines (1951), 37 Cal.2d 65, 68, 230 P.2d 339, defendant pleaded that plaintiff was herself guilty of negligence proximately contributing to her injuries. Under such circumstances and in view of the undisputed fact that plaintiff attempted to return to the curb without looking for traffic which might be approaching, it appears that here, as in the Fowler case, the evidence of custom bore on the issue of contributory negligence and was "admissible as a part of the res gestae for the purpose of giving to the jury full knowledge of all the facts and circumstances which existed at the time and place of the accident, which were known to the parties, so as to permit the jury to pass upon the question of whether plaintiff conducted himself as an ordinary and reasonable person would have conducted himself in the light of all of the circumstances." (Muir v. Cheney Bros. (1944), 64 Cal.App.2d 55, 63, 148 P.2d 138, quoted at page 69 of 37 Cal.2d, at page 342 of 230 P.2d of Fowler v. Key System Transit Lines, supra.)

[2-4] Plaintiff next urges error in the trial court's refusal to permit her to prove that during her employment by the laundry she as well as other laundry employes had customarily crossed San Fernando at the point here in question, that formerly a crosswalk had been marked there with white lines, and that a marked crosswalk had been authorized and directed at the point by "competent city authority." However, other testimony showed that between 125 and 150 pedestrians crossed San Fernando Road daily at the point between 7 a. m. and 6 p. m., that some six months prior to the accident San Fernando Road had been resurfaced, and that at the time of the accident two rows of metal buttons extended out from the west curb some seven to 12 feet into the roadway which was 56 feet wide. Moreover, following objection by defendant's counsel to a question put by plaintiff's attorney as to how far the buttons extended out into San Fernando before it was re-surfaced, and the attorney's statement that the witness would answer that the "metal markers extended completely across the street," the court ruled that "I will permit you to ask him if the buttons had previously gone across the street, or had at the time it was re-surfaced. * *" Although the record does not indicate that plaintiff's counsel thereafter took advantage of the court's ruling, it is apparent that plaintiff is not in a position to complain, since opportunity was thus provided her to prove that a marked crosswalk formerly existed. Plaintiff cites no authority and none has been discovered supporting her claim that although a crosswalk actually was not marked at the time of the ac-

cident and had not been during the previous six months, she should have been permitted to prove that a marked crosswalk had been authorized and directed by "competent city authority." On the record we perceive no error in the ruling. Unless an authorized marked crosswalk is actually marked the mere fact that it has been authorized cannot affect the duties of persons using the street.

Finally, plaintiff contends that error prejudicial to her case resulted from the court's refusal to give the following two instructions requested by plaintiff by number (Nos. 201-E and 102-A; see paragraph (a) of Rule 16, Rules for Superior Courts, 33 Cal.2d 7) from "California Jury Instructions, Civil":

[5, 6] No. 201-E: "While it is the duty of both the driver of a motor vehicle and a pedestrian, using a public roadway, to exercise ordinary care, that duty does not require necessarily the same amount[2] of caution from each. The driver of a motor vehicle, when ordinarily careful, will be alertly conscious of the fact that he is in charge of a machine capable of projecting into serious consequences any negligence of his own. Thus his caution must be adequate to that responsibility as related to all the surrounding circumstances. A pedestrian, on the other hand, has only his own physical body to manage and with which to set in motion a cause of injury. While, usually, that fact limits his capacity to cause injury, as compared with a vehicle driver, still, in exercising ordinary care, he, too, will be alertly conscious of the mechanical power acting, or that may act, on the public roadway, and of the possible, serious consequences from any conflict between himself and such forces. And the caution required of him is measured by the possibilities of injury apparent to him in the conditions at hand, or that would be apparent to a person of ordinary prudence in the same position."

No. 102-A: "Inasmuch as the amount of caution used by the ordinary prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that in the exercise of ordinary care the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances. To put the matter in another way, the amount of caution required by the law increases as does the danger that reasonably should be apprehended."

At defendants' request, the court did instruct as follows: "It is the duty of every person using a public highway, whether a pedestrian or the driver of any kind of vehicle, to exercise ordinary care at all times to avoid placing himself or others in danger and to avoid a collision," and that "The law imposes upon the operator of any vehicle using a public highway, and upon a pedestrian, the same duty, each to exercise ordinary care to avoid causing an accident from which injury might result. This duty continues even when one has the right of way over the other. * * *"

Concerning the duties of a pedestrian attempting to cross a street, the court, at defendants' request, included the following instructions: "What observations he should make, and what he should do for his own safety, while crossing the street are matters which the law does not attempt to regulate in detail and for all occasions, except in this respect: it does place upon him the continuing duty to exercise ordinary care to avoid an accident. * * * While as to a roadway locality such as that involved in this case, a pedestrian has a right to cross the road at any point, these factors of consideration enter into the question of what conduct is required of him in the exercise of ordinary care. First: if he crosses at a point other than within a marked crosswalk or within an unmarked crosswalk at an intersection, the law requires him to yield the right of way to all vehicles on the roadway so near as to constitute an immediate hazard. Second: the amount of caution required to constitute ordinary care increases as does the danger that a reasonably prudent person, in like position, would apprehend in the situation. For example, heavy vehicular traffic, fast traffic, poor visibility, obstructions to view —any of these or any other perceivable factor increasing the hazard, increases the amount of caution which an ordinarily prudent person would use."

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[2] Originally instruction No. 201-E used the word "degree" instead of "amount." The inaccuracy of saying that a different "degree of care" may be exacted of the driver of an automobile as compared with a pedestrian is forcefully pointed out in Lasater v. Oakland Scavenger Co. (1945), 71 Cal.App.2d 217, 221, 162 P.2d 486. As stated by the court there, "The decedent was struck by a truck while crossing a street in the darkness. Appellants proposed an instruction that by reason of the fact that she was dressed entirely in black she should have used 'a greater degree of care' for her own safety. The instruction was erroneous in using the word 'degree' instead of 'quantum' or 'amount.' The degree of care required of a person for his own safety is always the same, i. e., ordinary care, although in some circumstances the quantum or amount of care required to reach the degree of ordinary care is greater than in others."

In 1950 instruction No. 201-E was amended by substituting the word "amount" for the word "degree." Inasmuch as this trial took place in 1952, plaintiff must be considered to have requested the instruction as it reads subsequent to the 1950 amendment.

Relating specifically to the duties of the operator of a motor vehicle the court instructed, among other things, that "Section 671 of the Vehicle Code in effect at the time of the accident provided as follows: 'The driver of a motor vehicle when reasonably necessary to insure safe operation shall give audible warning with his horn. Such horn shall not otherwise be used.'

"It will be noted that the law does not prescribe the specific circumstances under which a horn shall be used, but provides that warning shall be given when reasonably necessary to insure safety. This means that the question whether or not the horn should have been sounded in this case is a question of fact for you to decide in the light of all the surrounding circumstances, judging the defendant's conduct by what might have been expected of a reasonably prudent person under similar circumstances.

"The speed at which a vehicle travels upon a highway, considered as an isolated fact and simply in terms of so many miles an hour, is not proof either of negligence or of the exercise of ordinary care.

"Whether that speed is a negligent one is a question of fact, the answer to which depends on all the surrounding circumstances.

"The basic speed law of this state, as provided in Section 510 of the Vehicle Code, is as follows:

" 'No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent, having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property.'

"A violation of this basic rule is negligence.

"You are instructed that the Vehicle Code of the State of California, in full force and effect at the time of the accident, provided as follows:

" 'Section 511. The speed of any vehicle upon a highway not in excess of the limits specified in this section or established as authorized in this code is lawful unless clearly proved to be in violation of the basic rule declared in Section 510 hereof.

" 'The prima facie limits referred to above are as follows and the same shall be applicable unless changed as authorized in this code, if so changed, then only when signs have been erected giving notice thereof, in which event the speed designated on the sign shall be the prima facie limit: Twenty-five miles per hour.

" '(1) In a business or residence district.' * * *

"Conduct which is in violation of any of the statutes just read to you constitutes negligence per se. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that he or she was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence."

A further instruction requested by defendants and given was that "the fact of having the right of way, if such be the fact, [does not] excuse one from the exercise of ordinary care to avoid causing an accident." At plaintiffs' request, an instruction on imminent peril was also given.[3]

The jury, midway in its deliberations, returned to the courtroom with a request that the instruction on imminent peril be re-read, and the court thereupon again read "a group of instructions which" the jury were again told "should be considered together," including among others the imminent peril instruction and the instruction that "It is the duty of every person using a public highway, whether a pedestrian or the driver of any kind of vehicle, to exercise ordinary care at all times to avoid placing himself or others in danger and to avoid a collision" and that the duty of exercising ordinary care "continues even when one has the right of way over the other."

Another instruction given (but not reread to the jury) was that even though a pedestrian is crossing outside a crosswalk and thus is obliged to yield the right of way to vehicles on the roadway the vehicle driver is not thereby relieved "from the duty to exercise due care for the safety of any pedestrian upon a roadway."

"Ordinary care" was defined to the jury as "that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others."

It should be mentioned also that the court cautioned the jury that "If in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions and as a whole, and to regard each in the light of all the others."

Plaintiffs, in support of their contention that instruction No. 201–E should have been given, rely upon Dawson v. Lalanne (1937), 22 Cal.App.2d 314, 70 P.2d 1002, in which a judgment in favor of defendant was reversed on the sole ground of error in failing to instruct the jury that "the plaintiff and the defendant were both chargeable only with the exercise of ordinary care, but a greater amount of such care was required of the defendant at the time of the accident in question by reason of the fact that he was driving and operating an automobile, which is an instrumentality capable of inflicting serious and often fatal injuries upon others using the highway." The court there declared that "This instruction clearly states the rule of law applicable to the facts of the case and has been approved in a number of cases," as follows: Weihe v. Rathjen Mercantile Co. (1917), 34 Cal.App. 302, 167 P. 287; Raymond v. Hill (1914), 168 Cal. 473, 483, 143 P. 743; Vedder v. Bireley (1928), 92 Cal.App. 52, 267 P. 724; Pinello v. Taylor (1933), 128 Cal.App. 508, 514, 17 P.2d 1039. Since the Dawson decision, supra, numerous other cases have approved instructions couched in substantially the same language (see Whicker v. Crescent Auto Co. (1937), 20 Cal.App.2d 240, 244, 66 P.2d 749; Broun v. Blair (1938), 26 Cal.App.2d 613, 615, 80 P.2d 95; Martin v. Vierra (1939), 34 Cal.App.2d 86, 93, 93 P.2d 261, 94 P.2d 567; McNear v. Pacific Greyhound Lines (1944), 63 Cal.App.2d 11, 18–19, 146 P.2d 34; Kuist v. Curran (1953),

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[3] The imminent peril instruction reads as follows:

"A person who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected, nor required, to use the same judgment and prudence that is required of him, in the exercise of ordinary care, in calmer and more deliberate moments. His duty is to exercise only the care that an ordinarily prudent person would exercise in the same situation. If at that moment he does what appears to him to be the best thing to do, and if his choice and manner of action are the same as might have been followed by any ordinarily prudent person under the same conditions, he does all the law requires of him, although, in the light of after-events, it should appear that a different course would have been better and safer."

116 Cal.App.2d 404, 406–408, 253 P.2d 681; Geisler v. Rugh (1937), 19 Cal.App.2d 738, 742, 66 P.2d 671; cf. De Greek v. Freeman (1930), 108 Cal.App. 645, 646, 291 P. 854; Morgan v. Los Angeles Rock & Gravel Corp. (1930), 105 Cal.App. 224, 231, 287 P. 152), and others have approved the B.A.J.I. instruction No. 201–E which was here offered by plaintiff (see Schulman v. Los Angeles Ry. Corp. (1941), 44 Cal.App.2d 122, 128, 111 P.2d 924; Reed v. Stroh (1942), 54 Cal.App.2d 183, 189, 128 P.2d 829; O'Brien v. Schellberg (1943), 59 Cal. App.2d 764, 770, 140 P.2d 159).

[7, 8] It is apparent that the intent of the instructions approved in the cited cases was to inform the jury that the elements of action constituting conduct which qualifies as ordinary care are those commensurable with the responsibility involved and depend upon the character of the instrumentality being used or the nature of the act which is being performed, all as related to the surrounding circumstances. If the particular instruction here requested by plaintiffs (No. 201–E) had consisted of only the first sentence thereof, which contains the expression "amount of caution," it perhaps would have been confusing to a jury. With the added explanation, however, set forth in the instruction, of the meaning of the quoted expression as related to the respective duties of driver and of pedestrian, the instruction as a whole correctly states the law and explains that what is meant by varying amounts of caution is that the elements of conduct entering into ordinary care or caution will vary and must be related to the particular circumstances involved, including the character of the act being performed. Both in the instruction approved in Dawson v. Lalanne (1937), supra, 22 Cal. App.2d 314, 70 P.2d 1002, and in the B.A.J.I. instruction here requested by plaintiffs the meaning intended to be conveyed is the same. Another effort to express such meaning is found in Reed v. Stroh (1942), supra, 54 Cal.App.2d 183, 189, 128 P.2d 829, stated as follows: "They [the instructions] require that both motorist and pedestrian exercise ordinary care; that the driver must be conscious of operating an engine capable of immense and potential danger, and that the pedestrian must be conscious of the fact that he is in the midst of such dangers on the highway and guard against the possibility of injury apparent to a careful, prudent person."

Tested by the standards above stated, and the circumstances of this case, instruction No. 201–E correctly states the law and, as its subject matter was not specifically covered by other instructions, it should have been given. Before determining whether the failure to give such instruction was prejudicial it is proper to recall that the trial court also refused, as above mentioned, to give plaintiffs' requested instruction No. 102–A, which states that the amount of caution required of the ordinary prudent person increases as does the danger that reasonably should be apprehended. Although refusing to give No. 102–A, the court at defendants' request instructed that "While * * * a pedestrian has a right to cross the road at any point * * * the law requires him to yield the right of way to all vehicles on the roadway so near as to constitute an immediate hazard * * * [and] the amount of caution required to constitute ordinary care increases as does the danger that a reasonably prudent person, in like position, would apprehend in the situation."

In view of the seeming emphasis thus placed by some of the instructions on the duties of the pedestrian, it is our view that the court might well have given plaintiffs' requested No. 102–A (which in its terms would apply to drivers as well as pedestrians) as well as No. 201–E. Such emphasis, however, is at most a relative matter and is something the appearance of which cannot always be avoided; it comes not from any misstatement of the law but from necessarily singling out the pedestrian in order to state accurately and fully the law applicable to any pedestrian under circumstances and in situations described in the evidence. Other instructions which in a like sense "emphasize" the duties of the operator of a motor vehicle were given. Such instructions are designed not to give unfair prominence to the obligations of the operator of a motor vehicle but to fully and fairly state the law applicable to any vehicle operator in the circumstances and situations described in the evidence. The fault in this case is not one of affirmative misstatement of any rule of law but of failure to explain more fully that in the application of the general rules of law which were correctly declared, the jury, as a matter of law, as well as factually in using common sense, good judgment and general knowledge, should recognize that the force of inertia of a heavy, fast moving vehicle is greater than that of a comparatively light and slow moving pedestrian and that the respectively ensuing potentialities of harm and devolving responsibilities vary accordingly.

The close point in this case, if there is one, appears to us to depend on the interpretation of plaintiff's own conduct as established by her testimony. If such conduct can be reconciled with the standards of ordinary care imposed on a pedestrian crossing a roadway at a place other than an intersection or marked crosswalk it would seem to be on the theory of sudden confrontation with imminent peril. As pointed out above, the instruction on imminent peril was twice read to the jury. So also, the jury were instructed fairly as to the meaning of ordinary care and were cautioned that if "any rule, direction or idea" had been stated in varying ways, no emphasis thereon was intended, "none must be inferred by you," and "you are to consider all the instructions and as a whole, and to regard each in the light of all the others."

[9–11] The rule is that "No judgment shall be set aside * * * on the ground of misdirection of the jury, or of the improper admission or rejection of evidence * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."[4] (Cal.Const., art. VI, § 4½; see also Loper v. Morrison (1944), 23 Cal.2d 600, 609, 145 P.2d 1; People v. De La Roi (1944), 23 Cal.2d 692, 703, 146 P.2d 225, 151 P.2d 837; Speck v. Sarver (1942), 20 Cal.2d 585, 589, 128 P.2d 16; People v. Honeycutt (1946), 29 Cal.2d 52, 62, 172 P.2d 698; People v. Sanchez (1947), 30 Cal. 2d 560, 575, 184 P.2d 673; Delzell v. Day (1950), 36 Cal.2d 349, 351–352, 223 P.2d 625; Popejoy v. Hannon (1951), 37 Cal.2d 159, 169, 231 P.2d 484.) The burden is on the appellant in every case to show that the claimed error is prejudicial; i. e., that it has resulted in a miscarriage of justice. (Vaughn v. Jonas (1948), 31 Cal.2d 586, 601, 191 P.2d 432.) Consideration of the entire cause, including the evidence as presented by the record, falls short of leading us to the opinion that failure to give the two numbered instructions has resulted in a miscarriage of justice; hence, any error in refusing to give them does not appear to be prejudicial and does not justify reversal of the judgment.

For the reasons above stated the judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

EDMONDS, J., concurs in the judgment.

CARTER, Justice.

I dissent.

I am of the opinion that it was prejudicial error to admit evidence of the "average speed" traveled by vehicles in the area of the accident in view of the testimony showing that the area in question was posted with 25-mile-an-hour speed limit signs. It has been held numerous times by this Court and by appellate courts of this state that the question of negligence, or lack of negligence, is not to be determined by what others did or did not do at the time and place under the particular facts and circumstances then and there confronting them, including the important and undisputed factor here that there was a pedestrian in the street. In Rudd v. Byrnes, 156 Cal. 636, 642, 105 P. 957, 960, 26 L.R.A., N.S., 134, it was held that "The standard of care required of persons under given circumstances is not to be established by proof that others have been in the habit of acting in a certain manner." In Phoenix Assur. Co. v. Texas Holding Co., 81 Cal.App. 61, 74–75, 252 P. 1082, 1087, it was held "That a mere custom or usage cannot make due care out of conduct that is, in fact, negligence, under the circumstances disclosed by the evidence, has been stated a number of times by the courts of this state, as well as of other states. * * * the specific practice of others cannot be admitted in testimony as an excuse for the alleged negligent act of the defendant." And in Robinet v. Hawks, 200 Cal. 265, 274, 252 P. 1045, 1048, it was held that "* * * the doctrine of customary usage does not to our knowledge apply to the question of legal duty under the law of negligence. In Perry v. Angelus Hospital Ass'n, 172 Cal. 311, 315, 156 P. 449, 450, we say: 'We know of no authority for the proposition that by continuing in a careless performance of duty a party transforms its negligence into due care. Silveira v. Iverson, 125 Cal. 266, 57 P. 996.'" In Sheward v. Virtue, 20 Cal.2d 410, 414, 126 P.2d 345, 346, it was held: "Assuming that other manufacturers likewise made no special examination to discover fractures, such a custom would not excuse the failure of these appellants. A somewhat similar contention was rejected in the case of Hughes v. Warman Steel Casting Co., 174 Cal. 556, 561, 163 P. 885. In Robinet v. Hawks, 200 Cal. 265, 274, 252 P. 1045, this court said that the doctrine of customary usage does not apply to the question of legal duty under the law of negligence, or that the continuance of a careless performance of a duty would transform a party's negligence into due care." In People v. Crossan, 87 Cal.App. 5, 16, 261 P. 531, 536, it was held that "'The standard of care required of persons under given circumstances is not to be established by proof that others have been in the habit of acting in a certain manner.'" See, also, Wolfsen v. Wheeler, 130 Cal.App. 475, 482–484, 19 P.2d 1004; Carroll v. Central Counties Gas Co., 96 Cal.App. 161, 165–166, 273 P. 875, 274 P. 594.

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[4] For illustrations or definitions of what may constitute a miscarriage of justice, see People v. Hall (1926), 199 Cal. 451, 458, 249 P. 859; People v. Putnam (1942), 20 Cal.2d 885, 892, 129 P.2d 367; People v. Rogers (1943), 22 Cal.2d 787, 807, 141 P.2d 722; People v. Dail (1943), 22 Cal.2d 642, 650, 140 P.2d 828; Daniels v. City & County of San Francisco (1953), 40 Cal.2d 614, 624, 255 P.2d 785; Delzell v. Day (1950), 36 Cal.2d 349, 351–352, 223 P.2d 625.

Fowler v. Key System Transit Lines, 37 Cal.2d 65, 68, 230 P.2d 339, 341, relied upon by a majority of this Court to support the determination that evidence of custom was properly admitted in the case at bar, involved an entirely different situation. There, the Court, citing Adamson v. City and County of San Francisco, 66 Cal.App. 256, 225 P. 875, said: "'Where * * * a usual practice or custom has obtained, and * * * *the claim is made that one of the parties has, to the discomfiture of the other, without notice, departed from the usual custom or practice,* [emphasis added] the courts have by an unbroken line of decisions held that the *question of negligence on the part of the defendant, and the question of contributory negligence on the part of the plaintiff,* are both questions for the jury to determine in the light of all of the facts, *including the evidence tending to establish the alleged custom or practice and the alleged deviation thereform.*'" In the Fowler case, it had been alleged that the passenger had been injured while stepping from a bus which had not stopped at its customary stopping place. In Ross v. San Francisco-Oakland Terminal Railways Co., 47 Cal.App. 753, 766, 191 P. 703, 709, relied on in the Fowler case, the Court said: "The settled practice of stopping a streetcar at a particular place becomes a rule of conduct upon which the public has a right to rely to a reasonable extent, and a departure from such rule is a vitally important element in determining the question of negligence, for it constitutes a departure from the standard of safety which the defendant has itself adopted." The majority here rely upon Muir v. Cheney Bros., 64 Cal.App.2d 55, 148 P.2d 138, 139, as it was cited in the Fowler case. The Muir case also involved a deviation from the normal method of travel on a certain portion of highway which was "difficult of description." The evidence was offered to show the method in which most vehicles negotiated a turn on an intersection in the shape of an arc. It was offered to show the jury the full set of circumstances surrounding the accident in question.

In support of the rule stated in the Muir case, and restated by the majority here, several cases are cited but none of them is in point. For example, in Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 716, 41 A.L.R. 1027, a pedestrian was struck by an automobile driven by an employee of the defendant. The defendant alleged that the deceased met his death through his own contributory negligence. No custom was involved. Testimony regarding statements made by the deceased prior to his death were held admissible so as to disclose "that the deceased had in his mind and fully realized, as he was walking along or over the highway just before he was struck, the perils or dangers of walking over the highway in the darkness of night, and further tended to show that, while thus engaged, he was exercising due care for his own safety." Another case is that of Dewees v. Kuntz, 130 Cal.App. 620, 20 P.2d 733, 735, where no evidence of custom was involved. The court there, in explaining the general rules governing the care to be used by the driver of an automobile summarized, in part, by saying: "In some cases the evidence may justify a conclusion that he had actual knowledge of the danger of collision; in others it may be concluded from the attendant circumstances that the defendant was advised of the peril, but in a less degree. If it appears that the defendant omitted to take a precautionary measure which was prescribed by law or usage, the imputation is that he must have had knowledge of the danger." In Mace v. Watanabe, 31 Cal.App.2d 321, 87 P.2d 893, 894, the trial court, over objection, permitted a traffic officer to testify that it was the general custom and habit of motorists to travel the roadway along each leg of the "Y" rather than to use the soft gravel forming the "V" of an intersection. This was offered to show that each leg of the "Y" constituted a well-traveled roadway and that the "V" did not constitute such a roadway. It was there said that there was no error in the admission of such testimony since "This evidence was not like that offered in Hurtel v. Albert Cohn, Inc., 5 Cal. 2d 145, 52 P.2d 922, to show the habit of pedestrians to violate traffic signals maintained for their protection. * * * The evidence showed that the county had constructed and maintained these two separate approaches, and the further evidence that they were commonly used as such by all motor traffic was material to respondents' case." In Scott v. Gallot, 59 Cal.App.2d 421, 426, 138 P.2d 685, it was held that evidence of custom which was a *safety measure* was admissible because it was not evidence of a custom which was *negligent*.

Here the evidence of custom showed negligence—that of exceeding the posted speed limit in the area and that evidence could only have been considered by the jury to excuse any negligence on the part of the defendant.

The law is well settled that mere custom or usage cannot make due care out of conduct that is in fact negligence under circumstances disclosed by the evidence. Phoenix Assur. Co. v. Texas Holding Co., supra, 81 Cal.App. 61, 252 P. 1082; Rudd v. Byrnes, supra, 156 Cal. 636, 105 P. 957; Anstead v. Pacific Gas & Electric Co., 203 Cal. 634, 265 P. 487; Perry v. Angelus Hospital Association, 172 Cal. 311, 156 P. 449; Robinet v. Hawks, supra, 200 Cal. 265, 252 P. 1045; Carroll v. Central Counties Gas Co., supra, 96 Cal.App. 161, 273 P. 875, 274 P. 594; Mehollin v. Ysuchiyama, 11 Cal.2d 53, 77 P.2d 855; Sheward v. Virtue, supra, 20 Cal.2d 410, 126 P.2d 345; People v. Crossan, supra, 87 Cal.App. 5, 261 P. 531; Wolfsen v. Wheeler, supra, 130 Cal.App. 475, 19 P.2d 1004; Sanford v. Moreau, 249 App.Div. 915, 292 N.Y.S. 595; 61 C.J.S., Motor Vehicles, § 516, page 271.

Plaintiffs' offer of proof that plaintiff wife knew of a custom of crossing San Fernando Road at the point of the accident was refused by the trial court. The offer of proof consisted of this: "If this witness were allowed to answer, she will testify that she had been crossing in this same crosswalk area since she first became employed there in 1945, and when she first came to work there were white lines painted across the pavement of San Fernando Road; that there have always been these metal—There have always been metal strips across the road; that she, even in company with many other employees and patrons of the Riverview Laundry had crossed there; that she has seen many, many persons cross in that particular area right up to the time of the accident, and she herself as I say, has crossed there to take the streetcar, as she was doing this morning." While the offer of proof was somewhat inartistically phrased, the meaning is clear. Plaintiffs sought to prove that the particular crossing space had formerly been a marked crosswalk and that since the San Fernando Road had been resurfaced and the white lines obliterated, it had by reason of custom become an unmarked crosswalk. We find in the record that one of defendants' instructions told the jury in a negative manner that if a pedestrian crosses at a point other than within a marked crosswalk or *within an unmarked crosswalk* at an intersection, the law requires him to yield the right of way. Stated affirmatively, the law requires a *motorist* to yield the right of way to a pedestrian crossing within a marked or unmarked crosswalk. Section 560(a) of the Vehicle Code provides: "The driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, except as otherwise provided in this chapter." Had the evidence been admitted, the jury would have been properly instructed since the instruction as given was substantially in the language of the section. Without the evidence, the instruction was meaningless and pointless. The evidence would have shown that by custom the point in question was an unmarked crosswalk giving plaintiff wife the right of way. Such evidence was not only admissible but material to plaintiffs' case. Its exclusion was clearly prejudicial.

I am also of the opinion that the failure to give plaintiffs' instruction 201-E constituted prejudicial error. It is admitted in the majority opinion that the requested instruction correctly states the law; that its subject matter was not covered by other instructions and that it should have been given. In the majority opinion, it is then pointed out that the trial court also failed to give plaintiffs' instruction No. 102-A. No. 201-E would have told the jury that "While it is the duty of both the driver of a motor vehicle and a pedestrian, using a public roadway, to exercise ordinary care, that duty does not require necessarily the same amount of caution from each. The driver of a motor vehicle, when ordinarily careful, will be alertly conscious of the fact that he is in charge of a machine capable of projecting into serious consequences any negligence of his own. Thus his caution must be adequate to that responsibility as related to all the surrounding circumstances. A pedestrian, on the other hand, has only his own physical body to manage and with which to set in motion a cause of injury. While, usually, that fact limits his capacity to cause injury, as compared with a vehicle driver, still, in exercising ordinary care, he, too, will be alertly conscious of the mechanical power acting, or that may act, on the public roadway, and of the possible, serious consequences from any conflict between himself and such forces. And the caution required of him is measured by the possibilities of injury apparent to him in the conditions at hand, or that would be apparent to a person of ordinary prudence in the same position." Plaintiffs' instruction No. 102-A would have told the jury that "Inasmuch as the amount of caution used by the ordinary prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that in the exercise of ordinary care the amount of caution required will vary in accordance with the nature of the act and the surrounding circumstances. To put the matter in another way, the amount of caution required by the law increases as does the danger that reasonably should be apprehended." Numerous cases are cited in the majority opinion to the effect that instruction No. 201-E is a correct statement of the law. For some peculiar reason, best known only to a majority of this Court, defendant's instruction that "While * * * a pedestrian has a right to cross the road at any point * * * the law requires him to yield the right of way to all vehicles on the roadway so near as to constitute an immediate hazard * * * [and] the amount of caution required to constitute ordinary care increases as does the danger that a reasonably prudent person, in like position, would apprehend in the situation" is quoted. It is then admitted that there has been a "seeming" emphasis placed on the duties of a pedestrian and that "it is our view" that the court might well have given plaintiffs' requested No. 102–A "as well as No. 201–E." *But* despite these admissions of error and "seeming" favoritism to the defense, it is concluded that no prejudice was suffered by plaintiffs. Or, at least, not enough error to constitute a miscarriage of justice because a different verdict "would have been improbable." I say that a different verdict would have been *most* probable had these errors not occurred.

In failing to give plaintiffs' two requested instructions and in giving those requested by defendant, the trial court weighted the scales in favor of the defendant by placing a greater burden of care on a pedestrian than that which the law imposes and relieved the motorist of the responsibility which has been imposed on him. We are told in the majority opinion, that, although, as mentioned, some of the instructions hereinabove quoted appear to emphasize the duties of a pedestrian who essays to cross a thoroughfare at a point other than an intersection or marked crosswalk, "such emphasis, however, is at most a relative matter and is something the appearance of which cannot always be avoided; *it comes not from any misstatement of the law but from necessarily singling out the pedestrian in order to state accurately and fully the law applicable to any pedestrian under circumstances and in situations described in the evidence.*" (Emphasis added.) There was no necessity of *singling* out the pedestrian. Had plaintiffs' requested instructions been given, a fair trial would have been more likely. Had the instructions been given (and it must be remembered that concededly they correctly stated the law and *should* have been given) the other errors complained of would not have been nearly so pernicious. Under the facts of this case, it may readily be seen that, first, in admitting evidence of a so-called custom of evading the law and exceeding the speed limit (with which practice plaintiff wife was supposedly familiar) the jury were, in effect, told that plaintiff wife was pretty stupid in crossing at that particular point where all cars were going too fast. In the refusal to give her instructions, confusion was compounded by placing a greater duty of care on her, as a pedestrian, than on the one driving a mechanical contrivance capable of inflicting great bodily injury. These two errors, added to the refusal to admit plaintiffs' evidence of a custom of all pedestrians to cross at an unmarked crosswalk (which had been previously a marked crosswalk and which was to be, again, a marked crosswalk) could have had but one result: that of impressing upon the jury that plaintiff wife had a tremendous duty of care for her own person in crossing a highway upon which cars were known to exceed the speed limit and that in failing to take all these things into consideration she was guilty of contributory negligence which proximately caused her injuries. We are told that instructions which "seemed" to emphasize the duties of the operator of a motor vehicle were given "not to give unfair prominence to the obligations of the operator of a motor vehicle but to fully and fairly state the law applicable to any vehicle operator in the circumstances and situations described in the evidence. The fault in this case is not one of affirmative misstatement of any rule of law but *of failure to explain more fully that in the application of the general rules of law which were correctly declared, the jury, as a matter of law, as well as factually in using common sense, good judgment and general knowledge, should recognize that the force of inertia of a heavy, fast moving vehicle is greater than that of a comparatively light and slow moving pedestrian and that the respectively ensuing potentialities of harm and devolving responsibilities vary accordingly.*" (Emphasis added.) Error is admitted; the instructions should have been given; so prejudice resulted. It is elemental that the jury determines the facts and renders its verdict *under the proper principles of law.* How is a body, composed of laymen untrained in the law, to make a correct determination and come to the right conclusion when it has not been *fully and fairly* instructed as to the proper principles of law? The majority of this Court, whose signatures appear there, would be the first to cry with horror that a jury must *not* be allowed, unaided by instructions on the applicable law, to decide which one of two opposing parties was guilty of either negligence or contributory negligence. In fact, normally, juries are considered so unreliable in their factual determinations that a majority of this Court would substitute itself for those august bodies and take even the most minute factual determination upon itself. Yet here, a jury is permitted to make a determination (and a majority of this Court affirms that determination) unaided by the proper instructions. The result achieved in this case brings home the truth of the saying that "there *ought* to be a closed season on us pedestrians"!

The discussion in the majority opinion as to the non-prejudicial character of the errors committed by the trial court in this case is meaningless. Some errors are conceded. The prejudicial character of any error is purely a matter of opinion. While the majority does not hold that it was error to admit evidence of custom as to the speed of automobiles at the place where the accident occurred or exclude the testimony offered by plaintiff relative to the custom of pedestrians to cross the street at that point it is conceded that the jury was erroneously instructed relative to the respective duties and responsibilities of pedestrians and operators of motor vehicles. From my examination of the record in this case I do not believe it can fairly and honestly be said that if the errors in question had not been committed a different result would have been improbable. On the other hand, I think, it highly improbable that the same result would be obtained upon a new trial free from the errors here shown. For this reason I believe the errors were prejudicial, and I would therefore reverse the judgment and direct that a new trial be had.

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122 Cal.App.2d 749

PEOPLE v. NEAL.

Cr. 2959.

District Court of Appeal, First District,
Division 2, California.
Jan. 25, 1954.

Defendant was convicted of possession of marijuana. The Superior Court, City and County of San Francisco, Twain Michelsen, J., rendered judgment, and defendant appealed. The District Court of Appeal, Dooling, J., held that where defendant is found in sole occupancy of premises, bearing on his person key to locked room in which narcotics are found, and he admits being in room on the day before, jury can fairly draw inference that he knowingly possessed narcotics.

Affirmed.

1. Poisons ⟹9

Where defendant is found in sole occupancy of premises, bearing on his person key to locked room in which narcotics are found, and he admits being in room on the day before, jury can fairly draw inference that he knowingly possessed narcotics. Health and Safety Code, § 11500.

2. Criminal Law ⟹938(1)

Motion for new trial for newly discovered evidence gives room for wide discretion to trial judge.

3. Criminal Law ⟹938(1)

On record there was no abuse of discretion in denying motion for new trial for newly discovered evidence in prosecution for possession of marijuana. Health and Safety Code, § 11500.

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C. L. Shinn, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen. of the State of Cal., David K. Lener, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Defendant was convicted by a jury of a violation of section 11500, Health and Safety Code, possession of marijuana. He appeals from the judgment and from an order denying his motion for new trial.

Two police officers on January 9, 1953 went to the premises known as 1626 Ellis

Street in San Francisco. The premises consisted of a front room used as a shoeshine parlor and a back room containing a restaurant counter, a juke box, a table and chairs and a Chesterfield sofa. Appellant was in sole charge of the shoeshine stand at the time and was shining a customer's shoes. The door to the back room was locked. At the officers' request appellant gave them a bunch of keys, including the key to the back room. They unlocked the door, entered the back room and discovered a package wrapped in newspaper protruding from between a cushion and the back of the sofa. This contained seven marijuana cigarettes. Appellant denied all knowledge of this package. Appellant admitted that he had rented or was negotiating to rent the restaurant and the day before had been working in the back room shortening the counter. He claimed that the back room had been open to the public until the day before when the police requested its owner or lessee, one Foley, to lock it up.

It was appellant's claim that one Jimmy Adalo operated the shoeshine parlor, that Adalo had spent the night before with him in his room and that he had only relieved Adalo a few minutes before the officers arrived to permit Adalo to go to appellant's room to get a coat which he had left there. Appellant testified that he had only relieved Adalo "about twice" at the shoeshine parlor. However the officers testified that Foley told them in appellant's presence that "defendant was shining shoes there on a part time basis", although Adalo regularly operated the stand.

In appellant's room the officers found two hypodermic needles and an eye-dropper, commonly used by addicts for taking heroin. Appellant denied any knowledge of these articles. They also found three packages of cigarette papers similar to the paper in which some of the marijuana cigarettes were wrapped. Appellant admitted that the papers were his and stated that he had used them for rolling cigarettes of tobacco.

Appellant urges that the facts show no more than a suspicion against him and are not sufficient to support his conviction. We dismiss the finding of the hypodermic needles and eye-dropper in appellant's room. They are not articles used in connection with marijuana. Nor is the possession of cigarette papers of a common sort which might be found in the possession of hundreds of cigarette smokers of any moment.

[1] Basically the question is, where a defendant is found in sole occupancy of premises with the key to a locked room on his person, he admits being in the room the day before and narcotics are found therein, may the jury fairly draw the inference that he knowingly possessed the narcotics? We think that they may.

Appellant testified that Adalo and others had equal access to the room and argues that unlawful possession of narcotics is not proved where equal right and facility to enter the premises is available to others. People v. Gallagher, 12 Cal.App.2d 434, 55 P.2d 889; People v. Martin, 76 Cal.App.2d 317, 172 P.2d 910; People v. Bledsoe, 75 Cal.App.2d 862, 171 P.2d 950. Appellant's testimony to this effect was evidently not believed by the jury and he called no witness to corroborate him in any particular.

[2, 3] Appellant made a motion for new trial. He produced in support of the motion one McDonald, who testified that he and several others were in the back room when the police entered it and that he saw somebody put a package of cigarettes under the cushion of the Chesterfield. A motion for new trial for newly discovered evidence gives room for a wide discretion to the trial judge. People v. Mandell, 48 Cal.App.2d 806, 818, 120 P.2d 921; People v. Coronado, 57 Cal.App.2d 805, 815, 135 P.2d 647. McDonald's story was at complete variance with all of the testimony given at the trial. According to the witnesses including appellant the back room was locked and nobody was in it when the officers unlocked the door and entered. There was no abuse of discretion in denying the new trial.

The judgment and denial of a new trial are both affirmed.

NOURSE, P. J., and O'DONNELL, J. pro tem., concur.

122 Cal.App.2d 654

Ex parte MARTHA.

Cr. 2480.

District Court of Appeal, Third District, California.

Jan. 19, 1954.

Habeas corpus proceeding. The Superior Court, Colusa County, Arthur Coats, J., held that petitioner was unlawfully detained under Count II of complaint, and people appealed. The District Court of Appeal, Van Dyke, P. J., held that petitioner presented no evidence tending to show that Justice's Court had not proceeded regularly from the time its jurisdiction was properly invoked until the sentence was imposed and evidence was not sufficient to justify order granting writ of habeas corpus.

Reversed.

1. Habeas Corpus ⚷74

In habeas corpus proceeding, the return which included a general denial of statements in petition for the writ was not a proper way to raise triable issues.

2. Habeas Corpus ⚷83

In habeas corpus proceeding where it appeared from return that proceedings from filing of complaint to detention of petitioner were regular, the return placed upon petitioner burden of raising issues by denying statements in the return, controverting material matters set forth therein, or affirmatively alleging factual matters as would show that although apparently regular, proceedings leading up to detention were in fact invalid. Pen.Code, § 1484.

3. Habeas Corpus ⚷54

Petition which stated that petitioner was unlawfully restrained of his liberty and that restraint was illegal because he had been arrested and imprisoned for taking part in a brawl but was not present at time and place alleged, that he pleaded guilty to charge against him but did not realize what plea meant, was not adequate to raise issues triable on habeas corpus.

4. Habeas Corpus ⚷85(1)

In habeas corpus proceeding, question of whether petitioner, detained under sentence, was guilty or not was not an issue and it was error to take evidence thereon.

5. Habeas Corpus ⚷85(1)

In proceeding for writ of habeas corpus, where petitioner did not tender any evidence tending to show that justice's court had not proceeded regularly from time its jurisdiction was invoked to time sentence was imposed, evidence was insufficient to justify granting of writ of habeas corpus.

◆

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for appellant.

C. D. McComish, Colusa, for respondent.

VAN DYKE, Presiding Justice.

Respondent, Jose Martha, having been convicted and sentenced to jail by a judgment made and entered in the Justice's Court of Colusa Judicial District, Colusa County, California, petitioned the Superior Court of Colusa County for a writ of habeas corpus. The writ was issued and after proceedings held the court declared that respondent was unlawfully detained under Count II of the complaint by which he had been proceeded against. The court declared that his detention under Count I of that complaint, however, was valid and remanded him to serve out the balance of his term thereunder. From that part of the order declaring that respondent's detention under said Count II of the complaint was unlawful the People have appealed.

The return to the writ showed that respondent was being held in the Colusa County jail by the sheriff of that county and that the justification for this restraint was the following: That he had been arrested on May 18, 1953, pursuant to a warrant of arrest which was attached to the return; that on that day he had entered a plea of guilty before the Judge of the Justice's Court of Colusa Judicial District to charged offenses of disturbing the peace (violation of Penal Code section 415) and battery (violation of Penal Code section 242); that he had been sentenced to serve three months in the county jail upon the peace disturbance charge, to serve six months in said jail upon the battery charge, and that for the latter offense he had been fined in the sum of $250 with directions that unless the fine was paid he be detained one day for each $2 of said fine. It does not appear that any exception was taken to the legal sufficiency of the return nor that any traverse thereto was filed. Before treating of the contentions of appellant we think it well to discuss briefly the procedural requirements as laid down in the Penal Code and as declared in the case law:

> "The action which the petitioners may take upon the filing of the return is specified in section 1484 of the Penal Code. They may deny or controvert any of the material facts or matters set forth in the return, or except to the sufficiency thereof, or allege any facts to show either that their imprisonment or detention is unlawful, or that they are entitled to their discharge. The section further provides that the court or judge must thereupon proceed in a summary way to hear such proof as may be produced against the imprisonment or detention, or in favor of the same, and to dispose of the party as the justice of the case requires, with full power and authority to require and compel the attendance of witnesses, and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case." In re Egan, 24 Cal.2d 323, 329, 149 P.2d 693, 697.

In this case the record on appeal does not disclose that respondent took any action upon the filing of the return other than to appear at and participate in the hearing which the court held. Neither does it appear that the petition was treated as a traverse if, indeed, it was sufficient, so treated, to raise any issue triable in a habeas corpus proceeding. We will further discuss this deficiency. We continue our quotation from In re Egan, supra, 24 Cal. 2d at page 329, 149 P.2d at page 697:

> "The only step taken by the petitioners upon the filing of the return was to stipulate that their petition be considered a denial of the matters set up in the return. [As noted, this was not done in the case before us.] The petitioners did not make the present objections to the return until full hearings had been had before the referee and more than a month after the filing of the referee's report. Objection to the return made at such time is not in accordance with the requirements of the Code and comes too late."

[1] As in the Egan case, supra, the return in this case included a general denial of the statements in the petition for the writ. This is not a proper way to raise triable issues, as was pointed out in the cited case in the following language, 24 Cal.2d at page 330, 149 P.2d at page 697:

> "* * * An objection that the general denial in the return was insufficient to meet the issues tendered by the petition may not be made. The function of the petition is to obtain the issuance of the writ. The return is not to the petition, but to the writ. Issues are thereupon joined by denial or other controversion of the material matters set forth in the return, Pen. Code, sec. 1484, and were so joined in this case by the petition, considered as a traverse to the return pursuant to the stipulation. Thereupon the petition being considered the answer, allegations as to any new matter therein are deemed denied. By analogy, the return is the complaint and the traverse * * * is the answer. New matter set up in the answer is deemed denied and must be proved by the parties alleging it, * * *."

While proceedings in habeas corpus ought never to be hampered by technicalities nevertheless the simple and substantial requirements of the applicable sections of the Penal Code ought to be followed. This is particularly true now that the People have been given the right to appeal from final orders made in such proceedings which discharge a person convicted of crime. The prosecution and determination of such appeals require that a proper record on appeal be presented. In so far as the trial court is concerned, any lack of appropriate pleadings was probably the result of oversight arising from the fact that three different trial judges participated after the issuance of the writ. The same excuse, however, cannot be made for counsel.

Notwithstanding the irregularities in procedure which we have pointed out, we will dispose of the appeal on the merits. This does not mean, however, that we can supply the lack of appropriate pleadings.

Appellant contends that the record does not support the order appealed from and this general contention must be sustained.

> "A habeas corpus proceeding, however, is in the nature of a collateral attack, and a judgment that is collaterally attacked carries with it a presumption of regularity. * * * This presumption of regularity applies to the proceedings of a justice's court only if the judgment affirmatively shows, as in the present case, that the court has jurisdiction over person and subject matter." In re Bell, 19 Cal.2d 488, 500, 122 P.2d 22, 29.

[2, 3] Here it was sufficiently shown by the return of the sheriff that the detention of respondent followed from the filing of a complaint charging offenses within the jurisdiction of the committing court; that there was issued thereon a proper warrant of arrest and that respondent was taken into custody thereunder; that respondent appeared before the justice's court and was by that court informed as to his constitutional rights, including his right to counsel; that he waived his right to counsel and elected to proceed in pro. per. in his own behalf; that he pleaded guilty and was sentenced; that he was remanded to the custody of the sheriff for the execution of that sentence. All these proceedings appear regular upon their face and the return thus placed upon respondent the burden of raising issues by denying the statements in the return or by otherwise controverting the material matters set forth therein, In re Egan, supra, 24 Cal.2d at page 330, 149 P.2d at page 697, or by affirmatively alleging such factual matters as would show that, though apparently regular, the proceedings leading up to his detention were in fact invalid. This invalidity might in such cases be shown to arise through loss of jurisdiction during the proceedings, caused by some denial of due process such as the denial of the right to counsel, the use of perjured testimony if a trial were had and the like. But as we have pointed out this record discloses nothing of the sort. No affirmative pleading was filed by the respondent and there was neither order nor stipulation that the petition be treated as a traverse. It must be said, however, that even if that had been done no triable issues would thereby have been raised for the petition itself contained nothing adequate to raise issues triable on habeas corpus. The petition contained the following statements: That respondent was being unlawfully restrained of his liberty; that the restraint was illegal, and that the illegality thereof consisted in this: That he had been arrested and imprisoned for taking part in a brawl, fight or disturbance on the street; that he was not present at the time and place alleged; that he pleaded guilty to the charge against him but did not realize what the plea meant; that he speaks poor English and was before the court with a number of persons of his own nationality and they all pleaded guilty so he followed suit.

[4, 5] Considered as a traverse, the petition raised no issues except that, by a broad indulgence, it might be said that respondent contended that he did not know what a plea of guilty meant. Treating it as sufficient to raise such issues, although surely it is apparent that this is broad indulgence indeed, we turn to the evidence received at the hearing, bearing in mind that it was for the respondent to prove the issue which we thus assume was presented. We find that no evidence was introduced upon the issue nor did the trial court purport to base its decision thereon. As we have said, there were three hearings in connection with this matter. The first was upon a writ which was discharged and we will consider it as a part of the proceedings initiated by the petition and writ whereunder the order appealed from was made because it might have been understood among those participating—although it is by no means clear from the record—that the evidence given at the first hearing was

stipulated as having been received on the later hearing. At that first hearing respondent took the stand. After some preliminary questions, the court concluded that he sufficiently understood the English language as not to require the help of an interpreter and his request for an interpreter was, therefore, denied. He proceeded then to testify that he had been arrested and confined in jail; that he had not been told by the officers why he was being locked up but thought it was for fighting; that he had not been fighting at that time; that he was born in New Mexico and had gone to school two years; that he was 19 years of age. Other witnesses were then sworn and testified that on the day on which he had been charged with disturbing the peace he had had a fight with another man which continued until both contestants became tired and went their way; that a later fight occurred on that same day. Nothing further was shown. Turning, now, to the evidence taken on the hearing of the later writ, which hearing ended in the making of the order appealed from, we find that respondent was again called to the stand, but gave no testimony. It was stipulated that he had been arrested and was confined in jail. Thereupon one Tony Gutierrez testified that he had been one of those engaged in the street fighting which formed the foundation of the charges against respondent, and that respondent had not been present. Armando Gutierrez testified that he was in jail as a result of that same fighting and was then asked if respondent was a participant therein. The People objected that in a habeas corpus proceeding it was not proper to receive evidence bearing upon the guilt or innocence of respondent and the objection was overruled. He thereupon testified that respondent had not participated in the disturbance. Jesse Gutierrez also testified respondent had not been a participant in that affair, as did one Ernie Wright, whose testimony was again objected to upon the same ground. The same ruling was made. Albert Ybarra was then sworn and testified that respondent had not participated in the altercation which was the foundation of the charges against him. Respondent rested. Thereupon counsel for the People, stating to the court that questions of fact touching guilt or innocence were apparently being tried, called several witnesses who testified that respondent had participated in the street fight in question. It is apparent that even if we assume, as we have done, that an issue of due process was tendered in any way respondent presented no evidence tending to show that the justice's court had not proceeded regularly from the time its jurisdiction was properly invoked by the filing of the complaint to the time when upon his plea of guilty respondent was ordered into custody to serve out the sentence imposed upon him. Whether he was guilty or not was not an issue and it was error to take evidence thereon. However, our decision is based on the insufficiency of evidence to justify the order of the court which has been appealed from, and upon that ground the order is reversed.

SCHOTTKY and PEEK, JJ., concur.

GELHAUS et ux.
v.
NEVADA IRR. DIST.*

Civ. 8273.

District Court of Appeal, Third District, California.

Jan. 12, 1954.

Rehearing Denied Feb. 9, 1954.

Hearing Granted March 10, 1954.

Action to recover for loss of fish caused by irrigation district's failure to provide continuous water supply. The Superior Court, Nevada County, Arthur Coats, J., granted defendant's motion for judgment notwithstanding the verdict and plaintiffs appealed. The District Court of Appeal, Schottky, J., held that jury's verdict was sustained by the evidence.

Reversed with directions.

1. Judgment 🔑199(3.10)

Motion for judgment non obstante veredicto may properly be granted only when, disregarding conflicting evidence, giving plaintiff's evidence all value to which it is legally entitled and indulging in every legitimate inference therefrom, there is no evidence of sufficient substantiality to support verdict for plaintiff.

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* Subsequent opinion 278 P.2d 689.

2. Appeal and Error ⚿1002

In action to recover damages caused by failure of irrigation district to provide continuous supply of water to fish hatchery, jury's implied finding that fish hatchery owner was party to contract to supply water was finding, where based on conflicting evidence.

3. Waters and Water Courses ⚿263

In action to recover for loss of fish caused by irrigation district's failure to furnish continuous supply of water as provided by contract, jury's implied finding that defendant, through its ditch tender, knew that water was being purchased under irrigation contract for use in fish hatchery, was supported by the evidence.

4. Waters and Water Courses ⚿260

Where ditch tender, who accepted application for water, knew that water purchased under irrigation contract was to be used for fish hatchery purposes, such knowledge would be imputed to the irrigation district.

5. Waters and Water Courses ⚿260

In action to recover for loss of fish because of irrigation district's failure to supply continuous flow of 10 miner's inches of water to fish hatchery under contract to irrigate 20 acres of pasture, the jury could consider the circumstances surrounding the making of the contract and the subsequent conduct of the parties in determining whether the parties had intended that water should first be supplied to fish hatchery. Civ.Code, § 1647; Code Civ.Proc. § 1860.

6. Evidence ⚿450(8)

Where contract for water to be supplied from irrigation district provided "the Applicant requests you to supply water for Irrigation purposes. * * * Acres Irrigated: Crop Acreages 20", the statement of use was ambiguous and permitted oral testimony to aid in the interpretation of what such use included.

7. Waters and Water Courses ⚿263

In action to recover for loss of fish because of failure of irrigation district to supply water to fish hatchery, the evidence sustained a finding that irrigation district was at fault in not providing the supply of water as provided under contract.

8. Waters and Water Courses ⚿261

Contract between fish hatchery owner and irrigation district for the supply of water to fish hatchery, was a private contract for the supply of water for a specific purpose and the irrigation district was liable to owner for damages which resulted because of failure to supply such water.

9. Waters and Water Courses ⚿263

Where complaint, which alleged that fish hatchery had suffered damages because irrigation district had not supplied continuous flow of 10 miner's inches of water as provided by contract, also alleged that irrigation district had wilfully or negligently turned off the flow of water to the fish hatchery, a cause of action for breach of contract was stated, and allegations of negligence did not transform action to one in tort.

10. Waters and Water Courses ⚿263

In action to recover for loss of fish because of irrigation district's failure to supply fish hatchery with water under contract which provided for continuous flow of 10 miner's inches of water for 20 acres of pasture, jury's implied finding that notwithstanding use of the word "pasture" in contract, water was to be first supplied to fish hatchery and that irrigation district's failure to provide such water caused damage to fish hatchery owner, was sustained by the evidence.

Floyd H. Bowers, Roseville, Thomas F. Sargent, Auburn, for appellants.

P. J. Minasian, Oroville, for respondent.

SCHOTTKY, Justice.

Appellants commenced an action against respondent to recover damages for loss of fish alleged to have been caused by the failure of respondent to deliver a continuous supply of 10 miner's inches of water. Upon the conclusion of the introduction of evidence respondent moved for a directed verdict which motion was denied. The jury then returned a verdict for appellants against respondent irrigation district in the sum of $9,416.00. Respondent thereupon moved for judgment notwithstanding the verdict and the court granted said motion, set aside the verdict of the jury and entered judgment in favor of respondent. This appeal is from said judgment.

[1] Appellants contend that the trial court erred in granting respondent's motion for a judgment notwithstanding the verdict, and the principal question that we must consider upon this appeal is whether or not the evidence was sufficient to support the verdict of the jury.

As was said by our Supreme Court in the case of Neel v. Mannings, Inc., 19 Cal. 2d 647, at page 649, 122 P.2d 576, at page 577:

> "It appears to be the well-established law of this state that the power of the trial court to set aside a verdict and enter a contrary judgment is absolutely the same as its power to grant a nonsuit. [Citations.] Therefore, a motion for judgment *non obstante verdicto* may properly be granted 'when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff.' [Citations.]"

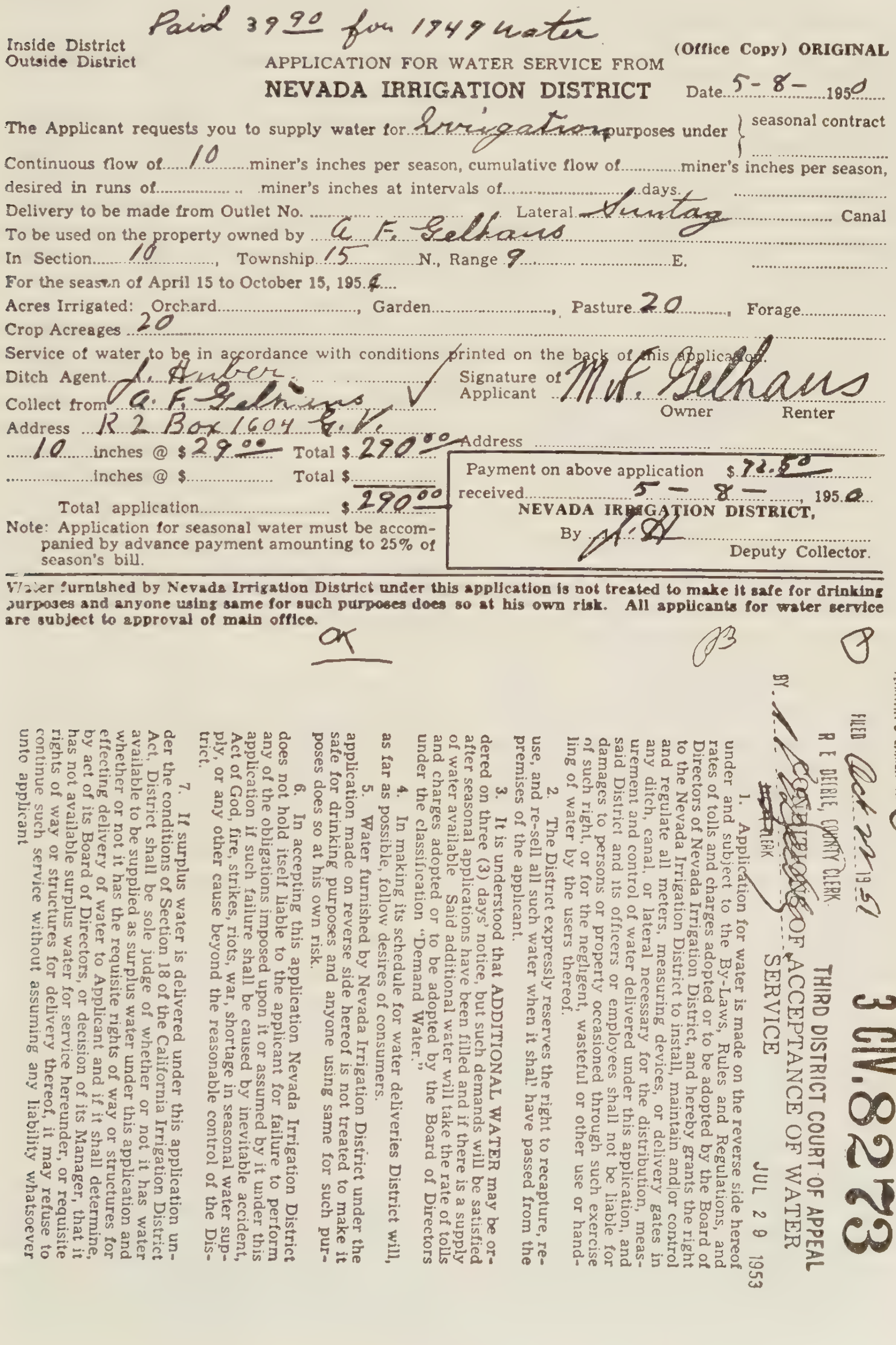
See, also, Megee v. Fasulis, 57 Cal.App. 2d 275, 134 P.2d 815; Valentin v. La Societe Francaise, 76 Cal.App.2d 1, 172 P.2d 359.

Bearing in mind the rule just quoted we shall endeavor to give a brief summary of the evidence.

Appellants were the owners of about 20 acres of pasture land in Nevada County, California, which land was also situated in the defendant irrigation district. The actual farming of this land was done by appellants' son, M. F. Gelhaus. Appellants, however, lived on the property and were engaged in the production of trout by means of a hatchery located on a part of the land. The hatchery consisted mainly of wooden, water-fed troughs in which the trout were reared. In the fish production business of this type it is necessary that there be a dependable, continuous flow of water feeding the troughs. Prior to the year 1950 appellants' troughs were fed by natural water from a stream available to appellants. Accessible to appellants in 1950 was irrigation water of the respondent. In the general locality of appellants' property respondent maintained a main irrigation canal known as the Chicago Park Ditch. Through a siphon water from this canal could be admitted into a canal known as the Sonntag ditch, also a part of the respondent irrigation system. From the Sonntag ditch appellants could receive water into their private ditch which supplied a reservoir located on appellants' land. Water from the reservoir could then be fed through a pipeline into a wooden trough containing the trout. This reservoir, when full, would hold about a two days' water supply for the feeding of the wooden troughs.

In May, 1950, one Huber, ditch tender for respondent, called upon appellants for the purpose of discussing selling irrigation water to appellants. Huber testified that he talked only with M. F. Gelhaus, son of appellants, about the water, and that he sold it to him. Appellant A. F. Gelhaus testified that Huber came to him and that he told Huber that he needed 10 miner's inches of water to run through his hatchery, and that Huber agreed to furnish him same and the contract was signed by them accordingly. M. F. Gelhaus, son of appellants, testified that on the same day of the above discussion between Huber and his father Huber came to him and asked him if he needed additional water for the farm land. M. F. Gelhaus testified that he told Huber that he did not need additional water as he would pick the water up after it had been spilled through his father's fish troughs and use it to irrigate the farm land. Huber denied having any knowledge that appellant A. F. Gelhaus was intending to use any of the water for a fish hatchery but it is clear that there is a conflict in the evidence on this point.

The contract was introduced in evidence, and a facsimile of it is here reproduced:



Paid 39⁹⁰ for 1949 water

Inside District
Outside District

APPLICATION FOR WATER SERVICE FROM
NEVADA IRRIGATION DISTRICT

(Office Copy) ORIGINAL
Date 5-8-1950

The Applicant requests you to supply water for Irrigation purposes under { seasonal contract
Continuous flow of 10 miner's inches per season, cumulative flow of .... miner's inches per season,
desired in runs of .... miner's inches at intervals of .... days.
Delivery to be made from Outlet No. .... Lateral Suntag .... Canal
To be used on the property owned by A. F. Gelhaus
In Section 10, Township 15 N., Range 9 E.
For the season of April 15 to October 15, 1950
Acres Irrigated: Orchard ...., Garden ...., Pasture 20, Forage ....
Crop Acreages 20
Service of water to be in accordance with conditions printed on the back of this application.
Ditch Agent J. Huber ✓
Signature of Applicant M. A. Gelhaus
Owner Renter
Collect from A. F. Gelhaus ✓
Address R 2 Box 1604 G. V.
Address ....
10 inches @ $29⁰⁰ Total $290⁰⁰
.... inches @ $ .... Total $ ....
Total application $290⁰⁰

Note: Application for seasonal water must be accompanied by advance payment amounting to 25% of season's bill.

Payment on above application $72.50
received 5-8-1950
NEVADA IRRIGATION DISTRICT,
By J. H.
Deputy Collector.

Water furnished by Nevada Irrigation District under this application is not treated to make it safe for drinking purposes and anyone using same for such purposes does so at his own risk. All applicants for water service are subject to approval of main office.

OK

B B

PLAINTIFF'S EXHIBIT No. 3
FILED Oct 22 1951
R E DEIBLE, COUNTY CLERK
BY .... DEPUTY CLERK

3 CIV. 8273
THIRD DISTRICT COURT OF APPEAL
JUL 29 1953

CONDITIONS OF ACCEPTANCE OF WATER SERVICE

1. Application for water is made on the reverse side hereof under and subject to the By-Laws, Rules and Regulations, and rates of tolls and charges adopted or to be adopted by the Board of Directors of Nevada Irrigation District, and hereby grants the right to the Nevada Irrigation District to install, maintain and/or control and regulate all meters, measuring devices, or delivery gates in any ditch, canal, or lateral necessary for the distribution, measurement and control of water delivered under this application, and said District and its officers or employees shall not be liable for damages to persons or property occasioned through such exercise of such right, or for the negligent, wasteful or other use or handling of water by the users thereof.

2. The District expressly reserves the right to recapture, reuse, and re-sell all such water when it shall have passed from the premises of the applicant.

3. It is understood that ADDITIONAL WATER may be ordered on three (3) days' notice, but such demands will be satisfied after seasonal applications have been filled and if there is a supply of water available. Said additional water will take the rate of tolls and charges adopted or to be adopted by the Board of Directors under the classification "Demand Water."

4. In making its schedule for water deliveries District will, as far as possible, follow desires of consumers.

5. Water furnished by Nevada Irrigation District under the application made on reverse side hereof is not treated to make it safe for drinking purposes and anyone using same for such purposes does so at his own risk.

6. In accepting this application Nevada Irrigation District does not hold itself liable to the applicant for failure to perform any of the obligations imposed upon it or assumed by it under this application if such failure shall be caused by inevitable accident, Act of God, fire, strikes, riots, war, shortage in seasonal water supply, or any other cause beyond the reasonable control of the District.

7. If surplus water is delivered under this application under the conditions of Section 18 of the California Irrigation District Act, District shall be sole judge of whether or not it has water available to be supplied as surplus water under this application and whether or not it has the requisite rights of way or structures for effecting delivery of water to Applicant and if it shall determine, by act of its Board of Directors, or decision of its Manager, that it has not available surplus water for service hereunder, or requisite rights of way or structures for delivery thereof, it may refuse to continue such service without assuming any liability whatsoever unto applicant

After the signing of this contract respondent started delivering water through the Sonntag ditch to appellants. The water was continuously taken by A. F. Gelhaus from the Sonntag ditch into his private ditch, thence into his reservoir where he fed it by pipeline into his fish troughs. As the water spilled from his fish troughs it was taken by M. F. Gelhaus for irrigation purposes as needed. After the signing of this contract, up until September, 1950, appellants made sixteen different complaints to respondent or Huber because they were not getting a sufficient head of water to make up 10 miner's inches. The lack of a 10 miner's inch head of water on these various occasions was due to various causes, and was always remedied by respondent or Huber. Then due to some cause not quite clear, during the night of September 3 and the early morning of September 4, 1950, water stopped flowing from the Sonntag ditch into appellants' ditch. Appellants, upon checking the hatchery on the morning of September 4, 1950, found that the reservoir was nearly empty, and that there was no water running in their private ditch or the Sonntag ditch. Appellants were unable to find the cause of the lack of flow of water, and had no immediate standby provisions for supplying water to their hatchery. Attempts by appellants to contact respondent or Huber so as to have them turn in water were to no avail. As a consequence of the lack of water appellants lost 130,720 trout valued at a total of $9,616.00.

Additional facts shown by the record will be detailed in the course of this opinion.

In arguing for a reversal of the judgment appellants make the following points:

1. That the contract did call for irrigation water to be used in the fish hatchery.

2. That appellant A. F. Gelhaus was a party to the written contract.

3. That the law and facts of the case require that the written contract be construed to require the furnishing of water for the production of fish.

4. That respondent is estopped from asserting that the water was not purchased for the production of fish.

Respondent in reply contends:

1. That there was no contract to furnish water for fish hatchery purposes.

2. That appellants were not a party to the written contract.

3. That the written contract was not for the benefit of appellants.

4. That the terms of the written contract cannot be varied.

5. That the liability is not an incident of the ordinary relation of water distributor and consumer.

6. That there was no showing of negligence.

7. That irrigation districts are not liable for torts.

8. That there is no estoppel.

[2] In support of its contention that appellants were not parties to the written contract and that it was not signed by appellant A. F. Gelhaus, respondent argues that a comparison of the exemplar of appellant A. F. Gelhaus' handwriting with the handwriting on the contract shows clearly that said appellant did not sign the contract. However, the record shows the following testimony of appellant A. F. Gelhaus:

> "Mr. Bowers: I will hand you, Mr. Gelhaus, Plaintiff's exhibit Number One, marked for identification, and I will ask you what that is, please? A. That is the application that I signed my name on, for ten inches of water, and was signed by Mr. Huber.
>
> "Q. Was that in your presence; was it signed in your presence by Mr. Huber? A. Yes.
>
> "Q. On the right hand side here is your signature? A. No, that is my son's signature; mine is right here.
>
> "Q. Where it says: 'Collect from?' A. Yes, he said I had to have that on there because I was the owner of the property."

While this testimony is denied by Huber such denial merely creates a conflict in the evidence on this point, and in the face of this conflict this court is bound by the implied finding of the jury that the contract was signed by appellant A. F. Gelhaus, at the place indicated by Huber and with the intent of both that by such signing A. F. Gelhaus became a party thereto.

[3] Respondent contends also that there was no contract to furnish water for fish hatchery purposes. The record shows that Mr. Huber called at appellants' home on May 8, 1950, to discuss appellants' need for water. Appellant A. F. Gelhaus testified as follows to the conversation that was had:

> "Q. Will you relate that conversation, what you said and what Mr. Huber said, as far as you can remember; that each of you said?
>
> "A. Yes, I could. He came and asked me how much water I wanted and I said, 'I need ten inches of water to run through my fish hatchery,' and he said 'Is that all the water that you need?' and I said, 'No, Melvin is leasing—'
>
> "Q. Who is Melvin?
>
> "A. That is my son, M. F. Gelhaus. I said, 'He might need some more,' and for him to go and see Melvin and he would get a check from Melvin. He said, 'You sign the application and I will go and see him.' He asked me how the fish were doing and I said they were doing pretty good but I had a tough winter, that is, I had ice forming on the troughs, and that I changed my nights into days and the days into nights to break the ice off, to keep the water flowing, and then he left to see Melvin. That is all that was said on the signing of the agreement on May 8th."

After this conversation was had Mr. Huber apparently went to see M. F. Gelhaus, appellant's son, who testified as follows as to the conversation that took place:

> "A. He told me he had been down to my father about the water and my dad had told him to come over and find out if I wanted additional water; that he wanted ten inches of water for the fish hatchery. We spoke over the situation and I told him that ten inches would be enough, and I was very careful to explain to him that the water was to come down the Sonntag ditch through the reservoir and dad would make use of it first through the fish hatchery, whereupon I would pick up the spilled water and use it on my clover."

M. F. Gelhaus also testified that he signed the application in question where the signature M. F. Gelhaus appears.

The contract itself provided for a continuous flow of ten miner's inches of water for 20 acres of pasture. The rules furnished appellants along with the contract contained various provisions two of which are pertinent here. Rule 15 provided:

> "No purchaser of any water from the District acquires any proprietary right therein by reason of such use, nor does such purchaser acquire any right to re-sell such water, *or to use it for a purpose other than that for which it was applied*, nor to use it on premises other than as stated at the time of making application."

There is ample testimony in the record to support the implied finding of the jury that the ditch tender Huber, who signed the contract on behalf of respondent and accepted payment of the initial payment of $72.50, knew that the water was being purchased to run through the fish hatchery. The record shows further that after the signing of the application on May 8, 1950, and prior to the failure of water which caused the damage here involved, appellants on 16 different occasions made complaint to respondent or their ditch tender, Huber, because they were not getting a sufficient head of water to make up 10 miner's inches and that each time the situation was remedied by respondent. Huber testified:

> "Q. On these occasions when Mr. Gelhaus called you and questioned about the water being off sixteen or more or less times during the summer didn't he on each occasion tell you that he had to have water for his fish and that was the cause of his emergency? A. Yes."

[4] Thus it appears that there was testimony from which the jury could have inferred that respondent and Huber knew that appellants were using the irrigation water for fish hatchery purposes under claim of a contractual right to do so. There appears to be no dispute that Huber was the agent of respondent, or that Huber had authority to accept the application for water from appellants. Knowledge on the part of Huber that the water was to be used and was being used for fish hatchery purposes would seem to be imputed to respondent. "The general rule is that when an agent, while acting within the scope of his authority, acquires knowledge, or receives notice, of any fact material to the subject matter of the agency, his principal is charged with constructive notice of that fact." 2 Cal.Jur.2d Agency, sec. 160. "This rule applies to corporations and to the state as well as to individuals, and to an undisclosed as well as to a disclosed principal. Moreover, it seems that it is applicable to ostensible as well as to actual agency." 2 Cal.Jur.2d, Agency, sec. 161.

[5] Respondent makes the contention that the contract called for irrigation water for 20 acres of pasture, not water for a fish hatchery. However, from the conduct of the parties prior to the signing of the contract as well as thereafter, the jury could have well inferred that notwithstanding the use of the word "pasture" the parties contemplated that the water would be first used through the fish hatchery. The record shows that prior to 1950 appellants had attempted to get water from respondent to use for their fish hatchery but this was refused because respondent could not recover the water after use by appellants. Therefore, until 1950 appellants were not supplied water by respondent from the Sonntag ditch. Testimony shows that in 1950 respondent, through its agent Huber, finally agreed to supply water to appellants through the Sonntag ditch. Appellant testified that at the time the application for this water was signed he told Huber the water was to be used in his fish hatchery and then spilled out on the 20 acres of clover when needed. After respondent started supplying the water sixteen complaints were made up to the loss of fish in September, appellant each time of complaining telling Huber that he needed water for his fish and that this was the cause of his emergency. Respondent, through its agent Huber, answered each complaint and saw that water service was restored to appellants. Thus both the circumstances surrounding the making of the contract and the subsequent conduct of the parties tend to show that both appellants and respondent knew and contemplated that appellants would use the water for their fish hatchery. Because of the doubtful and uncertain nature of the intended use of the water from the contract, the jury could well have considered the circumstances surrounding the making of the contract and the subsequent conduct of the parties in determining what was intended by the parties by the contract. Civil Code section 1647 provides:

> "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."

Code of Civil Procedure section 1860 provides:

> "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

While it is true that it is only where the contract is doubtful or uncertain or ambiguous that the surrounding circumstances become important in ascertaining the intent of the parties, 6 Cal.Jur., Contracts, sec. 180, it appears in the instant case that the meaning of the parties as to the intended use of the irrigation was doubtful or uncertain, and that therefore the rules of construction above stated are applicable.

The contract called for a continuous flow of 10 miner's inches of water. Appellant A. F. Gelhaus testified that on the morning of September 4th the water was not flowing in the Sonntag ditch, and that he attempted to contact respondent or Huber so as to have water service restored, but that he was unable to reach anyone, and as a result he lost his fish due to the lack of supply of water. He testified further that Superintendent Smith and Mr. Huber came to his farm the next morning, observed the loss of the fish, and "Mr. Huber said, 'I knew that you were raising fish but I had no idea that you had such a big set-up; if I knew you had such a big set-up I would have checked your water twice a day the same as I do for Redman, who raises fish.' * * * I asked if it was leaves or cones in the siphon grate or what was it because I didn't get any notice as to why the water was shut off—Mr. Smith said there was no leaves, just that the water was shut off, that was his answer."

[6] The written contract is a filled-in form used by respondent generally and respondent claims, necessarily, that as filled in the document includes a provision for furnishing water to irrigate 20 acres of pasture and excludes any obligation to furnish water for any other use. But the document does not expressly declare no other use is intended. All that appears on this subject is the following: "The Applicant requests you to supply water for Irrigation purposes. * * * Acres Irrigated: Orchard ...... Garden ......, Pasture ..20.., Forage ...... Crop Acreages ..20.." We do not believe that the subject document compels the conclusion, as a matter of law, that the statement of use is exclusive. On the contrary, we think that on the subject now discussed the provisions as to use of water are uncertain enough to permit oral testimony in aid of interpretation, and we think further that the trial court was bound, as this court is bound, by the implied finding of the jury that the appellant was a party to the contract to furnish water to his hatchery as an included use.

[7] Huber testified that there was plenty of water in the Chicago Park ditch to be run into the Sonntag ditch, but he made no explanation as to why the water was not running in the Sonntag ditch. Huber testified further that he had an over-supply of water in the Chicago Park ditch on the day of the loss and was spilling water there. From this evidence the jury could well have inferred that the respondent was clearly at fault in not having the water running in the Sonntag ditch, and that the failure to supply appellants with 10 miner's inches of water continuously amounted to a breach of contract causing appellants' loss.

[8] Respondent contends that it is not liable for the loss of appellants' fish because such liability is not an incident of the ordinary relation of water distributor and consumer. It cites Niehaus Bros. Co. v. Contra Costa Water Co., 159 Cal. 305, 113 P. 375, 36 L.R.A.,N.S., 1045 and several other cases, all of which deal with the liability of a water company supplying water to fire hydrants for damages caused by a fire where the water supply at the hydrant was inadequate. We do not believe that those cases are applicable to the instant case for in such cases liability was not imposed upon the water company because, as stated by the court, liability can only arise from a private contract between the company and the consumer under which a specific purpose is undertaken by the company. However, as we have hereinbefore pointed out, respondent agreed to furnish a continuous flow of 10 miner's inches of water, knowing that said water was for appellants' fish hatchery.

Respondent contends that there was no showing of negligence on its part and that even if there was negligence it, being an irrigation district, cannot be held liable in tort. We believe that the evidence hereinbefore set forth is sufficient to support a finding that respondent was negligent in permitting the flow of water to appellants to be shut off. It does not appear that any satisfactory explanation as to why the water was shut off was given, and there was evidence which would support a finding that there was plenty of water but that it was shut off from the ditch that led to appellants' land.

[9] However, it is clear that appellants' action was to recover damages for loss sustained by them by respondent's breach of its contract to supply appellants with a continuous flow of 10 miner's inches of water. The fact that appellants also alleged that respondent turned off the flow

of water wilfully or negligently would not transform the action from an action for breach of contract to one in tort.

As was pointed out by our Supreme Court in L. B. Laboratories, Inc. v. Mitchell, 39 Cal.2d 56, at page 62, 244 P.2d 385, at page 388:

> "'Notwithstanding the basic distinctions between actions on contract and in tort, there are many wrongful acts that constitute a breach of duty that is not only created by contract but imposed by law as well. Thus, negligence may be conceived as being of two types: delictual negligence, which involves a breach of a duty owed to a world at large, as to the general public in driving an automobile; and contractual negligence, which consists of a breach of a primary duty owed to the injured party—a "polarized" duty arising from some prior relationship between him and the tortfeasor, as in the case of a bailee or common carrier. The latter type of negligence ordinarily gives rise to an action either on contract or in tort, and the injured party may at his election waive the contract and sue in tort, or waive the tort and base his action on the contract alone.'"

See, also, the recent case of Langley v. Pacific Gas & Electric Co., 41 Cal.2d 655, at page 662, 262 P.2d 846, at page 850, where the court said:

> "Defendant contends that unless the duty to give notice is expressly provided for in its contract with plaintiff, recovery cannot be had in an action on the contract but only in an action in tort for negligence. By undertaking to supply electricity to plaintiff, defendant obligated itself to exercise reasonable care toward him, and failure to exercise such care has the characteristics of both a breach of contract and a tort."

[10] In view of the foregoing we conclude that there was sufficient evidence to support the implied finding of the jury that respondent had contracted with appellants to supply them with a continuous flow of 10 miner's inches of water, and that due to respondent's failure to perform said contract appellants had suffered damage in the amount awarded them in the verdict. It follows that the court erred in granting respondent's motion for judgment notwithstanding the verdict.

The judgment is reversed with directions to the trial court to enter judgment on the verdict.

VAN DYKE, P. J., and PEEK, J., concur.

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122 Cal.App.2d 585

PERKINS v. WEST et al.

Civ. 4756.

District Court of Appeal,
Fourth District, California.
Jan. 18, 1954.

In action involving question whether property which had been conveyed to spouses as joint tenants was in fact community property, the Superior Court, San Bernardino County, R. Bruce Findlay, J., entered judgment holding that property was community property, and surviving spouse appealed. The District Court of Appeal, Mussell, J., held, inter alia, that evidence was insufficient to show agreement or understanding between spouses that property was held as community property.

Affirmed in part and reversed in part.

1. Husband and Wife 🔑249

The form of instrument under which husband and wife hold title to realty is not conclusive as to status of the property, but the property acquired under joint tenancy deed may be shown to be actually community property or separate property of one spouse according to intention, understanding or agreement of parties.

2. Husband and Wife 🔑262(1)

The declaration in deed or other instrument that spouses are to take as joint tenants raises presumption that legal title is in parties in accordance with such language and destroys the statutory presumption that property is community.

3. Evidence ⚿220(4)

Even if wife did hear statements of her deceased husband as he was dictating will to effect that property, which had been conveyed to the parties as joint tenants, was community property, in view of fact that she had been sent from the room so that he could dictate the will and had been called back when he had been seized by a heart attack and was busy attending him at time of such statements, she was not bound to deny or admit the statements and her failure to object thereto did not constitute an admission on her part of truth of such statements.

4. Evidence ⚿246

In action involving question whether property, which had been conveyed to spouses as joint tenants, was in fact community property, letter written by surviving spouse's attorney to inheritance tax department in connection with inheritance tax affidavit, in which letter property was claimed to be community property, was inadmissible as against surviving spouse, in absence of showing that it had been written with her consent.

5. Husband and Wife ⚿264

In action involving question whether property, which had been conveyed to spouses as joint tenants was in fact community property, evidence was insufficient to show agreement or understanding between spouses that property was held as community property.

Morgan W. Lowery and Charles R. Stead, Pomona, for appellant.

Adolph B. Rosenfield, Long Beach, for respondents.

MUSSELL, Justice.

Caroline R. West, the surviving spouse of J. Howard D. West, deceased, appeals from a judgment in which it was decreed that certain real and personal property standing of record in the names of appellant and her predeceased husband as joint tenants, was nevertheless the community property of appellant and said J. Howard D. West. West, hereinafter referred to as decedent, purchased the real property involved in April, 1942, and took title in his own name. The total price of the property was $6,500, $2,500 being paid in cash, of which appellant paid $500 and the balance being secured by a promissory note and trust deed signed by decedent and appellant. Decedent and appellant were married on May 29, 1943, and the $4,000 note and trust deed, which had been given as part of the purchase price of the property, was paid off, and a reconveyance was executed on January 10, 1944. On January 14, 1944, decedent and appellant joined in executing a deed to said real property (which was known as the Carbon Canyon property) whereby it was conveyed to decedent and appellant as joint tenants. Bank accounts were opened by decedent and appellant and both signed the bank's joint account forms without any discussion between them as to whether the funds would be considered as community property * * * "just a routine matter". Beginning in October, 1946, decedent caused various stock certificates, some theretofore standing in his own name, to be issued or reissued in his name and that of appellant as joint tenants, each being pursuant to written instructions from the decedent.

On July 16, 1949, decedent made his will in which he stated that all of his property was community property with his wife, with the exception of a Hudson car which he directed his executor to sign over to his daughter. He directed his executor to make certain payments from his interest in the community property to his first wife, Amy L. West, one of the plaintiffs herein, to his daughters and to appellant. The will was dictated by decedent to G. R. Case, a certified accountant, who was called to decedent's home at his request. At the time decedent was suffering considerably with a severe heart attack and was in bed. Case testified that when he came into decedent's bedroom, decedent suggested that appellant leave the room so that he could dictate the will; that she did leave the room, and after decedent dictated the first part of the will, he had "another attack" and called out or made some noise which resulted in appellant coming back into the room; that decedent did not make any statement to the effect that his property was community property during any time that appellant was in the room; and that appellant was in and out of the room during the remainder of the dictation; that after decedent had completed dictating the will, he, Case, went away, prepared the will and returned with it shortly thereafter; that decedent then read the will and signed it; that it was also signed by witnesses and delivered to the witness and left in his possession; that appellant did not see the will prior to the death of the decedent. In this connection appellant testified that at the time she did not see the will and could not say what was in it; that she heard the deceased talking and did not "pay too much attention"; that decedent did what he wanted to and she did not interfere; that she could not say whether she was in the room when decedent actually started talking; that she and the decedent did not agree at any time that any or all of the property of the decedent which he had acquired before his marriage to her or thereafter should become community property.

On May 25, 1950, after the death of decedent, which occurred on April 26, 1950, appellant filed a petition in the superior court to terminate the joint tenancy in the Carbon Canyon property, the stocks, bank accounts and a certain mortgage and trust deed, with the exception of the business and property referred to as the Canyon Food Products in which decedent did not own any interest at the time of his death. In the course of these proceedings appellant executed an inheritance tax affidavit in which it is stated that the "property transferred was all community." The attorney who represented appellant and prepared the affidavit testified that he handed her the affidavit; that "she looked it over, read it over and said, 'It says here that it is community property. I thought it was joint tenancy,' or 'I told you it was joint tenancy,' or some words to that effect, whereupon I said, 'Well, yes, it is joint tenancy property, but this is just for the purposes of inheritance tax, and the question relates to the source of the property,' or some general words to that effect, I can't, of course, remember the exact words at this stage."

In connection with this affidavit, appellant's attorney wrote a letter to the inheritance tax attorney in Los Angeles in which he stated, among other matters, that it was his understanding that "Mr. and Mrs. West at all times understood, agreed and intended that none of his property would be separate property but that it would all be the community property of himself and his surviving wife notwithstanding the fact that title to the property was in joint tenancy." The writer of the letter testified that the contents thereof were not discussed with appellant prior to the time it was written and that appellant did not authorize him to make any statements contained therein with respect to the nature of her property.

The will, the inheritance tax affidavit, and the letter written by appellant's attorney were all admitted in evidence over the objection of appellant's counsel. Appellant contends that these documents were inadmissible and that the evidence is not sufficient to support a finding and judgment that the property which stood of record in joint tenancy at the date of the death of decedent is nevertheless community property.

[1, 2] It is well settled in this state that the form of the instrument under which a husband and wife hold title is not conclusive as to the status of the property and that property acquired under a joint tenancy deed may be shown to be actually community property or the separate property of one spouse according to the intention, understanding or agreement of the parties. Gudelj v. Gudelj, 41 Cal.2d 202, 259 P.2d 656; Socol v. King, 36 Cal.2d 342, 345, 223 P.2d 627. The declaration in a deed or other instrument that spouses are to take as joint tenants raises the presumption that the legal title is in the parties in accordance with such language and destroys the statutory presumption that the property is com-

munity. Estate of Jameson, 93 Cal.App.2d 35, 41, 208 P.2d 54. In Cash v. Cash, 110 Cal.App.2d 534, 538, 243 P.2d 115, it is held that the opening of a joint tenancy bank account by husband and wife creates a rebuttable presumption that the money therein is joint tenancy property; that either may rebut this presumption, but in the absence of rebutting testimony the presumption must prevail. And in De Boer v. De Boer, 111 Cal.App.2d 500, 505, 244 P.2d 953, 956, it is said that "A determination by a trial court that the presumption has been rebutted is conclusive on a reviewing court unless it is manifestly without support in the evidence. Estate of Baer, 81 Cal.App.2d 830, 833, 185 P.2d 412."

In Edwards v. Deitrich, 118 Cal.App.2d 254, 257 P.2d 750, it is held that the statutory presumption that property acquired after marriage except by gift, will, devise, or descent is community is rebutted by evidence that the property was taken in joint tenancy; that that form of conveyance not only rebuts the community property presumption, but itself raises the rebuttable presumption that the property is as described in the deed, and places the burden on the party claiming the property to be community to prove that fact; (citing cases) that by oral agreement a husband and wife can convert community property into separate, and vice versa, and that evidence of such agreement will rebut the presumption created by the form of the deed; (citing cases) that in order that property may be converted from one form to another there must be relevant evidence of an agreement to that effect; and that the mere fact one of the parties has a mistaken belief about the nature of the property, or has an intent uncommunicated to the other spouse about converting the property from one form to another, or expresses such an intent by will, will not rebut the presumption raised by the form of the deed. Citing Socol v. King, supra; Cash v. Cash, supra; and Watson v. Peyton, 10 Cal.2d 156, 73 P.2d 906.

In the instant case the record shows without question that the title to the property involved was placed by the parties in joint tenancy. The question is whether there was substantial evidence showing that there was an agreement or understanding between the decedent and appellant that the property so placed in joint tenancy should be held as community. We are of the opinion that this question requires a negative answer.

Decedent's statement in the will that all of his property was community indicates a mistaken belief about the nature of the property or an intent to convert it to community and is not sufficient to rebut the presumption raised by the form of the deed and conveyances. Edwards v. Deitrich, supra, 295; Potter v. Smith, 48 Cal.App. 162, 169, 191 P. 1023. In this connection it may be noted that there was evidence that the decedent requested appellant to leave the room while the will was being dictated. From this it may be inferred that he did not want appellant to hear his statements as to the character of the property.

[3] It is argued that appellant was present when the will was dictated and heard the statements made by decedent; that she made no objection and acquiesced therein. There was evidence to the effect that appellant was not present when the statements were made and that she did not see the will or pay "too much attention" to what was said. If we assume that appellant did hear the statements of decedent, the facts shown do not indicate that she was bound to deny or admit them or that the statements called for a denial on her part. Under such circumstances she was not affected by the statements or declarations. Henshall v. Coburn, 177 Cal. 50, 53, 169 P. 1014.

The inheritance tax affidavit, containing a statement as to the community character of the property involved, was prepared by the attorney for appellant and intended by him for use by the inheritance tax department. Appellant read the document and expressed her opinion that the property was "joint tenancy" and upon being informed that it was "just for the purpose of inheritance tax and that the question related to the source of the property", affixed her signature thereto. These circumstances do not show an agreement on the part of decedent and appellant that the property was to be considered as community. On the contrary, they indicate that appellant considered the property as in joint tenancy. It may here be noted that the objection to the admissibility of the affidavit on the ground that it was a privileged communication between the attorney and client was apparently waived as appellant's attorney voluntarily produced a copy of the affidavit and exhibited it to plaintiffs' attorney for his inspection and perusal.

[4] The letter written by appellant's attorney to the inheritance tax department in connection with the inheritance tax affidavit was inadmissible. It was not shown to appellant, or written with her consent and only expresses the opinion of the attorney. It does not purport to be a recital of facts related to the attorney by appellant and does not contain a recital of facts upon which such opinion was based.

[5] Considering the entire record in the light of the rules announced in the cases cited herein, we conclude that there is no substantial evidence showing an agreement or understanding that decedent and appellant held the property as community.

The appeal herein is from a part of the judgment only and the notice of appeal excepts therefrom the provisions thereof relating to the bank accounts which were placed in the names of decedent and appellant as joint tenants and appellant is not seeking a reversal of the provisions of the judgment relating to the claims against the estate, the provisions relating to the third and fourth causes of action set forth in the complaint, or costs.

The judgment is reversed in so far as it requires the appellant to deliver to the plaintiffs, to be administered according to law, all or any of the property of record in the names of decedent and appellant as joint tenants except the bank accounts. Otherwise it is affirmed. Appellant to recover costs.

BARNARD, P. J., and GRIFFIN, J., concur.

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122 Cal.App.2d 592

HESSION
v.
CITY AND COUNTY OF SAN FRANCISCO.

Civ. No. 15396.

District Court of Appeal, First District, Division 2, California.

Jan. 19, 1954.

Rehearing Denied Feb. 18, 1954.

Hearing Denied March 17, 1954.

Action against municipal corporation operating street railroad, for personal injuries sustained when railroad switchman riding atop box car moving across intersection was struck by trolley wires. The Superior Court, City and County of San Francisco, William F. Traverso, J., rendered judgment against municipal corporation and the municipal corporation appealed. The District Court of Appeal affirmed in 258 P.2d 50. On rehearing, the District Court of Appeal, Nourse, P. J., held that even if railroad which was switchman's employer was guilty of negligence which was a proximate cause, the city, by virtue of evidence showing that violation of statute requiring it to maintain wires at height of 22 feet above street was a proximate cause, was a joint tort-feasor, and had no legal right to complain that railroad, as another joint tort-feasor, was improperly exonerated from liability by an allegedly erroneous instruction, since there is no right of contribution between joint tort-feasors.

Affirmed.

1. Street Railroads ⚿114(4), 117(34)

In action against city which operated street railway, for personal injuries sustained by railroad switchman who was struck by trolley wire as switchman was riding atop box car across intersection, question whether violation by city of its statutory duty of maintaining wires at height of 22 feet above the street was a proximate cause of switchman's injury was for jury, and its verdict against city was sustained by the evidence.

2. Street Railroads ⚿78

Where railroad switchman was injured when struck by trolley wire of city operated street railway as switchman was riding across intersection on box car, and evidence established that violation by city of statute requiring maintenance of such wires at height of 22 feet above street was a proximate cause of switchman's injuries, even if railroad was also guilty of negligence which was a proximate cause of switchman's injuries, city was a joint tort-feasor, and was not entitled to complain that railroad was improperly exonerated from liability by an allegedly erroneous instruction, since no right of contribution exists between joint tort-feasors.

3. Street Railroads ⚷117(3)

In action against municipal corporation operating street railway for personal injuries sustained when railroad switchman riding atop box car moving across intersection was struck by trolley wire, evidence raised question for jury as to whether defective condition of wires existed at time of accident and for such a period before accident that municipal corporation in exercise of ordinary care should have discovered and corrected such condition.

4. Estoppel ⚷62(4)

Municipality sued for injuries sustained when railroad company's switchman atop box car moving on spur track across intersection was struck by wire of street railway operated by municipality, was estopped from urging, in support of its contention that switchman was gratuitous licensee, that operation of spur was not covered by municipality's permit to warehouseman for construction and use of spur because warehouseman had no right to assign permit to railroad company, where ordinance granting permit disclosed intention that railroad company would operate spur.

5. Street Railroads ⚷13

A municipality operates its street railway system in proprietary capacity and in doing so is normally under duty to exercise same degree of care and is liable for negligence in same manner as private corporations.

6. Street Railroads ⚷86(1)

A street railroad company must exercise reasonable care and diligence so to construct and maintain its trolley wire as to make it reasonably safe for passage of persons who have a right to pass under it.

7. Street Railroads ⚷85(1)

Where permit or franchise ordinance under which spur track was maintained gave railroad company the right to have its freight cars pass over spur and spur was in use when trolley wires were installed more than 35 years ago, passage of freight cars at intersection was as to municipality a known and rightful use of street to which in operation of municipal street railway the municipality had to give full consideration and to which municipality owed ordinary care not to endanger such use. Civ.Code, § 470.

8. Municipal Corporations ⚷685

A city grants right to construct, maintain and operate spur track over public street in its governmental capacity in the commercial and industrial interest of city which is indirectly served by transportation advantage to individual plant, rather than as a personal favor within rule that simple gratuitous licensee is owed lesser care in that such licensee is only the recipient of a favor.

9. Municipal Corporations ⚷763(1)

A city owes duty of ordinary care in maintenance of streets to employee of railroad maintaining and operating spur track over street under permit from city without regard to whether employee is invitee, licensee or trespasser. Civ.Code, §§ 470, 1714.

10. Municipal Corporations ⚷680(1)

A city under its police power over its streets may require permits for many uses.

11. Street Railroads ⚷102(1)

A railroad company's violation of rules of Public Utilities Commission prohibiting operation of cars where there is insufficient clearance would not exonerate municipality violating Commission's rules prohibiting owner of wires from maintaining them with insufficient clearance over railroad tracks from liability for injuries sustained when switchman riding atop box car moving on spur track across intersection was struck by wire of street railway operated by municipality.

12. Negligence ⚿136(25)

Generally, the reasonable foreseeability of intervening act is for jury where there is room for reasonable difference of opinion.

13. Street Railroads ⚿86(1)

The known danger to users of street of impaired clearance of wires over streets imposed on municipality sued for injuries sustained when railroad company's switchman riding atop box car moving on spur track across intersection was struck by wire of street railway operated by municipality, the duty of reasonable inspection of wires.

14. Appeal and Error ⚿1064(1)

In action against municipality for injuries sustained when railroad company's switchman riding atop box car moving on spur track across intersection was struck by wires of street railway operated by municipality, instruction on requirements of Public Utilities Commission order which was not applicable to lines constructed when wires involved were constructed was not prejudicial to municipality in view of ordinance and general law making such requirements applicable.

15. Street Railroads ⚿86(2)

A municipality sued for injuries sustained when railroad company's switchman riding atop box car moving on spur track across intersection was struck by wire of street railway operated by municipality was not relieved of duty of inspecting wires for minimum clearance required by Railway Commission by relying on contractor having constructed wires many years before under contract requiring the work to be done in conformity with requirements of Commission.

16. Appeal and Error ⚿232(2)

Propriety of exclusion of evidence will not be considered on appeal on a ground of admission not stated to trial court.

17. Witnesses ⚿198(1), 219(3)

An attorney or person in similar position is not incompetent to testify in the case of his client and does not become incompetent for the future when the privilege is asserted, and the privilege may be waived by the person in whose favor it exists at any time and only thereafter is the testimony of the witness also available to the opposing party.

18. Damages ⚿50

Traumatic neurosis is a basis for damages.

19. Damages ⚿130(3)

$7,500 to injured man who had 40 year life expectancy and who suffered physical injury, long and severe mental suffering, loss of job, loss of income, and loss of earning capacity by restriction of kind of work for which he was fit was not excessive.

Dion R. Holm, City Atty. of City and County of San Francisco, George E. Baglin, Deputy City Atty., San Francisco, for appellant.

Hoberg & Finger, San Francisco, for respondent.

KAUFMAN, Justice.

The court granted a rehearing in this case to give further consideration to appellant's contention that the jury was improperly instructed as to proximate cause and that the trial court gave an erroneous instruction which brought about the exoneration of the codefendant, Western Pacific Railway.

[1] Here the dangerous condition of the wire had existed for many years. There was a clear duty under the law requiring the city to maintain the wires at a height of 22 feet above the street. Whether this violation of the statute on the part of the city was a proximate cause of respondent's injury was for the jury to determine. The jury was properly instructed as to the proximate cause by the trial court and returned a verdict against the city. This verdict is therefore supported by both the law and the evidence.

[2] Appellant's contention that the trial court gave an erroneous instruction which

brought about the exoneration of the codefendant, Western Pacific Railway, is answered in the case of Sullivan v. City and County of San Francisco, 95 Cal.App.2d 745, 214 P.2d 82, 88. The court there said in part, "The City, as a joint tort feasor, has no legal right to complain that another joint tort feasor was improperly exonerated from liability, there being no right of contribution between joint tort feasors. * * * Under the facts if the City was negligent, and the evidence is overwhelming that it was, such negligence, as a matter of law, was at least a concurrent cause. This being so, even if the nonsuit as to the driver and owners of the truck was erroneously granted the City was not prejudiced, since one joint tort feasor has no legal cause for complaint if another tort feasor is relieved of liability, even erroneously, there being no right of contribution between them."

Since appellant in its petition for rehearing did not question the accuracy of the recital of the specific facts in our opinion previously filed, nor our conclusion that its negligence was clearly established, we adopt our previous opinion as follows:

"This is an action for personal injuries. When, on December 16, 1948, plaintiff as a member of a switching crew of the Western Pacific Railroad Company, hereinafter called the company, was riding on top of a box car which was being moved along a spur track across the intersection of Potrero Avenue and Alameda Street in San Francisco, his face struck against a wire of the street railway operated there at that time by the City and County of San Francisco, hereinafter called the city. He sued the city because of negligence in the maintenance, control and operation of the wires at too low a level above the spur track, and the company because of negligent failure to provide him with a safe place to work and to warn him of the danger caused by said wires. Recovery against the company was sought under the Federal Employer's Liability Act against the city under the general law. After motions of defendants for directed verdicts had been denied the jury returned a verdict for the company but one against the city for $7,500. The city appeals. No appeal was taken from the judgment in favor of the company.

"At the intersection Alameda Street runs east and west, Potrero Avenue north and south. The municipal trolley cars ran on Potrero Avenue. The single spur track runs on Alameda Street in a westerly direction to the intersection and curves diagonally over the intersection to a warehouse at the southwest corner of the intersection. Approximately where the trolley tracks cross the spur track the two trolley wires, which provided the electric force for the trolleys, were supported by a set of two span wires both suspended from the same two poles located near the east and west curbs of Potrero Avenue. According to the scale map of the intersection (Plaintiff's Exh. 5) these poles were approximately 80 feet apart.

"It is conceded by the city in its opening brief that respondent while on top of a box car which was being slowly pulled out of aforesaid warehouse across Potrero Avenue hit his nose against one of the wires of the municipal trolleys. It is there further conceded that under the General Orders of the Public Utilities Commission—formerly Railway Commission—Nos. 26, 26B, 26C, 26D, which constituted at least a standard of the care required, Polk v. City of Los Angeles, 26 Cal.2d 519, 542, 159 P.2d 931, the trolley wires should have been maintained with a minimum clearance of 22 feet above the railway tracks and that a lesser clearance would constitute a defective condition. No contention of contributory negligence of plaintiff is presented on appeal. Additional facts will be stated in connection with the assignments of error to which they pertain.

[3] "Appellant's first contention is that the motion for a directed verdict should have been granted because plaintiff had failed to prove that a defective condition of the wires existed at the time of the accident and for such a period before the accident that the city in the exercise of ordinary care should have discovered and corrected it. The contention is without merit. The evidence supporting the verdict in this

respect is as follows: The principal witness, Brown, at the time of the accident a foreman and since February, 1949, general foreman of the line department of the Municipal Railway, testified to the effect that the wire system at the intersection was originally installed in 1913–1914, that in 1934–1935, when Potrero Avenue was widened, the State of California had the poles and wires reconstructed by a contractor, after which there were no other major changes before the date of the accident. Four days after the accident the witness measured the trolley wires (the wires which carry the electricity) at the intersection and found that the south-bound (western) trolley wire was 19 feet 10 inches, the north-bound (eastern) trolley wire 20 feet above the spur tracks. At the time of the trial he measured the spots where the supporting span wires had been attached to the poles and found that at the western pole the attachment had been 23 feet 10 inches, at the eastern pole 24 feet 4 inches from the ground. A span wire hung from one pole to another loops down in the center and a span of 50 or 60 feet will come down 2 or 3 feet or more. The trolley wires are suspended from the span wires and hang 2 or 3 inches under them. Between spans a trolley wire normally sags 9 or 10 inches. The witness knew and had in his possession the Public Utilities Commission's General Order No. 26D, which was in effect in December, 1948. He worked with it all the time. He was familiar with its provision which for wires required a minimum clearing of 23 feet 6 inches above steam railroad tracks, and also with an earlier General Order, 26B, in effect at the time of the reconstruction in 1935, which required a minimum clearance of 22 feet. He was one of the people responsible for the lines being at the proper height. He had never measured the wires at the intersection prior to December 20, 1948, had made no inspection to determine whether they were not maintained contrary to the law and to his knowledge nobody else connected with the Municipal Railway had at any time made such inspection. The distance of only 20 feet above the railroad track did not comply with the order of the Public Utility Commission and was not safe so far as a man on top of a car was concerned. (Witness said on top of a *street* car but obviously meant on top of a railway car.) The city did not introduce any evidence which tended to contradict or rebut any part of Brown's testimony. There was furthermore a stipulation that the running board on top of the box car on which plaintiff was at the time of the accident was 14 feet 6 inches above the railroad tracks. Plaintiff was 6 feet 2 inches tall.

"From the above evidence the jury could infer that the low level of the trolley wires found by Brown four days after the accident had existed at the time of the accident and long before that, since the reconstruction in 1935. The height at which the span wires were attached to the poles, 23 feet 10 inches at the western pole, 24 feet 4 inches at the eastern pole, combined with the evidence that such span wires loop down strongly (2 or 3 feet or more at a width of 40 or 60 feet, whereas here the width was 80 feet) and that the trolley wires are still a few inches lower, permitted the jury to draw the inference that from the time at which the span wires were installed on the poles (in 1935) the trolley wires had been down as low as they were found to be after the accident, 19 feet 10 inches for the western trolley wire, 20 feet for the eastern one. These levels leave only clearances of 5 feet 6 inches and 5 feet 8 inches above the running board on which plaintiff was standing, whereas plaintiff is 6 feet 2 inches, circumstances which fully explain the accident which happened.

"Appellant is the less in a position to attack the inference that the low level of the trolley wires had existed since their installation, because the city itself expressly took said position at the trial. In his opening statement its attorney said in part: 'The evidence will show that the trolley wires and the span wires * * * are high there, 20 feet above the ground, and the evidence will further show that there was no sagging of the wires, that is the way the wires are constructed back in 1914, and there had been no change in all that time, there had been no sagging.' Although 'back in 1914' evidently was a mistake because of the undisputed reconstruction in 1935, it shows that the city was not aware of any recent sagging of the wires but that it ascribed the level of the wires at the time of the accident to the manner of installation as is borne out by the evidence stated before.

"Evidently there had existed for many years a defective condition, which the city by simple measuring could and should have discovered and then corrected.

[4] "Appellant next urges that even if a defective condition was proved to have existed on December 16, 1948, this would not cause responsibility of the city to the plaintiff because the plaintiff was at most a gratuitous licensee to which the city so far as the condition of the premises was concerned owed only the duty of abstaining from wilful or wanton misconduct, and was under no duty of inspection. This contention is based on the fact that for construction, maintenance or use of a spur track in San Francisco a permit of the Board of Supervisors is required, which permit must be temporary and revocable at the will of said Board. Ordinance 69 (New Series), Def.City's Ex. 3. Under said Ordinance said Board on July 20, 1910, granted to F. E. Knowles, the then owner of the warehouse at the intersection here involved, permission revocable at will to construct, maintain and operate a spur track from the tracks of 'the Western Pacific Company' into said property. Ordinance 1255 (New Series), Def.City's Ex. 2. Said Ordinance particularly referred to section 8 of Ordinance 69 (New Series), supra, relating to the duties of 'the railway operating any spur track on any public street' (also called 'the operating railway'). On October 13, 1910, Knowles signed an assignment of said permit to Western Pacific Railway Company. Appellant now intimates that Knowles had no right to assign the permit, that the assignee had no right to operate the spur track and that not Western Pacific Rail*road* Company, the party to the action below, but Western Pacific Rail*way* Company was the assignee. The argument is frivolous. The ordinance granting the permit shows on its face that, understandably, the intention had always been that a railway company, not Knowles, would operate the spur. The evidence moreover showed that on the ground of the stated assignment the city in 1914 when the street car tracks were laid, demanded and received from Western Pacific Railway Company all costs of constructing the crossing of the street car and spur tracks, and that thereafter the spur tracks remained in frequent use until the accident. It was further conceded at the trial that until the time of the trial the city had always taxed the Western Pacific as the owner of said spur track. When said concession was made no indication was given that the corporation taxed might be another than the one which operated the spur track on the day of the accident and which was a party to the action. Under these circumstances the city has evidently ratified the assignment and is estopped from urging that operation of the spur track by the Western Pacific Railroad Company was not covered by the permit. If the city had in any way intimated a doubt as to the identity of Western Pacific (which it itself incorrectly called 'Western Pacific Company') certainly a showing would have been made that Western Pacific Railroad Company since a reorganization in 1916 was the successor of Western Pacific Railway Company. See Moody's Transportation, 1952, p. 375.

"There remains the question whether the fact that the spur track was being operated under the above permit absolved the city from exercising ordinary care in the maintenance of the level of its trolley wires above said spur track. We answer said question in the negative.

[5-7] "The city operates the municipal street railway system in proprietary capacity, Postal Telegraph-Cable Co. v. City and County of San Francisco, 53 Cal.App. 188, 190, 199 P. 1108, and in doing so is normally under duty to exercise the same degree of care and is liable for negligence in the same manner as private corporations. Peccolo v. City of Los Angeles, 8 Cal.2d

532, 536, 66 P.2d 651. 'A street railroad company must exercise reasonable care and diligence so to construct and maintain its trolley wire as to make it reasonably safe for the passage of persons who have a right to pass under it * * *." 60 C.J. 410 [83 C.J.S., Street Railroads, § 217]. The permit gave the company the right to have its freight cars pass over the spur track so long as the permit was not revoked and the permit even imposed on the operating railway a duty to deliver freight cars of a connecting railway over it. The spur track was in use under said permit when the trolley wires were first installed, had been so in use for more than 20 years when the wires and poles were reconstructed and for more than 35 years when the accident happened. There can be no doubt that the passage of freight cars at the intersection was as to the city a known and rightful use of the street to which in the operation of its street railway the city had to give full consideration and to which it owed ordinary care not to endanger it. It is irrelevant in this respect whether the ordinance of the city under which the spur track was maintained is labeled a permit or a franchise, both equally mentioned in section 470, Civil Code.

[8–10] "The position of the Western Pacific and of plaintiff as its employee is not the same as that of a simple gratuitous licensee on private property. The rationale of the lesser care due such a licensee is that he is only the recipient of a gift, a favor. See § 342, Restatement of Torts, Comment (c). The city granting the right to construct, maintain and operate a spur track over a public street does not do this as a personal favor but in its governmental capacity in the commercial and industrial interest of the city which is indirectly served by the transportation advantage to the individual plant. Symptomatic in this respect is section 7 of the Ordinance No. 69 (New Series), supra, which reserves to owners or users of adjacent properties or tracks the right to use the spur tracks for which a permit is granted against payment of a proportionate share of the costs. Substantial duties as to maintenance and service are imposed on the operating railway. If the distinction of invitee and licensee is at all appropriate for such special situations the position of the Western Pacific might be considered more like that of an invitee with a right to be on the premises so long as the permit was not revoked. See Grant v. Sunset Telephone, etc., Co., 7 Cal.App. 267, 94 P. 368; Sills v. Forbes, 33 Cal.App.2d 219, 226, 91 P.2d 246. However, we prefer not to apply the distinction at all but to hold in accordance with Fernandez v. Consolidated Fisheries, Inc., 98 Cal.App.2d 91, 95–96, 219 P.2d 73, that under the general provision of sec. 1714 of the Civil Code appellant was liable for the injury caused by its want of ordinary care, as explained hereinbefore. In the Fernandez case the difficulties and defects of a distinction in required care according to a strict division of the persons to be protected into invitees, licensees and trespassers has recently been vigorously urged by the other division of this court, Presiding Justice Peters writing the opinion. Certainly where, as here, there are very special relations which can not with any certainty be brought under either the category of invitee or licensee, the care required should not be decided on the basis of the affixing of an inappropriate label but on the basis of common sense applied to the actual facts. A rule which would deprive any user of public streets on the basis of a required revocable permit of the protection of ordinary care by the city in the maintenance of its streets and otherwise is unacceptable. The city under its police power over its streets may require permits for many uses. 19 Cal.Jur. 75. Suppose a taxi service was operated under such permit. Would there be any sensible ground for awarding less protection to the user of such a taxi than to the user of a private automobile? Neither can the city be permitted to escape liability here by labeling plaintiff a licensee. Appellant relies mainly on Sincerney v. City of Los Angeles, 53 Cal.App. 440, 200 P. 380. The case is distinguishable on its facts because there the accident occurred when the cars of the railway company moving over its private right of way protruded over a sidewalk of the city illegally without any permission. If there is language in that opinion which does not square with our theory it is not binding on us.

[11, 12] "Appellant next assigns as reversible error the refusal by the court of an instruction proposed by the city to the effect that defendant company was bound by General Order No. 26D of the Public Utilities Commission prohibiting a railroad corporation from operating cars over tracks on which overhead clearances are less than 22 feet, and the giving of an instruction to the effect that a similar provision did not apply to said defendant. If this was error it was error prejudicial to plaintiff only, who has not appealed. 'The City, as a joint tort feasor, has no legal right to complaint that another joint tort feasor was improperly exonerated from liability, there being no right of contribution between joint tort feasors.' Sullivan v. City & County of San Francisco, 95 Cal.App.2d 745, 755, 214 P.2d 82, 88. The city contends that it also was prejudiced because if the jury had been instructed on the above duty of the company not to operate its cars under the existing condition the jury might have found that the negligence of company was the sole proximate cause of the accident, thus exonerating appellant. This is not so. The rules which prohibited the owner of wires from maintaining them with an insufficient clearance above railway tracks and railroad companies from operating cars where there was insufficient clearance were both intended to prevent just such accidents as here happened. Both the city and the Railroad Company violated these safety rules for many years continuing until the moment of the accident. The negligence of each then constitutes a concurrent cause of the accident. 'Where the original negligence continues and exists up to the time of the injury, the concurrent negligent act of a third person causing the injury will not be regarded as a superseding cause; but each of the two concurring acts of negligence will be held to be a proximate cause.' Werkman v. Howard Zink Corp., 97 Cal.App.2d 418, 426, 218 P.2d 43, 48, and cases there cited. Moreover, 'If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby.' Restatement of Torts, sec. 449; McEvoy v. American Pool Corp., 32 Cal.2d 295, 299, 195 P.2d 783. The possibility of a car being driven over the spur track was certainly one of the hazards which made the city negligent in maintaining the wires at too low a level. Although in general the reasonable foreseeability of the intervening act is for the jury where there is room for reasonable difference of opinion, Restatement of Torts, sec. 453, Comment (a); McEvoy v. American Pool Corp., supra, here there is no room for such difference of opinion as undisputed evidence shows that these acts had openly occurred under a permit of the city daily for many years prior to and until the accident. If appellant was negligent, and it was correctly found to be negligent, its negligence was under these circumstances a cause of the accident as a matter of law. The above shows also that the court's refusal of the city's related proposed instruction No. 33 cannot have been prejudicial to the city.

[13] "There was no error in the refusal of instructions as to absence of negligence in the use of appliances not obviously dangerous, used safely and without accident for a long time by a defendant who had no reason to know of any danger, because the known danger of impaired clearances, which led to rules as to minimum clearances recognized as applicable by the city, imposed on the city the duty of reasonable inspection, 38 Am.Jur. 667, and the simplest inspection by measuring would have shown the dangerous condition which existed for many years, so that the city as a matter of law was not in the position of somebody who had no reason to know of the danger. The city can be said to have had constructive knowledge. Fackrell v. City of San Diego, 26 Cal.2d 196, 206, 157 P.2d 625, 158 A.L.R. 773; Perry v. City of San Diego, 80 Cal.App.2d 166, 170, 181 P.2d 98.

[14] "Appellant points out that it was error to instruct on the requirements of General Order 95 of the Public Utilities Commission because that order, effective July 1, 1942, contained a provision that its requirements do not apply to lines constructed or reconstructed prior to its effective date, the line involved having been constructed in 1914 and reconstructed in 1935. The error was not prejudicial because the provisions stated to the jury as applicable as part of said ordinance were at any rate applicable to the city under the general law except a provision requiring *frequent* inspections of the line and one requiring a minimum clearance of 22 feet. The latter was concededly applicable to the city on the basis of other orders of the Public Utilities Commission, the former was not prejudicial because the city, which as stated before was under duty of *reasonable* inspection, had necessarily violated that duty, as one inspection by simple measuring would have shown the defect.

[15, 16] "Appellant further complains that the court erroneously rejected the city's evidence relative to the reconstruction of the overhead system in 1935 by a contractor under contract with the State of California which contract required the work to be done conforming to the requirements of the California Railroad Commission. The materiality is not obvious as the amended complaint predicates the city's liability on the fact that it negligently owned, operated, maintained and controlled the wires at too low a level, not that it so constructed them. The only ground for materiality submitted by the city at the trial was that the reconstruction in the stated manner might constitute an excuse for the maintenance and operation of the wires by the city in violation of an order of the Railroad Commission. As reliance on the correct execution of the work by the contractor, whether contractor of the city or of the State, would not constitute an excuse for operation and maintenance without any inspection during many years when a simple one time measuring would have shown the defect, this only ground of materiality proposed was correctly rejected. The same ground is not repeated on appeal. Other grounds of materiality proposed on appeal need not be reviewed, as appellant cannot complain that grounds of admissibility were not accepted which were not stated in the court below. Valentin v. Valentin, 93 Cal.App.2d 588, 593, 209 P.2d 654; In re Estate of Parkinson, 190 Cal. 475, 477, 213 P. 259.

[17] "Prejudicial error is predicated on the court's allowing Dr. Catton to testify although when the city had tried to take Dr. Catton's deposition plaintiff had successfully interposed the claim of the attorney client privilege because Dr. Catton was an intermediate agent for communication between plaintiff and his attorneys. City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 234 et seq., 231 P.2d 26, 25 A.L.R.2d 1418. The contention, not supported by any authority, has no merit. An attorney, or a person in a similar position, is not incompetent to testify in the case of his client, and does not become incompetent for the future, when the privilege is asserted. The privilege may be waived by the person in whose favor it exists at any time, and only thereafter is the testimony of the witness also available to the opposing party. Accordingly Dr. Catton was cross-examined at length.

"With respect to the several assignments of error stated before it may be added that if with respect to any of them there has been some error, it has not resulted in a miscarriage of justice as appellant under all circumstances shown by the evidence should clearly be held liable for the negligent maintaining of its wires. Art. VI, sec. 4½ of the California Constitution.

"Finally appellant contends that the damages in the amount of $7,500 granted are excessive as a matter of law. Appellant does not give an analysis of the evidence supporting the award, but mainly contends that there were no special damages, that the physical injury plaintiff suffered was slight, that he was never confined to bed, that most of his complaints were subjective in character, and that his lower earnings were mainly attributable to slackness of times for the railroad, low seniority and plaintiff's turning to office work, which he preferred.

"Plaintiff's medical expenses were paid under an insurance policy of his employer. The evidence favorable to respondent shows in part the following: Plaintiff when hit by the wire over the bridge of his nose was only knocked out for a moment and was soon able without assistance to get up from the top of the car, set the brake and to come down. A physician applied some merthiolate to his face and he then continued to work and even worked a second shift that day. However at the end of the day his eyes were swollen, his neck was stiff and he had a severe headache. The trouble with neck and headache kept him from work for the next two days and also later prevented him from working double shifts and a few times from working at all. There was a definite sprain of the neck. An X-ray taken just before the trial showed a minute calcium deposit in the neck which had not been present on X-rays taken shortly after the accident, which new deposit was explained by one expert witness as corroborating that a ligament had there been actually sprained. Except for that little deposit there was no objective indication of disability at the time of trial. Dr. Catton who examined plaintiff a week after the accident saw symptoms as of shingles on left arm and chest, according to said witness attributable to damage to nerves and ganglia in the accident. Early in January a feeling of weakness in the left shoulder developed; plaintiff felt he could not hang on to the side of a freight car and had difficulty throwing a switch. Other nervous symptoms also developed over and above the severe headaches and stiffness of the neck; restlessness, sleeplessness and fear of dying, for which a few times a doctor had to be called in the night. The diagnosis was, according to Dr. Catton, traumatic neurosis of the anxiety type. There was no indication of malingering or of a litigation neurosis, but of a traumatic neurosis on the basis of physical injury. Physical therapy for the several symptoms did not yield sufficient results. In April, 1949, plaintiff was forced to give up his work as a switchman and later he was notified by the Western Pacific that his services were no longer needed because he did not report to work. Two physicians testified that in his condition it was not safe for him to do switch work. At the time of the trial, nearly three years after the accident, the several symptoms had decreased but not disappeared, and they were not expected to disappear completely. Since his dismissal appellant had done different kinds of work among which was work as a warehouseman; because of inability to handle heavy tires he transferred to a desk job with the same firm which paid $30 a month less than he received as warehouseman. If he had stayed with the Western Pacific he would in two years have attained regular status and earned $15.64 per day. His salary at the time of the trial amounted to $200 a month.

[18, 19] "Traumatic neurosis was recognized in this state as a basis for damages as early as 1896. Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, 680, 44 P. 320, 32 L.R.A. 193. There was here evidence of physical injury, long and severe mental suffering, loss of a job, loss of income, and loss of earning capacity by restriction of the kind of work for which respondent was fit. He had a life expectancy of forty years. Under these circumstances we cannot say that the recovery of $7,500 shocks the sense of justice and raises at once a presumption that it is the result of passion or prejudice, the degree of evident excessiveness required according to the rule in this state to permit an appellate court to set aside a damage award. 8 Cal.Jur. 834."

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

122 Cal.App.2d 631

BRISTOL
v.
METROPOLITAN LIFE INS. CO.
Civ. 8287.

District Court of Appeal, Third District, California.

Jan. 19, 1954.

Action by beneficiary against insurer to recover, under accidental death benefit provisions of policy, for death of insured, a police officer, who fell dead after assisting in quelling a disturbance at a wrestling match which insured was attending while off duty. The Superior Court, San Joaquin County, Woodward, J., entered judgment that plaintiff take nothing, and plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that whether death of insured was due to ventricular fibrillation brought on by excitement attendant upon such occurrence, or was due to natural causes and not as result of any bodily injury effected or sustained by accidental means, was question for trier of fact.

Judgment affirmed.

1. Insurance ⚷646(6)

In action by beneficiary against insurer to recover under accidental death benefit provisions of policy, beneficiary had burden of proving that insured's death was result of bodily injury effected through accidental means.

2. Insurance ⚷668(11)

In action by beneficiary against insurer to recover, under accidental death benefit provisions of policy, for death of insured, a police officer, who fell dead after assisting in quelling a disturbance at a wrestling match which insured was attending while off duty, whether death of insured was due to ventricular fibrillation brought on by excitement attendant upon such occurrence, or was due to natural causes and not as result of any bodily injury effected or sustained by accidental means, was question for trier of fact.

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Lawrence Edwards, Chas. H. Epperson, Stockton, for appellant.

Knight, Boland & Riordan, San Francisco, for respondent.

VAN DYKE, Presiding Justice.

Appellant, as beneficiary under a policy of insurance issued by the respondent, brought this action to recover $5,000 payable to her under the terms of said policy in the event of the death of said insured "as the result, directly and independently of all other causes, of bodily injuries caused solely by external, violent, and accidental means."

This appeal is taken from the judgment that plaintiff take nothing.

The insured at the time of his death was, and had been for several years, a police officer of the City of Stockton and as such was subject to call to duty at all times. On the evening of March 3, 1949, while off duty, he attended wrestling matches held in the Civic Auditorium in Stockton. Several officers were in attendance, some of them on active duty and some of them as spectators. A commotion arose among the spectators which was described in terms varying from those indicating a minor disturbance to those indicating a riot. When this occurred the senior police officer on duty called upon all officers present to calm the disturbance. The insured responded and took part in restoring order. When the disturbance had been quieted the insured fell to the floor and died. Appellant contends that the death of the insured was due to ventricular fibrillation brought on by the excitement attendant upon the occurrences we have related and that, therefore, his death proximately resulted from bodily injuries caused solely by external, violent and accidental means within the meaning of those terms as used in the policy. The trial court upon this matter, which is the heart of the controversy, found that "the insured died * * * from natural causes and not as a result of any bodily injury effected or sustained by accidental means as defined by the provisions as to accidental death benefit contained in said policy of insurance." This was a finding of ultimate fact against appellant. Horton v. Travelers Ins. Co., 45 Cal.App. 462, 187 P. 1070; Richards v. Travelers Ins. Co., 89 Cal. 170, 26 P. 762 whose burden it was to prove the converse. Rock v. Travelers Ins. Co., 172 Cal. 462, 464, 156 P. 1029, L.R.A.1916E 1196. The question presented for decision, therefore, is: Does the evidence compel a contrary finding?

It is without dispute herein that a commotion of considerable proportions did arise in the auditorium at the end of one of the wrestling matches during which a considerable number of people left their seats and attempted to follow one of the wrestlers to whose actions in the ring they had taken exceptions; that there was a general milling around of the crowd, with considerable tension and excitement; that the insured, responding to a call of duty, did take active part, along with his fellow officers, in calming this commotion; but there is no evidence that in doing so he was struck or shoved about or suffered anything in the nature of an assualt upon his person. The testimony of a pathologist concerning the cause of death may be summarized as follows: That the witness was a physician and surgeon and specialized in pathology; that when insured died the witness was the autopsy surgeon for the San Joaquin County Coroner and performed an autopsy on the insured's body; that he found the body to be that of an athletic, well-developed white male; that there was no evidence of trauma; that examination of the neck organs revealed no pathological findings; that the lungs contained some fluid; that the heart showed grossly some fatty changes and was slightly enlarged; that the coronary arteries were normal; that the stomach was filled with undigested food; that the abdomen, liver, spleen and other organs which could be visualized were normal; that the kidneys showed a mild pyelitis; that the skull and skull contents were grossly normal; that following the gross examination a toxicological examination of stomach contents, liver, kidneys and brain was negative as to presence of poison which might have been the cause of death; that microscopic examination of the various organs, including the heart, were negative, except that sections of the heart showed a fine scarring in the heart muscle, visible only under microscope; that after his examinations and investigations were completed he diagnosed the cause of death as ventricular fibrillation, with myocarditis. As to the myocarditis, the witness said that the microscopic scars he found were healed and might have occurred long before death. He said that even so such a heart would be more susceptible to ventricular fibrillation than a heart which had not been damaged in any way, although a sound heart could go into fibrillation with death ensuing. He explained that in ventricular fibrillation the ventricular muscles, instead of, as is normal, rhythmically contracting so as to force the blood out and through the circulatory system, lose their rhythm and act discordantly, with the result that the ventricle merely quivers, the blood ceases to flow and death ensues. The witness said further that this heart, and even a sound heart, might go into fibrillation and that in his opinion that was what had happened to the insured and was the cause of his death; but he said further that he arrived at this conclusion by a method of exclusion, that is, his toxicological analyses had excluded poison as a cause, he had found no other evidence in the body for the cause of death and that, assuming that the history of the exciting events we have related was correct, and that there was some disease of the heart, he put the two together, with the result that he concluded the most logical cause of death was ventricular fibrillation. He said that the slight dilatation of the heart with some pulmonary edema fitted the picture "which would occur with ventricular fibrillation". He gave it as his opinion that if the insured had had no excitement that evening he probably would not have died. On cross-examination the witness said it was possible that the attorney questioning him, just from the excitement of the trial might have a ventricular fibrillation and die; and that to be positive that a death had occurred from ventricular fibrillation a concurrent electro-cardiogram would have to be available, or some one would have had to be listening with a stethoscope. The witness said that other forms of heart failure left symptoms which could be detected, but that in ventricular fibrillation there might be no such objective findings.

Depending upon the diagnosis of the pathologist that the insured died from ventricular fibrillation, induced by the excitement attendant upon the commotion which he aided in quelling, appellant argues that a death so caused occurs through bodily injuries caused by accidental means. Appellant contends that the occurrence arose in an unexpected and unforeseen manner and directly caused the injury so that not only was the death unforeseen and unexpected and in that sense accidental, but that the cause thereof, and the means whereby the injury was suffered, were equally unexpected, unforeseen and fortuitous, and therefore accidental.

[1, 2] On this record we do not reach the problem posed by these contentions, for we have no finding in this record by the trier of fact that the decedent died from ventricular fibrillation, nor can it be said that such a finding is compelled by the facts presented to the trial judge. It was, as we have said, the burden of appellant, as plaintiff below, to prove that the death of the insured was the result of bodily injury effected through accidental means. And what was shown adds up to this, that, having excluded a number of causes of death, the pathologist concluded that death could have been caused by ventricular fibrillation induced by excitement and that, in his opinion, such had been the case. But this record is not one from which it can be said that the trial court was bound to find in accordance with the theory of appellant that the excitement brought on fibrillation and death.

The pathologist's testimony rested upon an assumption that deceased was excited by the events attendant upon the disturbance at the wrestling matches. It may be said the record shows that a number of people were excited, but as to whether their excitement and the action which decedent, along with his fellow officers, was called upon to take, excited the decedent himself was a matter which the court could have determined adversely to appellant. Thus Thomas Monarch, a police officer who had been seated with decedent, and who also answered the call to duty, said that when the people started toward the dressing room doors through which the wrestler to whose actions they took exception had passed, that he and the insured stationed themselves in front of the dressing room doors and stood there side by side; that it was not necessary for him to use his police club; that no arrests were made; that he did not see the insured use any force on anyone; that he did not see anyone lay a hand on the insured nor push or shove him around; that the people were not out of hand and that he saw no evidence of fear or excitement on the part of decedent when they were telling the people to go back to their seats. Another witness said the decedent did not look sick or excited; that he was not breathing hard and did not look like he had been working. This witness also said there was nothing unusual about the people gathering at the dressing room doorway and that there was a like disturbance at every match. Another witness said that after the people left the dressing room doorway the insured passed within four feet of her, that she observed his appearance and that it was normal and he showed no signs of being excited or out of breath; that a moment later she saw him on the floor.

From the foregoing, and from the admitted fact that the insured was a police officer of several years' experience and often attended these wrestling matches, the trier of fact could determine that the occurrence had not excited the decedent and that, therefore, the essential assumption underlying the opinion of the pathologist did not, in fact, exist.

The judgment is affirmed.

SCHOTTKY and PEEK, JJ., concur.

122 Cal.App.2d 512

HARRIS
v.
SECURITY TRUST & SAVINGS BANK OF SAN DIEGO.

Civ. 4766.

District Court of Appeal, Fourth District, California.

Jan. 12. 1954.

Action, against the estate of deceased, for damages arising out of automobile collision. The Superior Court, Orange County, Raymond Thompson, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that under the circumstances the instruction on right to recover for time lost concerned a matter in issue and was not misleading, and that judgment should be modified to reflect that it was payable in due course of administration of estate.

Judgment affirmed as modified.

1. Damages ⚷216(8)
Trial ⚷296(11)

In personal injury action, instruction on right to recover for time lost concerned a matter in issue in view of allegation in complaint relating to cost of hiring substitute and in view of evidence as to kind of work done by plaintiff and cost of employing a substitute, and was not misleading in view of the other instructions given and in view of size of verdict.

2. Appeal and Error ⚷1152

Where judgment against administrator of estate for negligence of deceased failed to provide for the payment of judgment in due course of administration as required by Probate Code, the District Court of Appeal modified judgment by adding words "payable in due course of administration". Probate Code, § 730.

Forgy, Reinhaus, Miller & Kogler, Santa Ana, for appellant.

Fred N. Howser, Arcadia, Lloyd S. Verry, Fullerton, for respondent.

BARNARD, Presiding Justice.

This is an action for damages arising out of an automobile collision. On October 21, 1951, the plaintiff was driving on Highway 101 when a car driven by the deceased, Edwin T. Smith, entered the highway from an intersecting street. In the resulting collision Smith was killed and the plaintiff suffered injuries to both knees, a back injury, cuts on his chin, chest and head, and injury to the spleen area. He was taken to a hospital where surgery was performed, he was confined to his home for four or five months, and there is evidence that some of his injuries would be permanent.

In his complaint the plaintiff sought $35,000 as general damages and as special damages alleged medical expenses amounting to $669.73, loss of personal property amounting to $700, and that he was further damaged in the sum of $1000 because he was required to employ the services of a substitute manager for his restaurant and cafe, and to pay this substitute the prevailing wage of $100 a week for ten weeks.

Evidence was introduced which is sufficient to support these items of special damage. A jury returned a verdict in favor of the plaintiff for $12,500.00, and finding against the defendant on its cross-complaint. Judgment was entered accordingly and the defendant has appealed.

Appellant's sole contention is that the court erred by giving a portion of an instruction which reads as follows:

> "The reasonable value of the time lost, if any, by said plaintiff since his injury wherein he has been unable to pursue his occupation. In determining this amount, you should consider evidence of said plaintiff's earning capacity, his earnings, and the manner in which he ordinarily occupied his time before the injury, and find what he was reasonably certain to have earned in the time lost had he not been disabled. A person's ability to work may have a monetary value to himself even though he is not gainfully employed by another. For example, if, as a result of being partially or wholly disabled, a

> person has been reasonably required to employ someone else to do things that such person, himself, ordinarily would do, the moneys paid out for such services are an element of the damages caused by the disability."

It is argued that it was prejudicial error to instruct the jury upon plaintiff's right to recover for time lost when such issue was not before the jury, and because there was no evidence as to the value of the time lost by the plaintiff as the result of the injuries sustained in this accident; that not being applicable to the evidence this instruction was calculated to mislead the jury; that it would allow the jury's imagination to run wild; and that it is not possible to tell how much influence it had upon the jury.

The language complained of was a part of an instruction in which the court told the jury that if it found that the plaintiff was entitled to a verdict, in arriving at the amount of the award it should determine each of the items of claimed detriment mentioned in that instruction "provided that you find it to have been suffered by him, and as a proximate result of defendant's negligence." (It was explained that by "defendant" it was intended to refer to the deceased.) The instruction then referred to the reasonable value, not exceeding the cost to the plaintiff, of the medical care, the reasonable value of any personal property destroyed as a result of the accident, reasonable compensation for pain and suffering, and made the reference to lost time as above quoted.

The court had previously instructed the jury that it must decide the issues on the evidence produced, and that if no evidence was produced on either side of any issue the jury's finding on such issue must be against the party who asserted the affirmative of that issue and who had the burden of proving it, as explained by the court. The instruction in question started out by stating that in arriving at the amount of the award the jury should determine as to each item of claimed detriment, provided that it found that item to have been suffered by the plaintiff. The quoted portion referred to the reasonable value of the time lost "if any", and stated that in determining this amount the jury should consider any evidence of the plaintiff's earning capacity, and then went on to say that a person's ability to work may have a monetary value even though he is not gainfully employed by another, and that where one was required to employ another as a substitute, the cost thereof was an element of the damages caused by the disability.

[1] The complaint here alleged the cost of hiring a substitute but did not otherwise allege the value of any lost time. It was incidentally brought out at the trial that the plaintiff was not only operating this restaurant but was also engaged in the used-car business. The used-car business was not stressed, no effort was made to show time loss in connection therewith, and no attempt was made to show the value of time devoted to that business, but evidence was introduced as to the kind of work done at the restaurant and the cost of employing a substitute for that work. The portion of the instruction which is objected to was entirely proper insofar as it related to the required employment of a substitute. The first part of the portion objected to, referring to loss of time in general, was unnecessary but it was qualified by the words "if any", and the jury had been told that where no evidence was produced on either side of any issue its finding on that issue must be against the party having the burden of proof. The second part then told the jury that the matter of hiring a substitute was one which was to be considered in that connection. There being no evidence of time lost, except as it was involved in the required hiring of substitute manager for the restaurant, the jury, following the court's instructions, would naturally and logically consider only the latter element, which was specially alleged and upon which evidence was received. Under the circumstances, it must be held that no prejudice appears. Castro v. Giacomazzi Bros., 92 Cal.App.2d 39, 206 P.2d 688. A substantial amount of special damage was proved and no complaint is made that the amount of the verdict, as

returned by the jury, was excessive. There is nothing to indicate that the jury could have been, or was, misled and under the circumstances no prejudice appears. Melone v. Sierra Railway Co., 151 Cal. 113, 91 P. 522; Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675.

[2] One error appears in that the judgment erroneously fails to provide for the payment thereof in due course of administration, as required by section 730 of the Probate Code. The judgment is modified by adding the words "payable in due course of administration," to be inserted after the figure $12,500.00, and, as so modified, the judgment is affirmed. The respondent to recover costs.

GRIFFIN and MUSSELL, JJ., concur.

122 Cal.App.2d 666

WELLS TRUCKWAYS, Limited, et al.

v.

CEBRIAN et al.

Civ. 4480.

District Court of Appeal, Fourth District, California.

Jan. 19, 1954.

Hearing Denied March 17, 1954.

Action for damage to plaintiff's tractor and trailer as the result of a collision with defendant's tractor and trailer driven by codefendant. From a judgment of the Superior Court of Riverside County, O. K. Morton, J., on a jury's verdict for plaintiff, defendants appealed. The District Court of Appeal, Griffin, J., held that a state highway patrol officer's opinion testimony as an expert witness for plaintiff that gouge marks, made in the paved highway by a broken landing gear on the left side of defendant's trailer after it became disconnected from the tractor as a result of the collision, were angling, not parallel to the center line of the highway, that the angle of the trailer when the marks commenced would have projected its rear end about 23 feet across the center line at the time of the impact, and that the gas tank on defendant's tractor was damaged from the top down and the cab thereon from the rear forward as the result of the trailer coming against the tractor, was properly admitted.

Judgment affirmed.

1. Evidence 🔑471(1), 472(1), 505, 506, 507

Generally, witnesses must testify to facts, not opinions, and when fact to be determined is result of common experience of man of ordinary education or to be inferred from particular facts, inference must be drawn by jury, not by witness.

2. Evidence 🔑508

Under statute, witness' opinion on question of science, art or trade in which he is skilled is admissible in evidence as dealing with matters not presumably within common knowledge of men, where opinion is proper and necessary to enlightened consideration and correct disposition of ultimate issue. Code Civ.Proc. § 1870, subd. 9.

3. Evidence 🔑536

Under common law, experts' opinions on matters within field of their knowledge was admissible in evidence.

4. Evidence 🔑536

An expert's testimony is admissible, where his professional pursuit or peculiar skill and knowledge in some department of science not common to men in general enable him to draw inference as to which men of common experience, after proof of all facts, would be left in doubt.

5. Evidence 🔑506

The fact that expert witness' expression of opinion may usually be adopted by court or jury as basis for ultimate decision in case does not mean that such witness is deciding case or usurping jury's functions, as court may or may not accept witness' opinion, based on his technical training, as testimony proper and necessary to enlightened consideration and correct disposition of ultimate issue.

6. Evidence 🔑506

In action for damage to plaintiffs' tractor and trailer as result of collision with defendant's tractor and trailer, questions propounded by plaintiff's counsel to state highway patrol officer, testifying as expert witness for plaintiff, as to whether gouge marks, made in paved highway by broken landing gear on left side of defendant's trailer after its disconnection from tractor as result of collision, were parallel to center line of highway or angling, whether trailer's angle when marks commenced would have projected its rear end across center line at time of impact, and direction of force which damaged gas tank and cab on defendant's tractor, were not improper as seeking answers invading jury's province in determining ultimate issue whether plaintiff should recover.

7. Appeal and Error 🔑971(2)
Evidence 🔑546

A witness' qualification to testify as expert is matter within sound discretion of trial court, whose ruling thereon will not be disturbed on appeal, in absence of showing of clear abuse of such discretion.

8. Evidence 🔑536

Where witness discloses sufficient knowledge of subject to entitle his opinion thereon to go to jury, question of degree of his knowledge goes more to weight of his testimony than to its admissibility.

9. Evidence 🔑555

Where circumstantial evidence is not necessarily self-explanatory to layman's eye and trial court reasonably believes that jurors need aid to ascertain clues leading to conclusions reached, admission of expert witness' opinion, based on required facts established by evidence and personally known to him, for jury's consideration, is proper, if opinion, because of witness' particular knowledge and experience, can aid jury in drawing correct inferences from facts.

10. Evidence 🔑570

A jury may give expert witness' opinion such credit as jury feels that opinion is entitled to receive and is not bound to accept opinion, but may even totally disregard it in favor of jury's own opinion based on facts adduced by evidence, if jury does not feel that reasons given by witness for such opinion are sufficient.

11. Evidence 🔑506

Expert opinion testimony should not be excluded merely on ground that it amounts to opinion on ultimate facts.

12. Evidence 🔑519

In action for damage to plaintiff's tractor and trailer as result of collision with defendant's tractor and trailer, state highway patrol officer's opinion testimony, as expert witness for plaintiff, that gouge marks, made in paved highway by broken landing gear on left side of defendant's trailer when it became disconnected from tractor as result of collision, were angling, not parallel to center line of highway, that trailer's angle when marks commenced would have projected its rear end about 23 feet to left side of roadway at time of impact, and that gas tank on defendant's tractor was damaged from top down and cab thereon from rear forward as result of trailer coming against tractor, was properly admitted.

13. Automobiles 🔑246(60)

An instruction in wrongful death action, consolidated with action by decedent's corporate employer for damage to its tractor and trailer, driven by decedent, as result of collision, causing his death, with defendants' tractor and trailer driven by co-defendant, that jury must consider presumption that decedent exercised due care for his own safety with rest of evidence in determining issues of negligence and contributory negligence, was not erroneous as telling jury that such presumption created inference or authorized presumption of defendants' negligence.

14. Automobiles 🔑242(8)

In action for damage to plaintiff corporation's tractor and trailer, driven by plaintiff's employee in course of his employment, as result of collision with defendants' tractor and trailer driven by co-defendant, jury being authorized to consider presumption that such employee exercised due care for his own safety in action, consolidated with employer's action, by employee's widow and children for his wrongful death as result of collision, was authorized to consider such presumption from same facts in employer's action. Vehicle Code, § 402(a).

15. Appeal and Error ⚿216(2)

Where defendants in consolidated actions by owner of tractor and trailer, driven by plaintiff's employee, for damage thereto as result of collision with defendants' tractor and trailer, and by employee's widow and children for his wrongful death as result of same collision, made no request for instruction limiting application of instruction as to presumption of employee's due care for his own safety to death action, may not be heard to complain for first time, on appeal from judgment on jury's verdict for plaintiff owner, that instruction was erroneous on ground that presumption did not extend in favor of decedent's employer.

◆

Tipton, Weingand & Tipton, Los Angeles, for appellants.

John Lewis King, San Bernardino, J. B. Lawrence, San Bernardino, of counsel, for respondents.

GRIFFIN, Justice.

As a result of a jury trial plaintiff Wells Truckways, Ltd. was given judgment for $18,864.32 against defendants for damage occurring to plaintiff's tractor and trailer when defendant Cebrian's tractor and trailer, driven by defendant Donahue collided with it on Highway 99 near Whitewater, about 9:30 p. m. on January 8, 1950, as a result of which Louis Richter, the driver of plaintiff's tractor and trailer, was killed. Defendants failed to recover on their cross-complaint.

Richter was proceeding easterly on Highway 99, about 1.2 miles east of the junction of that highway with State Highway No. 11. Donahue was proceeding in a westerly direction. The concrete pavement was 20 feet wide, with a white center line indicated. There was an additional 7-foot oiled gravel shoulder on each side of the highway. The road near the point of impact runs generally east and west. For approximately one mile to the east of that point proceeding westerly, there is a general descent in grade, and approximately 200 yards east of the point of the accident there is a 4.6 per cent descent grade with a slight curve to the north or to the right as one approaches that point from the east. There is evidence that the curved highway did not slope to the right or north side of it but rather sloped to the south or the left to permit drainage.

The vehicle driven by Donahue carrying perishable vegetables (including crated lettuce) destined for Los Angeles market, was described as a 1945 Kenworth Tractor with a box type 35-foot utility van. The power unit that pulled the trailer had two rear axles, and the box trailer which the tractor pulled rested on the back of the tractor on a plate or fifth wheel. This plate carried the weight of the trailer. The front end of the trailer, when detached, was prevented from hitting the ground by means of a landing gear on each side of the trailer box but under the trailer. These gears were of solid metal disc wheels about 10 inches in diameter, each carrying 2 wheels about 12 inches apart. When the trailer was resting on the fifth wheel of the trailer the clearance between the bottom of the landing gear wheel and the surface of the road was approximately 18 inches.

Plaintiffs' equipment was similar in size and general construction but had an open top covered with canvas, and was loaded with general freight. The night was disagreeable in that it was raining and there was a heavy wind blowing in the same direction defendants' truck was proceeding.

It is plaintiffs' contention that as the two tractors were about to pass each other each was on its respective proper lane on the highway but that Donahue was proceeding too fast in the wind and rain, down hill, and on an unbanked curve, and as a result of which the truck portion of his outfit swerved over or came over the center line into the pathway of plaintiff's truck and that the front left portion of plaintiff's tractor collided with it and then swerved over to its right or the south side of the highway, struck a large boulder, and crashed, resulting in the damage alleged.

It is further contended that as a result of the collision the trailer of defendants' truck became disconnected with the tractor; that the landing gears on it hit the highway and the two wheels on the left gear broke and the remaining structure left unbroken gouge marks in the paved highway from the point where they hit to the point where the trailer finally stopped; that these two gouge marks, about 12 inches apart, commenced in the northerly lane of the highway on the Donahue one-half thereof, and the left one commenced about 15 inches from the center white line and continued in a gradual swerving line northerly across the north one-half of the highway for about 330 feet to a point where the trailer finally turned over and stopped off the north portion of the paved highway and on the oiled shoulder. The south gouge mark paralleled the white center line for about 40 feet and varied from 15 to 18 inches. The evidence showed that the left and right landing gear wheels were inset a distance of 18 inches from the outer edge of the trailer box. The length of the trailer box was 35 feet and its width was 8 feet. The distance between the place of attachment of the landing gear and the back end of the trailer box is 23 feet. The set of rear wheels on defendants' trailer were completely knocked out from under it. Photographs of the general terrain, the highway, the debris thereon, the demolished trucks, the gouge marks on the highway, and lettuce from broken-open crates on both sides of the highway, were received in evidence after proper foundation was laid.

It is defendants' contention that Richter was coming around the curve; that each driver was traveling between 35 and 40 miles per hour and each was in his own lane of traffic about 12 to 18 inches from the white center line, but that Richter must have come over into Donahue's lane to some extent with his tractor and trailer after the tractor had passed Donahue's tractor, and struck the defendants' trailer near the center side loading door with the front portion of plaintiff's tractor, and that this was the proximate cause of the accident.

Donahue testified that after the impact he felt the trailer come forward over the tractor and it caved in the cab on it and then later dropped to the highway on the landing gear and the tractor continued on down the highway at about 10 miles per hour.

Since Richter was killed in the accident plaintiffs did not receive the benefit of his testimony. They rely upon the testimony of Donahue, the presumption that Richter exercised due care, and the circumstantial evidence related, as shown by the photographs, and particularly the testimony of a California Highway Patrol officer who, after qualifying as an expert witness, testified for plaintiffs in relation to what he saw at the scene of the accident and as to his opinion as to what actually happened in relation to the position of the trucks on the highway.

The main objection here presented goes to the question of the opinion of the witness testifying as an expert, in this respect, based upon the gouge marks indicated, the location of the trucks, the tracks of the tires, the position and damage to the tractors and trailors after the collision, and the surrounding circumstances above related. The witness drew many diagrams on the board illustrating what he saw there in reference to the gouge marks, the curve in the roadway, the position of the tractors and trailers after the accident, as well as the general position of the landing gear in relation to the trailer hook-up.

The following questions propounded to the witness by plaintiff's counsel were strenuously objected to by defendants' counsel on the ground that no foundation had been laid, that the opinions attempted to be elicited were nothing but conclusions of the witness based upon assumed facts and were ultimate facts which were to be determined by the jury. In overruling the objections the court admonished the jury generally that by reason of certain training or experience certain witnesses were offered by counsel in a trial as experts; that their testimony was admitted with the admonition to the jury that it could give it such credit as it felt it was entitled to, after hearing the reasons expressed by the alleged expert as to why he had that opinion; and that the jury might disregard it in favor of its own opinion, after hearing the evidence, if it did not feel his reasons were sufficient. The questions complained of are:

(1) "Were you able to determine whether or not those gouge marks were made when the landing gear was going parallel to the white line, or was it angling?" The witness was permitted to answer: "They were angling". The witness Donahue testified that these gouge marks were made by the broken landing gear on the left side of his trailer. We see no objection to the testimony of this witness in this respect. It did not need an expert witness to determine this fact. The photographs in evidence fully disclosed it.

(2) "Were you able to form an opinion of your own as to the approximate degree of angulation of the trailer at the time the marks were made?" Over objection the witness testified that in his opinion the trailer was at an approximate 20-degree angle at the time the marks were made.

(3) This question was followed by the question: "If there was a 20-degree angle of the trailer at the time of the commencement of the marks, do you have an opinion as to whether or not that would have projected the rear end of the trailer across the white line onto the south side of the road?" Over objection, the witness answered: "It is my opinion that it would have projected the trailer to the wrong side of the road."

(4) The next question was: "Based upon the testimony you have already given as to the length of the trailer and the distance between the landing gear and the rear end of the trailer, do you have an opinion as to how far the rear end of the trailer would have been projected across the white line onto the south side of the road?" Over objection it was answered: "It is my opinion * * * that there was approximately 23 feet angulation to the left side of the roadway at the time of the impact."

(5) This answer was explained by a diagram on the blackboard which the witness drew and to which the same objection was made.

(6) The question was then reiterated in different form and it was specifically sought to elicit how far the extreme edge of the trailer protruded over the center white line. The substance of the answer to this question was that in his opinion the complete trailer, up to the landing gears, was on the wrong side of the roadway.

(7) The witness was thereafter asked where the Donahue trailer was hit. He stated that on that matter he could testify as to a fact rather than an opinion, and described the damage done to it.

(8) After this description he was asked whether he had an opinion as to the original point of impact. Objection was interposed but it was overruled.

(9) Thereafter the question was asked as to whether or not the witness had an opinion approximately how far south of the white line the door of the Donahue trailer was at the time of the original impact. Objection was again interposed and the witness stated that in his opinion the door was 3 feet south of the white line.

(10) The witness was further asked whether he had an opinion as to the direction of the force that had damaged the gas tank on the Cebrian truck, to which he answered over objection that it was damaged from the top down.

(11) It was then established by pictures that the cab on the Cebrian truck was shoved forward from its normal position, and the witness was then asked whether he had an opinion as to the direction of the force that had damaged the cab. Again over objection he said that it was damaged from the rear forward.

(12) The witness was then asked whether he formed an opinion as to what had damaged the cab and the gas tank of the Cebrian truck to which he answered, again over objection, that in his opinion the damage was caused by the Cebrian trailer coming against the Cebrian tractor.

[1, 2] The general rule is that witnesses must testify to facts, and not opinions, and that whenever the question to be determined is the result of common experience of a man of ordinary education or is to be inferred from particular facts, the inference is to be drawn by the jury, and not by the witness. Burch v. Valley Motor Lines, Inc., 78 Cal.App.2d 834, 839, 179 P.2d 47. Section 1870, subdivision 9 of the Code of Civil Procedure provides that the opinion of a witness is admissible "on a question of science, art, or trade, when he is skilled therein", because it deals with matters not presumably within the common knowledge of men, and where the opinion is proper and necessary to an enlightened consideration and a correct disposition of the ultimate issue.

[3–5] The question here presented for decision is whether the testimony produced was within the general rule or whether it was within the purview of section 1870, subdivision 9 of the Code of Civil Procedure. Expert testimony has been uniformly sanctioned as proper in many instances, particularly in jury trials, for the crystallization of intelligent and just results. Under the common law the admissibility of the opinion of experts upon matters within the field of their knowledge was well established. Section 1870, subdivision 9, supra, is but a legislative enactment of the common-law rule. Estate of Toomes, 54 Cal. 509, 513. The testimony of an expert is admissible because a man's professional pursuit, his peculiar skill and knowledge in some department of science not common to men in general, enable him to draw an inference where men of common experience, after all the facts are proved, would be left in doubt. (10 Cal.Jur. pages 957–958, Sec. 216.) Rarely, if ever, does an expression of opinion by a so-called expert not amount to that which either the court or jury might adopt as a basis for the ultimate decision in the case. However, that does not mean that the witness is deciding the case or that in so testifying he is usurping the functions of the jury. He is merely giving an opinion, based upon his technical training, which the court may or may not accept as testimony that is proper and necessary to an enlightened consideration and a correct disposition of the ultimate issue. Fonts v. Southern Pacific Co., 30 Cal.App. 633, 641, 159 P. ?15.

Here, as in Lemley v. Doak Gas Engine Co., 40 Cal.App. 146, 180 P. 671, the ultimate question which the jury had to answer was whose negligence, if any, caused the collision or contributed thereto. It was there held that in ascertaining the answer to the main question, the subsidiary or secondary inquiry in reference to expert opinion evidence as to a defective condition of a certain drawbar was relevant and proper provided the answer to the secondary question might aid the jury in answering the first.

In People v. Haeussler, 41 Cal.2d 252, 260 P.2d 8, where a traffic officer who had had many years of experience in investigating automobile accidents, similar to the experience had by the officer in the instant case, and who, with reference to the point of impact of two vehicles involved in the collision, based his opinion on an inspection of skid and gouge marks on the pavement and location of oil, broken glass, parts of vehicles and other debris, it was held that he was an expert and might testify as to his opinion regarding the point of impact. Zelayeta v. Pacific Greyhound Lines, Inc., 104 Cal.App.2d 716, 232 P.2d 572, is to the same effect and cited with approval.

In Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675, the testimony of an expert witness was held to be admissible for the purpose of showing the distance within which a Dodge car, going 20 miles per hour, could be stopped. It was there held that the fact sought to be shown was not a matter of such common knowledge as to preclude the admission of expert testimony. See, also, Howland v. Oakland Consolidated St. Ry. Co., 110 Cal. 513, 42 P. 983. In the same case it was held that a qualified expert could testify whether the damage to the truck, as shown by the evidence, could have been caused by the Dodge car traveling at 20 miles per hour. Cases are collected in Zelayeta v. Pacific Greyhound Lines, Inc., supra, 104 Cal.App.2d at page 727, 232 P.2d 572, discussing this subject. There are several cases cited holding that a garage mechanic cannot testify, based on facts set forth in a hypothetical question, as to the probable course of two colliding automobiles after the impact; or, as to the speed of two colliding cars; or which one was traveling faster; or as to whether an accident could have been avoided under certain circumstances; but that the cause or starting point of a fire may be the subject of expert testimony; and that such a witness may be permitted to testify that a certain mark on the highway appeared to have been made by a 'free running wheel". In that case Stuart v. Dotts, 89 Cal.App.2d 683, 201 P.2d 820, was cited by appellant. There a police officer was permitted at the trial to give his opinion as to whether a collision between an automobile and a pedestrian occurred within or without a certain crosswalk. It was held that the introduction of such testimony was error, not because the subject matter of the question was not a proper subject of expert testimony, but because a proper foundation was not laid. Many such conflicting cases are collected in annotations in 66 A.L.R. 1117; 70 A.L.R. 540; and 94 A.L.R. 1190.

As pointed out by defendants, there are a group of cases similar to Fishman v. Silva, 116 Cal.App. 1, 2 P.2d 473, where an opinion as to the probable course the respective cars would take after the impact was rejected upon the ground that there were too many varying factors lacking, where the witness, who was not an eye witness, attempted to reconstruct what had happened from the position of the cars after they came to rest. In many of the cases important elements were omitted. The cases relied upon are Johnston v. Peairs, 117 Cal.App. 208, 3 P.2d 617; Linde v. Emmick, 16 Cal.App.2d 676, 61 P.2d 338; Moore v. Norwood, 41 Cal.App.2d 359, 106 P.2d 939; and Moniz v. Bettencourt, 24 Cal.App.2d 718, 76 P.2d 535.

In Burch v. Valley Motor Lines, Inc., 78 Cal.App.2d 834, 840, 179 P.2d 47, many of the cases relied on by defendants, as well as other cases, are discussed and differentiated.

The fact that the expert testimony sought to be produced involves vehicle accidents, as opposed to opinions of experts peculiar to the cause of a particular fire or of a medical expert's opinion as to the nature of the agency or instrument which may have produced a physical injury, or of the construction of the force of a blow as evidenced by an X-ray picture of injured bones, cannot be differentiated provided the nature of the evidence to be interpreted by the expert comes within the rule announced. Baltimore & Ohio R. R. v. Schultz, 43 Ohio St. 270, 1 N.E. 324; Manney v. Housing Authority, 79 Cal.App.2d 453, 460, 180 P.2d 69.

[6] Some distinction is noted in reference to the admission in evidence of opinions of experts based upon facts related to them in a hypothetical question, and of opinions of experts or nonexperts when testifying about facts they have personally observed, as was done in the instant case. Either form of such evidence has been held admissible when complying with the tests indicated. 7 Wigmore on Evidence, 3d Ed. pages 1–29; Manney v. Housing Authority, supra, 79 Cal.App.2d at page 459, 180 P.2d 69. Applying these rules to the facts in the instant case it cannot be said that the answers sought by the questions propounded to the witness, whether expert or nonexpert, necessarily invaded the province of the jury in its determination of the ultimate issue, i. e., whether plaintiffs should recover for the negligence of the defendants. The position of the tractor and trailer on the highway at the time was one of the facts to be decided, either by eye witnesses or by the facts and circumstances, aided by the opinion of expert witnesses, if the proper foundation was laid.

The question of the general qualifications of the witness to testify generally as an expert witness in reference to automobile accidents is not disputed. The evidence shows that the highway patrol officer had had many years of experience in investigating accidents on the highway; that he had been with a railroad company and acted in this capacity; had acted as an investigating officer in the U. S. Army in respect to accidents; and that he had investigated "considerably more than" 100 accidents in 14 years of such work. It further appears that the witness arrived at the scene of the accident here involved within 30 minutes after it happened and was testifying from facts which he had related to the jury and which he obtained from his personal observation at the time.

Whether the witness showed sufficient qualifications to express the opinion related in reference to the degree of angulation and other such deductions from the facts related may be questioned. He was examined in reference to his qualifications and the trial judge expressed himself as being satisfied with his general qualifications to testify on the subject under discussion at the time. As to his opinion regarding the point of impact, he stated he based it on his observation of the damage incurred to the trailer; from the angle in which the metal was broken and torn on each piece of equipment; from the angle in which the trailer was torn from the rear axle; the gouge marks in the highway; the dirt and debris knocked loose from the respective vehicles; the oil spots; and from what he there saw; and that from the facts related he was capable of expressing an opinion on the subject about which he was interrogated.

[7, 8] Plaintiff makes no point in its brief in respect to lack of showing of qualification of the witness. The qualification of a witness to testify as an expert is a matter within the sound discretion of the trial court, and where there is no showing of a clear abuse of that discretion, the ruling of that court will not be disturbed on appeal. Where the witness has disclosed a sufficient knowledge of the subject to entitle his opinion to go to the jury the question of the degree of his knowledge goes more to the weight of the evidence than its admissibility. People v. Haeussler, 41 Cal.2d 252, 260 P.2d 8; Pitt v. Southern Pacific Co., 121 Cal.App. 228, 236, 9 P.2d 273; 10 Cal.Jur. 963, sec. 220.

Assuming therefore the qualifications of the witness to relate the opinions expressed, the only question remaining is whether the witness was possessed of sufficient facts and information to express those opinions, whether the evidence was of such a character as to indicate the necessity of and require an interpretation for the benefit of the jury, whether it was proper and necessary to an enlightened consideration and a correct disposition of the ultimate issue, and whether or not the facts sought to be shown by the expert were matters of such common knowledge as to preclude the admission of expert testimony.

[9, 10] Here, the circumstantial evidence was not necessarily self-explanatory to the layman's eye. It was reasonable for the trial judge to believe that the jurors needed aid, even if they had been at the scene of the accident that night, to ascertain the clues leading to the conclusions reached. It was therefore proper, if the required facts were established, to admit the opinion of the expert, based on those facts in evidence, which he personally knew, for the consideration of the jury, if the opinion, because of the witness' particular knowledge and experience, could aid the jury in drawing correct inferences from the raw and unsorted facts. Of course, as the court instructed the jury, it was entitled to give the opinion such credit as it felt it was entitled to receive; and the jury was not bound to accept such opinion and might even totally disregard it in favor of its own opinion, based on the facts adduced by the evidence if it did not feel that the reasons given by the expert were sufficient.

[11] In 20 American Jurisprudence, p. 654, it is stated that:

> "It is certainly contrary to the unmistakable trend of authority to exclude expert opinion testimony merely upon the ground that it amounts to an opinion upon ultimate facts. The

> modern tendency is to make no distinction between evidential and ultimate facts subject to expert opinion. The courts consider that it is more important to get to the truth of the matter than to quibble over distinctions in this regard which are in many cases impracticable."

[12] We conclude that the trial court committed no error in admitting the opinion evidence.

[13] The instant action was consolidated for trial with an action instituted by the widow and children of the deceased Louis Richter against these same defendants for wrongful death. In that action plaintiffs recovered a judgment. Before the appeal was perfected in that case it was dismissed under Rule 17(a) of the Rules on Appeal. Defendants now complain because the trial court gave plaintiff's instruction in the consolidated action which reads in part as follows:

> "* * * that although the plaintiffs have the burden of proving the allegations of negligence that they have made, this burden is carried and fulfilled by the plaintiffs if from the entire evidence you are able to conclude that the greater probability of truth supports the plaintiff's contention that the defendants were negligent and that this negligence was a proximate cause of the accident. In this connection you are reminded that the presumption that a deceased person exercised due care for his own safety is in itself evidence and you are to consider this presumption together with all the rest of the evidence in determining the issues of negligence and contributory negligence in this case."

Defendants' complaint is that this instruction, in effect, told the jury that the presumption of due care created an inference or authorized the presumption that the defendants were negligent and accordingly was erroneous, citing Gardner v. Seymour, 27 Wash.2d 802, 180 P.2d 564.

Defendants endeavor to distinguish a similar instruction given in Woodward v. Southern Pacific Company, 35 Cal.App.2d 130, 94 P.2d 1028, which instruction was held proper after a similar complaint. We perceive no distinction and the case relied upon by plaintiff supports the authority of the court in giving the instruction about which complaint is here made. See, also, Wiswell v. Shinners, 47 Cal.App.2d 156, 117 P.2d 677; and Wahrenbrock v. Los Angeles Transit Lines, 84 Cal.App.2d 236, 190 P.2d 272.

[14] Lastly, it is argued that although there was a presumption of due care in favor of Richter which extended to his widow and children, such presumption did not extend in favor of Richter's employer in a parallel suit in an action to recover damages to the truck and cargo. No authority is cited in support of the argument. That the presumption extends to the surviving spouse and children is sufficiently established in Wahrenbrock v. Los Angeles Transit Lines, supra; Paulsen v. Spencer, 78 Cal.App.2d 268, 177 P.2d 597; and Wiswell v. Shinners, supra. Since the jury was properly authorized to draw this deduction from the facts established by the evidence in the companion case involving Richter's widow and children, no basis or logical argument is presented why the jury was not authorized to consider this same presumption from the same facts when Richter's employer, the owner of the equipment, is plaintiff and is seeking recovery for damages resulting to its trailer and tractor, which was driven by its duly authorized agent in the course of his employment and with plaintiff's permission. See, Sec. 402, subdivision(a), Vehicle Code; Milgate v. Wraith, 19 Cal.2d 297, 121 P.2d 10; Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590; and Boellaard v. Crabbe, 41 Cal.App.2d 792, 107 P.2d 951, where it was held that the presumption that a deceased driver exercised due care for his safety is broad enough to embrace the safety of the other occupants of the automobile where it is sought to impute the driver's negligence to the occupants. See, also, 7 Cal.Jur.2d 323, sec. 402.

[15] Regardless of this conclusion defendants may not now be heard to complain for the first time on appeal since the

instruction was applicable to the companion case and defendants made no request for an instruction limiting its application to the other action. Liebrandt v. Sorg, 133 Cal. 571, 65 P. 1098; Craig v. Boyes, 123 Cal.App. 592, 11 P.2d 673; Gajanich v. Gregory, 116 Cal.App. 622, 3 P.2d 389.

Judgment affirmed.

BARNARD, P. J., concurs.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

122 Cal.App.2d 541

LEONARD v. HUSTON.

Civ. 15607.

District Court of Appeal, First District,
Division 2, California.
Jan. 18, 1954.

Action to quiet title. The defendant filed a cross-complaint. The Superior Court, Alameda County, James G. Quinn, J., rendered judgment and both parties appealed. The District Court of Appeal, Kaufman, J., held that there was such ambiguity as warranted the admission of parol evidence to explain and interpret contract.

Judgment affirmed.

1. Specific Performance 🔑130

In equitable action for specific performance of land contract, court is not required to grant interest upon purchase money withheld from seller. Civ.Code, § 3287.

2. Interest 🔑39(3)

Where landowner and investor entered into joint adventure contracts for completion of apartment buildings which were thereafter to be divided, and landowner demanded an unreasonable sum from investor so that investor had to file suit before he could determine the amount he was to pay, the allowance of interest to landowner only from date of judgment and not from date that money became due from investor was not abuse of discretion. Civ.Code, § 3287.

3. Contracts 🔑169, 170(1)

Surrounding circumstances and subsequent conduct may be invoked to aid interpretation of contract only where on contract's face there is doubt as to its meaning.

4. Contracts 🔑164

Similarity of form or of circumstances giving rise to contracts is not reason enough to interpret one with reference to the other, unless the meaning cannot be ascertained from the contracts themselves.

5. Appeal and Error 🔑842(1)
Contracts 🔑176(2)

Whether or not a contract is ambiguous is a question of law, and trial court's finding on that issue is not binding on appellate court.

6. Contracts 🔑143

Court cannot rewrite terms of a clear contract.

7. Evidence 🔑455

In action on contract, parol evidence is admissible to explain what parties meant by what they said.

8. Evidence 🔑450(7)

In quiet title action by joint adventurer against coadventurer involving joint adventure contracts for construction of apartment buildings upon coadventurer's realty, there was such ambiguity that parol evidence was admissible to interpret term of contract by which joint adventurer agreed to assume all of costs necessary to build the buildings. Civ.Code, § 1647; Code Civ. Proc. § 1860.

Gibbs & Gideon, David B. Gideon, San Francisco, for defendant-appellant.

Morse & Richards, Paul D. Morse, Oakland, for plaintiff, respondent and cross-appellant.

KAUFMAN, Justice.

This is an appeal from a judgment of the Superior Court of Alameda County in a quiet title action, decreeing that defendant and cross-complainant Huston convey two parcels of property to plaintiff and cross-defendant Leonard upon receipt of the balance of the purchase price in the amount of $13,853.32 with interest at 7% from entry of judgment, and determining that Leonard as equitable owner of the property was entitled to the accrued rentals over the period from August 1944 to 1951. Cross-complainant Huston appeals on the ground that interest should have been awarded to him, not from the date of entry of judgment, but from the date the rentals began to accrue—August 1944.

The appeal is presented on an Agreed Statement which summarizes the pertinent facts as follows:

Appellant John Huston, defendant and cross-complainant below, met appellant Royal Leonard, plaintiff and cross-defendant below, in March 1944. Huston had recently purchased two tracts of land in Oakland and was engaged in building apartments upon them. Neither Huston nor Leonard were licensed contractors. The first tract, located on Atherton Street in East Oakland, comprised six adjoining lots, on which Huston was building six duplex dwellings. This site cost $5,000. Huston had a bank loan of $3,000 on the land and a Federal Housing Administration construction loan of $6,900 on each of the six duplex units. Six other duplexes were being built by Huston on various other sites, making a total of twelve duplex dwellings which were under construction when Huston and Leonard first met in March of 1944.

The second site, which was located on Derby Street, also in East Oakland, cost Huston $12,000 and it, too, embraced six lots. On these he had just commenced construction of six four-unit apartments, or four-plexes. Each of these units was financed by a Federal Housing Administration loan of $12,000. There was no loan against the land.

At the time Leonard met Huston construction on the Atherton duplexes was well under way; the Derby project had just been commenced. Leonard expressed interest in the Atherton project and indicated that he had capital to invest. Huston asked him whether he would like to participate in that venture. Several discussions were had between the two men. On March 13, 1944, they entered into the following agreement:

"Oakland 6, California
March 13, 1944

"Agreement

"It is hereby agreed that Royal Leonard shall pay all of the out of pocket expenses for the completion of twelve duplexes six on Atherton Street, three on Fifty Fifth Avenue, one on Bancroft, one on Olive Street and one on Quigley. This amount shall be all of the expenses above the loan. It shall include interest, F.H.A. closing and similar charges. In the future, Royal Leonard had the option of dividing the duplexes.

"Royal Leonard is to receive a one-half interest in the twelve duplexes.

"Royal Leonard shall pay in addition the sum of $1200 twelve Hundred and no cents for participation in the deal.

"(Signed) Royal Leonard
(Signed) John Huston"

The contract was prepared jointly and was typed by Huston at his apartment in the presence of Leonard.

Four days later, after Leonard remarked that he had additional capital available for investment, a second agreement was entered into covering the Derby Tract. That contract, which was also prepared jointly at Huston's apartment, read as follows:

"Oakland 6 California
March 17, 1944

"Agreement

"It is hereby agreed that Royal Leonard shall pay all of the expenses for the completion of six four unit dwellings located on East Fifteenth street between Derby and Thirty First Ave. (two on one of the side streets mentioned).

"In return he shall receive one half interest in the six four unit buildings (he being Royal Leonard).

"The cost shall be all of the cost necessary to build the buildings including office expenses. F.H.A. costs, Fire insurance, surveys, taxes R. L. with no pro-rating of these J. H. R. L. costs as in a regular sale.

"This agreement is effective this day.

"Royal Leonard has the option of dividing the buildings in the future.

"Payment to be made within 30 days. J. H. R. L.

"(Signed) Royal Leonard
(Signed) John Huston"

Upon signing of the first contract Leonard gave Huston a check for $4,500. He gave him an additional $7,500 on March 31st. Leonard also paid $386.45 to cover certain taxes which fell due on the property while appellant Huston was out of town. Thus the total amount paid by Leonard for participation in the venture was $12,386.45.

In return for this investment Leonard selected as his half of the properties, the six Atherton duplexes and three of the four-plexes on Derby Street. The other half of the properties were retained by Huston and are not involved in this dispute. The duplexes were finished in June, 1944, and the four-plexes in September. They were immediately rented, through an agent. Deeds to both properties were prepared and acknowledged by Huston on March 27, 1944. Leonard claimed the deeds were delivered to him but Huston denied it.

During construction of the buildings a dispute had arisen between Huston and Leonard as to how much Leonard was supposed to pay for participation in the two ventures. At various times after the second check was made out by Leonard, Huston had demanded additional amounts from Leonard, but the two were unable to agree on the amount due. The disagreemen was twofold: first, the amount properly due Huston as "expenses" or "building costs" under the two contracts, and, second, whether or not the cost of the land was to be paid by Leonard under the terms of the two contracts. It was stipulated during the trial which ensued that the cost of the land—$5,000—was included in the first (Atherton) contract and was to be paid by Leonard, but Leonard denied that he was to pay for the cost of the land—$12,000—under the terms of the second contract.

On July 14, 1944, Leonard commenced this action against Huston, claiming title to the two properties, alleging that Huston asserted an adverse interest, and praying that Leonard's title be quieted as against Huston. Huston, on August 4, 1944, filed an answer and cross-complaint, denying Leonard's claim of title and alleging that Leonard still owed over $16,000 on the two contracts. In addition, Huston asked $1,800 damages for Leonard's failure to fulfill his contractual obligations.

The case came to trial before the court sitting without a jury on February 26, 1944. It was continued thereafter from time to time by stipulation of counsel, for further trial and written and oral argument. Findings of Fact and Conclusions of Law were entered on May 23, 1951, and judgment was ordered in accordance therewith on June 5, 1951.

Because of the dispute the rents had been collected and held by a receiver from August 1944 to date.

The court found that on March 13, 1944 (the date of the first written agreement), defendant Huston had on deposit with the Central Bank of Oakland, sufficient funds together with financing by F.H.A., to completely pay for construction of the 12 duplex buildings; and that on March 17, 1944 (the date of the second written agreement), Huston had on deposit with the Central Bank, sufficient funds, together with financing by F.H.A. loan, to completely pay for construction of the six four-unit dwellings. It was found that the written agreements of March 13 and March 17, 1944 constituted agreements of joint venture whereby investments above the amount of loans obtained thereon were to be made by plaintiff Leonard, and the management was to be done by defendant Huston, and that their intent was to divide the properties equally; that the balance of the construction costs was not ascertainable at the time the improvements were completed and could not be determined until the court's accounting was completed, and that Leonard was ready, able and willing to pay Huston all sums properly due but that Huston has at all times refused to convey said property *except on condition that Leonard pay a sum substantially greater than the amount found due by the court.* (Emphasis ours.)

It was further found that the agreements of March 13 and 17, 1944 were ambiguous; that construing them in the light of surrounding circumstances, the conduct of the parties and the stipulations in the record, that the two agreements, despite their different wording, meant the same with respect to the items to be included in "all of the out of pocket expenses for the completion of twelve duplexes" in the agreement of March 13 and "all of the expenses for the completion of six four-unit dwellings" in the agreement of March 17, and that the cost of the land upon which the buildings were to be constructed was to be included in such expenses to be paid by plaintiff and cross-defendant Leonard. It was found that the office expenses incurred by Huston amounted to $585; that plaintiff was not in default because the amounts payable by plaintiff to defendant pursuant to these agreements were not ascertainable until determined by the court's accounting; that the total amount due from plaintiff Leonard to defendant Huston for the cost of the land and office expenses was $13,853.32 with interest at 7% from date of entry of judgment. The accrued rentals were determined to be due Leonard, subject to deduction of the amount owing by Leonard to Huston.

Huston's Appeal.

Defendant and cross-appellant Huston contends that it was reversible error to fail to allow Huston interest on the sum of $13,853.32 prior to judgment, maintaining that the effect of the judgment is to allow Leonard the free use of Huston's money for a period of seven years while at the same time giving him the benefit of the rentals for that period. In Brandt v. Clark, 81 Cal. 634, 641, 22 P. 863, it was held not to be unjust to require defendants to pay interest since they had been in possession and had the use of the property during all of the time that interest was allowed. It has been said that the estate and purchase money are things mutually exclusive and neither party is entitled to the enjoyment of both. 75 A.L.R. 325; Fry on Specific Performance, 5th Ed., §§ 1399, 1402, 1404; Pomeroy, Specific Performance, 3d Ed., § 427; 23 Cal. Jur. 513, § 69.

[1] Respondent contends that the above authorities hold that the court in the situations dealt with therein *may* grant interest, but do not hold that in such equitable proceedings the court *must* grant interest. With this contention we agree.

Appellant contends that as a matter of law he is entitled to interest on the unpaid purchase price from the date it became due because of § 3287, Civil Code, which reads: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt." He contends that the only question is whether the damages are capable of "being made certain by calculation". The only major item in dispute, other than office expenses, was whether Leonard should pay the cost of the land involved in the second building agreement. Since this sum was $12,000, all but a small amount was readily determinable. Appellant cites McCowan v. Pew, 18 Cal.App. 482, 123 P. 354, a case upholding an award of interest against a vendee who contended that the amount was uncertain. However that case appears to go no further than to hold that it is discretionary with the court to order or withhold interest. The court stated that neither section 3287 nor section 1917 were intended to take away all discretion from the court in such a case, and that the appellate court would review only for an abuse of discretion.

[2] It is true that the amount of $12,000, the purchase price of the land, was easily ascertainable. However, the court found that defendant Huston at all times refused to convey except upon condition that Leonard pay "a sum substantially greater than the amount herein fixed by the court as properly due." The court also found that the balance was not ascertainable upon completion of the improvements and would not be ascertainable until entry of judgment herein. Defendant Huston does not attack the finding that he demanded a sum substantially greater than that found to be due, as unsupported by the evidence. It was therefore necessary for plaintiff to file suit before he could determine the amount he was to pay. If a court of equity may award damages to compensate for the unreason-

able demands of a buyer, it may also withhold interest to compensate for the unreasonable demands of a seller. Plaintiff was the first party to resort to a court of equity to have determined the amount that was justly due. In May v. Hunt Hatch & Co., 75 Cal.App. 283, 242 P. 735, it was held that as the amount of plaintiff's claim was not ascertained until judgment was entered, plaintiff's right to interest did not arise until the entry of judgment.

Although appellant has argued that plaintiff will enjoy the use of his money and the rentals also for the seven year period, it is to be noted that the rentals until the time of trial were in the hands of a receiver, hence plaintiff was not enjoying the benefit of that money during those years. Furthermore more than $5,000 was deducted from the rentals as compensation for the receiver and an accountant.

Leonard's Appeal.

[3] Plaintiff Leonard appeals on the ground that the cost of the land ($12,000) was not properly chargeable against him under the agreement of March 17, 1944. He contends that the plain reading of the contract shows that the cost of the land was excluded. The words "pay all of the expenses for the completion of six four-unit dwellings" can mean only the unpaid balance of the costs of construction. To include the cost of the land, appellant contends, changes the plain meaning of the language used, and it was therefore erroneous to interpret this contract with reference to the contract of March 13, 1944 and by parol evidence. Appellant had stipulated that in the case of the first contract which provided for the payment of "all out of pocket expenses for the completion of twelve duplexes" and "all of the expenses above the loan", the cost of the land was included as an expense chargeable to him. This admission, he maintains, evidently influenced the trial judge to conclude that if it was true in one case it probably was true in the other, and led him to hold that an ambiguity existed in the second contract. Surrounding circumstances and subsequent conduct may be invoked to aid interpretation only where on the face of the contract there is doubt as to its meaning. Purdy v. Buffums, 95 Cal.App. 299, 272 P. 770; Sass v. Hank, 108 Cal.App.2d 207, 238 P.2d 652.

[4] Appellant maintains that the contracts are independent of each other. Similarity of form or of the circumstances giving rise to the contracts is not reason enough to interpret one with reference to the other, unless the meaning cannot be ascertained from the contracts themselves. Briggs v. Marcus-Lesoine, Inc., 3 Cal.App.2d 207, 39 P.2d 442; Jameson v. Chanslor-Canfield Midway Oil Co., 176 Cal. 1, 8, 167 P. 369; Moreing v. Weber, 3 Cal.App. 14, 84 P. 220; 6 Cal.Jur. 304, § 184.

Appellant emphasizes the fact that the contracts were entered into at different times—four days apart—and cites San Francisco Milling Co. v. Frye & Co., 2 Cal.App.2d 563, 38 P.2d 165, 166, in which it was contended that two contracts for the sale of seed should be construed together, citing sec. 1642, Civil Code, which provides that several contracts relating to the same matters between the same parties, and made as parts of substantially one transaction are to be taken together. The contracts in the cited case were entered into on April 5 and May 15, 1930. The court stated: "There appears to be no connection between them. They were each separate and distinct sales of foul seed." Here, however, the trial court found that the contracts constituted agreements of joint venture in the construction of dwelling units whereby the investments above the loans were to be made by plaintiff Leonard, and the management of the ventures was to be assumed by Huston, the parties to divide the properties and profits equally. It was also found as a fact that Huston, prior to March 28, 1944, prepared deeds naming himself as grantor and Leonard as grantee, and describing these certain properties, that these deeds were duly acknowledged but that neither was delivered, it being agreed that they should be retained by defendant Huston as security for the sums due from plaintiff under the agreements.

Appellant stresses the slight differences in the wording of the two contracts, but read as a whole, they seem to be remarkably similar. He also argues that the fact that the first project was well under way when he put money into it, while on the second, work had just begun, made the first an investment and the second a speculation.

[5, 6] Respondent cites several authorities to the effect that the interpretation placed upon a written contract by a trial court in the light of conflicting parol evidence is binding on appeal, In re Estate of Rule, 25 Cal.2d 1, 152 P.2d 1003, 155 A.L.R. 1319; Transportation Guarantee Co. v. Jellins, 29 Cal.2d 242, 174 P.2d 625; Taylor v. J. B. Hill Co., 31 Cal.2d 373, 189 P.2d 258, and with these authorities, appellant has no quarrel but notes that they become applicable only when it has been first determined that a contract is ambiguous. But whether or not it is ambiguous is a question of law, and the lower court's finding on this issue is not binding on the appellate court. 4 Cal.Jur.Supp. 148, sec. 192; Brant v. California Dairies, 4 Cal.2d 128, 48 P.2d 13; Lane-Wells Co. v. Schlumberger, 65 Cal. App.2d 180, 150 P.2d 251. The court cannot rewrite the terms of a clear contract. "The rule forbids adding by parol where the writing is silent as well as varying where it speaks * * *." 4 Cal.Jur.Supp. 104, § 162.

[7, 8] Appellant maintains that no extrinsic ambiguity is involved in the contract, and that where such is the case, the ambiguity should be pleaded and the contract reformed. It is true that there is no evidence or pleading in the instant case that the words have any technical meaning apart from their usual meaning. But as said in Wells v. Wells, 74 Cal.App.2d 449, 169 P.2d 23, 27, parol evidence is admissible to explain "what the parties meant by what they said." If the phrases "all of the expenses for the completion of six four-unit dwellings" and "the cost shall be all of the costs necessary to build the buildings including office expenses, F.H.A. costs, fire insurance, surveys, taxes with no pro-rating of these costs" are so very clear as to admit of no interpretation, then appellant's position is sound. But it appears to us that the general phrase "all of the costs necessary to build the buildings" can bear some further interpretation. Appellant cannot successfully maintain that the enumerated items such as fire insurance, taxes, etc., are a complete index of all of the costs necessary to build the buildings. If parol evidence is admissible to go into what expenses were considered by the parties as costs of constructing the buildings, it is reasonable to admit into evidence the interpretation given to this term by them in a very similar contract entered into a few days earlier as one of the surrounding circumstances throwing light on what was meant by the language used. We conclude that the trial court properly allowed parol evidence to explain and interpret the contract in question. See 6 Cal. Jur. 294, § 180; § 1647, Civil Code; § 1860, Code of Civ.Proc.

In view of the foregoing it is our judgment that the findings and judgment of the trial court are supported by the law and evidence in the record before us.

The judgment is hereby affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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122 Cal.App.2d 756

TEXTILE, Inc. v. COLEMAN et al.

Civ. 19875.

District Court of Appeal, Second District, Division 1, California.

Jan. 25, 1954.

Hearing Denied March 25, 1954.

Lessee brought action against lessors to recover damages for alleged breach of implied covenant of quiet enjoyment in lease, and for allegedly being fraudulently induced to enter into the lease. The Superior Court of Los Angeles County, Caryl M. Sheldon, J., entered judgment adverse to lessee, and lessee appealed. The District Court of Appeal, Doran, J., held that where written lease, which was drawn by lessee's attorney, did not give lessee permissive use of certain parking areas and other privileges, fact that previous lessees enjoyed permissive use of parking areas and other privileges did not entitle lessee to continuation thereof.

Judgment affirmed.

1. Landlord and Tenant 🔑37

Terms of lease, which was drawn by lessee's attorney, were required to be interpreted most strongly against the lessee. Civ.Code, § 1654.

2. Appeal and Error 🔑882(8)

Where lessee, in action by lessee against lessors to recover damages for alleged breach of implied covenant of quiet enjoyment, raised issue that intended lease was much broader in scope than indicated by terminology employed by lessee's attorney in drawing up the written lease, lessee was in no position to complain because trial court heard parol evidence of lessors as to surrounding circumstances in connection with execution of written lease, over objection of lessee that admission of such evidence was a violation of the parol evidence rule.

3. Appeal and Error 🔑1056(1)

Where excluded evidence was not of such a nature as to change trial court's decision, alleged error in exclusion of such evidence was not prejudicial.

4. Contracts 🔑143

A court has no authority to make a contract for the parties.

5. Landlord and Tenant 🔑37

A court has no authority to write into a written lease material terms which will greatly broaden lessee's rights.

6. Landlord and Tenant 🔑134(3)

Where written lease, which was drawn by lessee's attorney, did not give lessee permissive use of certain parking areas and other privileges, fact that previous lessees enjoyed permissive use of parking areas and other privileges did not entitle lessee to continuation thereof.

Aaronson & Shapero, Judith B. Aaronson, Martin M. Shapero, Beverly Hills, for appellant.

David Lynn, Wm. F. Kistler, Inglewood, for respondents, J. Reed Barron and Rita L. Barron.

DeForrest Home, Wilbur D. Finch, Los Angeles, for respondents, Wm. P. Coleman, Clara L. Coleman, and Richard C. Ott.

McClean, Salisbury, Petty & McClean, Los Angeles, Don Petty, Los Angeles, for respondent, A. E. Krause.

DORAN, Justice.

Appellant, as plaintiff, instituted the present action for the purpose of recovering damages for alleged breach of the implied covenant of quiet enjoyment in a lease, and for being fraudulently induced to enter into said lease. The trial court held that no eviction had taken place and gave judgment in favor of the respondent defendants.

The property involved herein is the Margent Building, 204 N. Market Street in Inglewood, a two-story structure, the first floor of which consists of storerooms, one of which was occupied by Norlo Stores, Inc. prior to appellant's occupancy. The second floor consists of offices, no part of which is involved in the present controversy. One block to the eastward was a parking lot separated from the Margent Building by an alley, which was leased from its owners by Coleman and Ott, owners of the Margent Building, and used from time to time by Norlo Stores customers and other tenants of the building. At 200 North Market Street was located a small vacant lot known as Norlo Square, which was landscaped with trees and contained benches used by the general public.

In April, 1948, Max Altman, predecessor and president of plaintiff corporation, Textile, Inc., purchased fixtures and stock in trade of Norlo Stores, Inc. from its assignee for benefit of creditors. Altman approached Richard Ott, one-third owner of the Margent Building and Norlo Square, to discuss the leasing of the storeroom at 204 N. Market Street. This was in April or May of 1948. Altman was given a copy of the lease under which Norlo Stores, Inc. had rented the storeroom, and showed the lease to an attorney. Rejecting this form of lease, further negotiations were conducted with Ott concerning such matters as parking, reservation of side walls, etc.

The record discloses that during these negotiations Ott informed Altman that the lease on the parking lot hereinbefore mentioned expired in March, 1949; that Ott did not know if it could be renewed, and that therefore parking privileges could not be included in the lease. Ott also discussed with Altman a proposed building to be erected on Norlo Square, as a result of which Altman demanded a limitation on renting any of the surrounding premises to a competing business. The trial court found that Altman knew that this new building would block off a 6 x 8 foot stationary window in the south wall of the store room. During the negotiations and before a lease was signed, Altman moved into the store room, and paid rent thereon, conducting the same business as that of the Norlo Stores, Inc.

The ultimate lease, prepared by tenant Altman's attorney, and signed about the first of June, 1948, covered a five-year period, and in July was duly assigned to appellant Textile, Inc., of which Altman was the president. In terms, the written lease covered:

> "Those certain premises * * * more particularly described as follows, to-wit: 204 North Market Street, Inglewood, California, limited to those areas now occupied by Norlo Stores, Inc., including an inventory and stock room".

No mention was made of any parking arrangements or facilities, nor did the lease contain any provision concerning the stationary window (which could not be opened), used for display purposes. During the first part of appellant's occupancy, its customers made use of the parking lot heretofore mentioned.

The lease contained a further provision that:

> "Lessee shall permit lessor and his agents to enter into and upon said premises at all reasonable times for the purpose of inspecting the same or for the purpose of maintaining the building * * * or for the purpose of making repairs, alterations or additions to any other portion of said building".

As hereinbefore mentioned, the written lease was prepared by the attorney for Altman, appellant's predecessor, after negotiations with the lessors.

About December 1, 1948, Norlo Square was prepared for the erection of a building, and about this time, the window in the south wall of the storeroom was bricked up. In February, 1949, Norlo Square and the Margent Building were sold to the defendant Krause who later sold the property to the defendants Barron. The building on Norlo Square was completed by the Barrons in June or July of 1949.

The trial court held that the leased premises were "limited", in the language of the lease, to the areas occupied by Norlo Stores, Inc.; that at the time the lease was executed, Altman, plaintiff's predecessor and the lessee, knew that a building was to be erected on Norlo Square and that as result thereof, the display window on the south wall of the Margent Building would be closed, and further knew that "the parking privileges were not included in the lease".

It was further found that plaintiff had not been evicted from the demised premises; that "the character of the leased premises has not been changed, destroyed or lessened in value, and that the quiet enjoyment of the leased premises has not been breached or interfered with wrongfully or otherwise by defendants".

One of appellant's main contentions is that "The parol evidence rule was violated" in the admission of testimony concerning the terms of lease entered into between defendant Coleman and Norlo Stores, Inc., plaintiff's predecessor, a copy of which lease, as the trial court found, was delivered to Max Altman by defendant Ott. This lease contained a provision reserving to lessor the right to erect a building on Norlo Square. Appellant likewise complains of the admission of parol evidence concerning conversations and negotiations between the parties prior to execution of the written lease, concerning erection of the Norlo Square building, parking rights, etc. In this connection, appellant asserts that parol evidence was inadmissible since the lease was not ambiguous nor uncertain.

No reversible error appears to have been committed by the trial court, in permitting introduction of such evidence. Although complaining of an alleged violation of the parol evidence rule, appellant, in the same breath, apparently desires the reviewing court to write into the written lease something which is not there.

As said in respondents' brief, "In determining what constitutes the demised premises, the lease is controlling". The written contract makes no mention of nor provision concerning the use of any parking space, nor for the continuance of the window in question. Had these matters been deemed of vital importance it is reasonable to assume that the lease, prepared by Altman's attorney, could have contained some definite and specific provision relating thereto. The very purpose of a writing is to set such matters at rest.

[1] The lessor, by the terms of the lease, acquired no rights in reference to Norlo Square, and no parking privileges. And as previously mentioned, the lessor reserved the right to enter the premises for the purpose of making "repairs, alterations or additions". The terms of the lease, drawn by the lessee's attorney, must, as provided by Section 1654 of the Civil Code, "be interpreted most strongly against the party who caused the uncertainty to exist."

[2] By introducing parol evidence to show the circumstances surrounding the execution of the written lease, the defendants were, in effect, merely rebutting plaintiff's contention that the lease did not mean what it said but was intended to include parking facilities and other privileges not mentioned in the written instrument. Having raised the issue that the intended lease was much broader in scope than indicated by the terminology employed by lessee's attorney, appellant is hardly in a position to complain that the trial court heard evidence as to the surrounding circumstances.

[3] Appellant's further contention that prejudicial error was committed in the exclusion of certain evidence, is not borne out by the record. In part, as pointed out in respondent's brief, evidence as to the nature and improvement of Norlo Square, etc., was already before the court. As to other matters, the excluded evidence does not appear to have been of such a nature as to change the trial court's decision; consequently, the alleged error cannot be deemed prejudicial to appellant's rights.

[4, 5] The record fails to support appellant's statement that "The findings are contradictory and uncertain". On the contrary, the court's findings and decision appear to be definite and certain in giving effect to the plain terms of a written instrument, and in following the long established rule that no court has authority to make a contract for the parties, or to write into a lease material terms which, as in the present case, would greatly broaden a lessee's rights.

Were the appellant's position to be sustained, neither lessor nor lessee would be able to rest on the assurance that protection is afforded by a written lease. When it is considered that the lease in question was drafted, not by the lessor but by the lessee, the only reasonable assumption is that all matters deemed relevant or material were duly discussed and that the written instrument represents the actual meeting of minds at that time.

[6] The fundamental concept advanced by appellant seems to be that, since previous lessees enjoyed a permissive use of certain parking areas and other privileges, appellant is entitled to a continuation thereof although the written lease afforded no such protection. The leased premises were "limited to those areas now occupied by Norlo Stores, Inc.". Norlo Stores "occupied" nothing more than that part of the building which appellant later took over under a new lease. Whatever other special privilege or permissive use may have been enjoyed either by Norlo or by appellant can have no contractual significance in the face of a carefully considered written lease containing no such provisions.

Findings and judgment are supported by substantial evidence, and the record reveals no prejudicial error.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

122 Cal.App.2d 876

BRUGGEMAN et ux. v. SOKOL et al.

Civ. 4757.

District Court of Appeal, Fourth District, California.

Jan. 27, 1954.

Quiet title suit wherein defendants cross complained for decree of specific performance pursuant to an escrow agreement. The Superior Court of Orange County, Raymond Thompson, J., entered judgment from which defendant appealed. The District Court of Appeal, Mussell, J., held that evidence warranted finding that the escrow instructions, and amendments thereto, were incomplete, indefinite and uncertain, and thus not capable of being specifically enforced.

Judgment affirmed.

1. Specific Performance ⚷28(2), 31

A contract for the sale of real property will not be specifically enforced by a court of equity unless it contains all of the material terms and also expresses each in a sufficiently definite manner to apprise court of the precise act which is to be done. Civ. Code, § 3390, subd. 6.

2. Specific Performance ⚷121(9)

In suit to quiet title, wherein defendants cross-complained for decree for specific performance of escrow contract under which defendant was to purchase approximately 20 acres of land from plaintiffs, evidence warranted finding that the escrow instructions and amendments thereto, all of which formed the agreement in question, were incomplete, indefinite and uncertain, particularly with respect to terms of payment and terms of any and all encumbrances to represent the payment, and thus not subject to specific enforcement.

Buchalter, Nemer & Fields, Los Angeles, for appellants.

Milford W. Dahl, Santa Ana, for respondents.

MUSSELL, Justice.

Defendants and cross-complainants appeal from a judgment and decree quieting title in plaintiffs as joint tenants of certain real property in Orange county and declaring that defendants and cross-complainants have no right, title, interest, claim or estate therein. Defendants, in their answer to the complaint to quiet title, admitted that the record title was in plaintiffs but claimed title to the property by reason of the terms of an escrow agreement and in their cross-complaint sought a decree providing for specific performance of the contract. The trial court concluded that the agreement was unenforceable, quieted plaintiffs' title to the property, and defendants have appealed from the judgment.

On June 19, 1950, plaintiffs and defendant George Sokol signed escrow instructions which provided in part as follows: "The total consideration of this transaction is $75,000. The first money derived from the sale of the homes to be built on the subject property is to be paid to the seller and continuing as each sale of the constructed homes is completed until the entire amount of $75,000 has been paid * * * which you are instructed to use when, after recording the necessary instruments, you are able to procure a * * * policy of title insurance * * * on the following described property situated in the county of Orange, State of California: Property located at the Northeast corner of 9th & Garden Grove Blvd., in the City of Garden Grove, containing approximately 5 acres. * * * 20 acres more or less located 675 feet east of 9th Street and running east along Garden Grove Blvd. 640 feet more or less. Legal to be inserted and made a part hereof. * * * Showing title vested in Garden Homes, Inc. (A Calif. Corporation being organized). * * * The successful consummation of this escrow is contingent upon the following:

> "1. F. H. A. & V. A. approval for construction loans to file.
>
> "2. Interim Finance to be obtained by the buyers. Buyer will give you written notice when these approvals have been obtained.
>
> "The second trust deed to file concurrently with the construction loans is to be as follows: $75,000.00, payable the net proceeds from the sale of each

> house on subject property, interest at the rate of 5% per annum from 90 days from the recording date of the deed to this property. This deed of trust is to be in favor of Herman Bruggeman and Florence Bruggeman, husband and wife as joint tenants. Beneficiary agrees to issue Partial Reconveyances upon the request of trustor.
>
> "It is understood and agreed that this is to be a 90 days escrow; however, in the event the buyers need additional time to obtain the necessary approvals, the time element is automatically waived and the buyers may continue to obtain the approvals without additional approval of the sellers."

These instructions were signed "Garden Homes, Inc. (being organized) George Sokol" and by the plaintiffs.

On September 6, 1950, these instructions were modified by a writing signed by "Sunshine Terrace Homes, being inc. by M. C. Sokol" and by plaintiffs. It was agreed therein that a part of the property referred to in the original instructions (approximately 5 acres) was to be conveyed to Garden Homes, Inc., for a consideration of $17,040, "to be in form of a note secured by a second deed of trust on said property (the same terms and conditions as set out in the original escrow instructions)." The instrument then provided as follows: "You are to hold this escrow open for the sale of the balance of the property involved. Instructions will be given you at a later date re: price and description."

On September 11, 1950, plaintiffs and Sunshine Terrace Homes, Inc., executed a further amendment to the escrow instructions providing therein that the title to the property described in the amendment of September 6, 1950, would be taken in the name of Sunshine Terrace Homes, Inc.; that certain lots described therein would be covered by a second deed of trust and that a partial reconveyance for each lot would be issued upon the payment of $950 for each lot so released.

On September 14, 1950, Sunshine Terrace Homes, Inc., advised plaintiffs by letter that they were desirous of proceeding with the development of plaintiffs' property in smaller groups than previously anticipated and that they would pay an additional $2,000 on or before one year after completion of the first group of houses should they for some unforeseen reason not be able to proceed with the entire development.

On March 21, 1951, plaintiffs advised the escrow agency that all escrow instructions pertaining to more than five acres (as described in the amendment dated September 6, 1950) were canceled and the sale involved in the escrow was limited to five acres.

On March 30, 1951, the original escrow instructions were again modified by a written agreement which provided in part that the payment of the sum of $17,040 provided for in the amendment of September 6, 1950, was to be paid in the following manner: The sum of $5,250 to be paid for lots 1 to 6, inclusive; the sum of $1,040 for lot 7, and $950 each for lots 8 to 15, inclusive, and lots 35, 36 and 37 in tract numbered 1466. This tract embraced the five acres described in the amendment of September 6, 1950, and five acres purchased by one Bears. Plaintiffs' remaining property was an undeveloped area. Since the payments set forth in the March 30 modification did not total the sum of $17,040, a further modification was executed on April 2, 1951, in which it was agreed that there would be one note in the sum of $15,700 and another in the sum of $1,340, secured by second deeds of trust, with interest at 5% from December 28, 1950. The deeds of trust were to be signed concurrently "with the first trust deed or building loan being arranged through F.H.A. commitments".

The March 30, 1951, amendment also provided that the escrow agency should:

> "Hold for the seller, Herman Bruggeman and Luella Bruggeman, the sum of $2,000.00 which you are to pay to said seller, in addition to the price of $3,000.00 per acre, in event that the purchaser does not proceed with the entire development as originally contemplated in escrow No. 968 within one year from this date. The above trans-

> action is to be completed in the office of Stephen & Stephen, 108 West Broadway, Anaheim, Calif. on or before March 30th, 1952."

On March 31, 1951, plaintiffs notified the escrow agency that all previous instructions in the escrow were canceled provided the amendment to the instructions dated March 30, 1951, was signed by all parties involved.

The houses built on tract No. 1466 were completed in the latter part of 1952 and sold and the said sum of $17,040, with interest, was paid to plaintiffs. About ten months after the completion of the houses the F.H.A. informed Sokol that the area had proved itself and that construction could be continued in that area.

Defendant Sokol testified that he had plans drawn for the houses he was considering building on the 19 acres of undeveloped property but that Mr. Bruggeman refused to let him go on the property to have it surveyed and graded and stated that "He didn't want to go ahead with those 19 acres"; that Bruggeman refused to let him go on the property after March or April of 1952.

On March 25, 1952, the escrow agent advised plaintiffs by letter that he had received a letter from Sokol instructing them to proceed with previous arrangements to purchase the balance of plaintiffs' property. The agent then said "We believe it would be better that you all call at our office together before we proceed with the transaction", and in a letter to plaintiffs, dated April 2, 1952, the escrow agent expressed his hope that the parties could get together, iron out their differences and enable the agency to proceed and close the escrow. No deeds or instruments of conveyance were deposited in the escrow by plaintiffs and no documents of indebtedness were deposited therein by Sokol in connection with the undeveloped acreage.

Sunshine Terrace Homes, a corporation, was named as defendant in the amended complaint herein and after filing its answer, stipulated that it could be withdrawn and a default judgment entered against the corporation. It was also stipulated that the defendant Garden Homes, Inc., was never incorporated and that it is one and the same as "Sokol".

Defendants first contend that the terms of the written escrow instructions of June 19, 1950, together with the subsequent amendments and modifications thereto are definite and certain and that the agreement between the parties should have been specifically enforced. We cannot agree with this contention.

[1] In Wood v. Anderson, 199 Cal. 440, 444, 249 P. 862, 864, it was held that the rule is well established that a contract, particularly one for the conveyance of real property, will not be enforced by a court of equity unless it contains all of the material terms and also expresses each in a sufficiently definite manner and that since the contract there under consideration was indefinite as to the land conveyed, the time, place and conditions of payment of the purchase price, and as to the amount of the purchase price itself, the question was one of "such uncertainty and indefiniteness in appellant's testimony concerning the terms and conditions of the alleged contract as would require the court to indulge in mere conjecture and speculation in order to arrive at the intent of the parties."

In Mills v. Skaggs, 64 Cal.App.2d 656, 658, 659, 149 P.2d 204, 205, it was held that:

> "It is well settled than an agreement that is incomplete, uncertain or indefinite in its material terms will not be specifically enforced in equity and 'that the degree of certainty required in an equity action is much greater than is required in an action at law.' * * This general principle has been applied in denying specific enforcement of agreements which were incomplete, indefinite or uncertain with respect to the terms of payment of deferred balances or the terms of the incumbrances representing such deferred balances." (Citing cases.)

Civil Code, § 3390, subdivision 6, provides that an agreement the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable cannot be specifically enforced. And in Roberts v. Lebrain, 113 Cal.App.2d 712, 716, 248 P.2d 810, 813, the rule is stated that a contract for the sale of real property will not be specifically enforced unless it not only contains all the material terms, but also expresses each in a reasonably definite manner; that the burden was upon the appellant as the cross-complainant to prove such a contract; that "'the proofs of the contract should be clear'" under such circumstances and that an appellate court must view the evidence most favorable to the successful party in the trial court.

In the instant case the escrow instructions are indefinite and uncertain as to the time, place and conditions of payment of the purchase price. The total consideration of the transaction is stated as the sum of $75,000. However, five acres were sold for the sum of $17,040. The purchase and selling price of the remaining property and the time and manner of payment thereof was never determined. The consummation of the escrow was made "contingent upon F.H.A. and V.A. approval for construction loans to file". The amounts of these loans were never determined and apparently they were to be secured by first trust deeds on the property. However, the form of the trust deeds or the amounts to be secured thereby were never agreed upon by the parties. The escrow was further contingent upon "interim finance to be obtained by the buyers". The terms and conditions of such "interim finance" are not set forth and were to be determined by the buyers at some future indefinite time. Plaintiffs were to be given a second trust deed in the sum of $75,000 "payable the net proceeds from the sale of each house on subject property", but the times at which such payments, if any, are to commence or are to be made thereafter is not stated. While interest at the rate of 5% per annum is mentioned, the time or times of payment thereof were never agreed upon nor was the amount on which it was to be computed ascertained. Although the escrow instructions were signed by defendant Sokol, they were signed by him as a representative of Garden Homes, Inc. (being organized). "Garden Homes" was never incorporated and the title to the property could not be shown to be vested as required by the instructions. The property involved was insufficiently described in the escrow instructions and the "legal" was to be inserted and made a part thereof. Pursuant to subsequent modifications of the agreement, part of the property was sold to Sunshine Homes, Inc., and the description of the remaining property or parts thereof which were to be developed and sold was left to future agreement of the parties.

The record herein shows that plaintiffs and defendant Sokol endeavored to enter into an agreement whereby plaintiffs would sell and Sokol would buy the entire acreage owned by plaintiffs. However, the whole transaction was subject to approval of F. H.A. and V.A. construction loans and "interim" financing to be obtained by Sokol. The parties, by the September 6, 1951, amendment to the instructions and subsequent amendments were able to agree upon the terms and conditions of the sale of five acres only. The September 6th amendment provided that the escrow would be held open for the sale of the balance of the property and instructions were to be given at a later date with respect to the price and description of the property to be sold. No further amendments to the instructions were made by the parties with respect to the terms of sale of the balance of the property and on March 21, 1951, plaintiffs advised the escrow agency that all escrow instructions pertaining to more than the five acres described in the September 6, 1950, amendment were canceled.

[2] The evidence was sufficient to sustain the finding of the trial court "That the escrow instructions dated June 19, 1950, and the amendments thereto, all of which form the alleged agreement in question, are incomplete, indefinite and uncertain, particularly with respect to the terms of payment and the terms of any and all encumbrances to represent the payment, so as to render the same unenforceable." Under the rules stated in the cases cited herein, the trial

court was justified in denying specific performance. Defendant attacks other findings of the trial court as not supported by the evidence. However, since the quoted finding and the finding that plaintiffs are the owners in fee as joint tenants and are entitled to possession of the property involved are supported by the evidence, it is not material whether other findings objected to are sustained by the evidence or not. Sands v. Eagle Oil & Refining Co., 83 Cal.App.2d 312, 321, 188 P.2d 782.

Appellants, in support of the contention that the agreement between the parties should be specifically enforced, cite Carr v. Howell, 154 Cal. 372, 97 P. 885; Hansen v. Hevener, 69 Cal.App. 337, 231 P. 361; Janssen v. Davis, 219 Cal. 783, 29 P.2d 196; Upton v. Gould, 64 Cal.App.2d 814, 149 P.2d 731; and King v. Stanley, 32 Cal.2d 584, 585, 197 P.2d 321. These cases are all distinguishable and are not in conflict with the conclusions reached herein.

In the Carr v. Howell case the contract definitely fixed the amounts of the respective notes, the rate of interest they were to bear, the time they were to run, and the rebate to be allowed for payment of mortgage taxes by the mortgagor. The court held that the fact that mortgages sometimes, or even usually, contain other terms and covenants than there prescribed did not render the contract uncertain. The elements of certainty found in the Carr case are not to be found in the instant case.

In the Hansen v. Hevener case [69 Cal. App. 337, 231 P. 362] it was contended that the agreement sought to be enforced was uncertain as to the time when the sum of $1,000 mentioned therein was payable and the court held that the payment was required on or before the close of the escrow since the agreement provided for such payment "when the 'papers are down.'" The amount of the purchase price was ascertainable from the agreement and the interest was payable "'from the close of escrow'," which was a sufficient statement as to the time of payment.

In the Janssen v. Davis case plaintiff was a seller who sought specific performance by the buyer of an oral agreement which had been fully performed on the part of the seller. Specific performance was granted by the trial court but the judgment was reversed upon grounds other than the alleged uncertainty or indefiniteness of the agreement. The situation in that case was so unusual as to cause the Supreme Court to express regret that a reversal was required as the case was one "'clearly calling for the relief granted.'" See Mills v. Skaggs, supra, 64 Cal.App.2d at page 659, 149 P.2d at page 205.

Specific performance was held to be proper in the Upton v. Gould case where the times and terms of payment and the amount of the purchase price were clearly set forth, a factual situation not present in the instant case. In the King v. Stanley case the rule is stated that:

> "Equity does not require that all the terms and conditions of the proposed agreement be set forth in the contract. The usual and reasonable conditions of such a contract are, in the contemplation of the parties, a part of their agreement. In the absence of express conditions, custom determines incidental matters relating to the opening of an escrow, furnishing deeds, title insurance policies, prorating of taxes, and the like. * * * The material factors to be ascertained from the written contract are the seller, the buyer, the price to be paid, the time and manner of payment, and the property to be transferred, describing it so it may be identified." [32 Cal.2d 584, 197 P.2d 324.]

However, in the instant case the time and manner of payments and the amounts thereof are clearly indefinite, uncertain and not ascertainable from the escrow instructions involved.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

122 Cal.App.2d 705

ROUSSEAU v. HURTADO et al.

Civ. 15577.

District Court of Appeal, First District, Division 1, California.

Jan. 21, 1954.

Hearing Denied March 17, 1954.

Action was brought to quiet title to realty and for an accounting, and certain of the defendants counterclaimed to quiet title to realty, and one of the defendants filed a cross-complaint to quiet title. The Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., entered judgment adversed to plaintiff, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that evidence sustained finding that alleged deed, on which plaintiff relied, had never been executed and delivered.

Judgment affirmed.

1. Appeal and Error ⚿994(3), 1011(1)

Arguments relating to conflicts in evidence and to credibility witnesses were not proper in District Court of Appeal on appeal.

2. Witnesses ⚿321, 400(1)

Parties who called witness were prohibited by law from impeaching her, but such prohibition did not extend to introduction of evidence that contradicted witness. Code Civ.Proc. § 2049.

3. Life Estates ⚿24

A life tenant cannot encumber by trust deed a remainder interest of record.

4. Deeds ⚿193, 194(5)

Presumption, arising from recordation of deed, that deed has been duly executed and delivered, is not a conclusive presumption and may be rebutted by other evidence.

5. Deeds ⚿193, 194(5)

In action to quiet title to realty, wherein evidence sustained finding of trial court that deed on which plaintiff relied had never been executed or delivered to plaintiff, presumptions that deed, because it had been recorded, was duly executed and delivered and that it had been accepted by plaintiff, who was a minor at the time, were immaterial.

6. Deeds ⚿207, 208(1)

In action to quiet title to realty and for accounting, evidence sustained finding that deed on which plaintiff relied had never been executed or delivered to plaintiff.

7. Evidence ⚿589, 590

Trial court, as trier of facts, was entitled to disbelieve plaintiff and her mother because they were interested witnesses.

8. Witnesses ⚿317(2)

Where trial court, as trier of facts, was entitled to find under evidence that witness had deliberately falsified her testimony as to the circumstances under which she had appeared as a witness, and, though witness told a detailed story concerning delivery of deed, her recollections of other events of later occurrence were vague and uncertain, trial court was justified in disbelieving all testimony of witness, particularly that portion relating to alleged delivery of deed.

◆

Ann Rousseau, appellant, in propria persona.

Tobin & Tobin, Charles R. Collins, San Francisco, O'Gara & O'Gara, San Francisco, for respondents.

PETERS, Presiding Judge.

Josephine B. McConnon died December 31, 1949, at the age of 86, leaving as her principal estate a valuable piece of real property on Fell Street in San Francisco, on which two buildings had been constructed. One building consisted of a garage and three apartments, the other consisted of four flats. After her death the plaintiff, Ann Rousseau, grandchild of the deceased, claimed the property by virtue of a purported deed from her grandmother dated January 5, 1931, and recorded February 5, 1931, at a time when Ann was nine years old and her grandmother was 68. Virginia Hurtado, a daughter of Josephine, claimed the property by virtue of a will in which she was named sole legatee. Two sons of the deceased, Joseph and John McConnon, and another daughter, Kathleen Rousseau, mother of Ann, claimed shares in the property as heirs of their mother. Virginia presented the will naming her as legatee for probate and her sister and brothers have contested the probate of this will. That action has not yet been tried, having been stayed to await the outcome of the instant case. The present case was instituted by Ann to quiet her title to the property against the claims of her aunt and uncles, to enjoin other claims, and for an accounting against Virginia, who is executrix of the estate. John and Joseph McConnon answered, challenging the allegations of the complaint, alleging that the property belonged to the estate of decedent, that the signature on the deed through which Ann claims was forged, and that such deed had not been delivered. These defendants also alleged title by adverse possession in the estate, and counterclaimed to quiet the title of the property in the estate. John claimed a lien for $8,000 on the property. Virginia's answer, individually and as executrix, alleged that the property belonged to the decedent at all times here relevant prior to her death, and also alleged title in her mother by adverse possession. She cross-complained as executrix, asking that title be quieted in the estate on the ground of the non-execution and non-delivery of plaintiff's deed, and on the ground of adverse possession.

Kathleen, mother of Ann, was named by Ann as a defendant, but she defaulted. Two corporate defendants claim no interest in the property. Thus, the situation is one where Virginia, John and Joseph are aligned in this case in opposition to their niece Ann, but John and Joseph oppose Virginia in the will contest. Kathleen is aligned with John and Joseph in the will contest, but in this case supports her daughter Ann.

The case proceeded to trial before the court without a jury. At the trial all parties were represented by counsel, but on this appeal Ann has elected to appear *in propria persona*. The trial court found that the decedent owned the property at the time of her death; that Ann had never had any rights therein; that the deed through which Ann claims was recorded February 5, 1931, but that it had not been "executed or signed by the said Josephine B. McConnon or by her filed for record"; that it had not been delivered to Ann or to anyone on her behalf with the intent to convey title; that Ann never obtained any interest in the property during the decedent's lifetime; that Ann at no time during decedent's lifetime asserted ownership of the property, enjoyed the right of possession, or claimed any rentals or even knew of the amounts of the rentals, taxes or insurance. The court then made appropriate findings in favor of respondents on the issue of adverse possession. The court also found that John McConnon had a valid lien on the property in the amount of $8,000. The judgment provided that Ann has no title to the property, enjoined her from asserting any claim thereto, and decreed that whoever prevailed in the pending will contest was the owner of the property subject to administration and to the prior lien. After denial of her motion for a new trial and of a motion to correct the transcript (in immaterial respects) Ann appeals.

[1] This is the general background of this controversy. As might be expected, much of the evidence is highly conflicting and the issues are primarily factual. Appellant has seen fit to present her appeal by making many of the arguments made by her then counsel in the trial court and by quoting from the trial brief prepared by him. Many of these arguments, proper in the trial court, relate to conflicts in the evidence and to the credibility of the witnesses. These arguments, of course, are not proper in the appellate court.

[2] The plaintiff's case in chief was very brief, covering but a few pages in the 415-page transcript. Her case consisted of stipulations that Josephine had died December 31, 1949, and that since that date Virginia had been in continued possession of the property and had rendered no accounting; of a certified copy of the record of a deed from Josephine to Ann dated January 5, 1931, and acknowledged and recorded February 5, 1931; of a certified copy of the birth certificate of Ann showing that she was born July 25, 1921; of a certified copy of the record of a deed of reconveyance by which Ann purported

to reconvey the property to Josephine[1]; and of a certified copy of the deed of trust, dated August 31, 1948, from Josephine to the title company as trustee for John McConnon. After the introduction of this evidence Ann rested, announcing through her trial counsel that for the balance of her case she relied upon the presumptions arising out of the execution and recordation of the deed to her. Thus, no direct evidence at all was introduced by plaintiff in her case in chief concerning the circumstances surrounding the claimed execution of the deed, of its asserted delivery, or even that the signature on the deed was that of Josephine. The document introduced was a certified copy of the recorder's record into which, upon recordation, the deed, including the signatures, was typed. The original deed was not produced, nor was its absence then explained. All evidence on these and other issues was introduced by defendants. Most of this evidence was produced from Ann or from her mother Kathleen, produced under section 2055 of the Code of Civil Procedure, and by reading into evidence the deposition of Mayzellia A. McCarthy, an old family friend, which deposition was taken by plaintiff but not introduced by her.[2] Mrs. McCarthy, who claimed to be an eyewitness to the delivery of the deed, was 76 years old when her deposition was taken in May of 1950, and had died prior to the trial which took place in May of 1951.

Mrs. McCarthy unequivocally testified that she saw a deed delivered by Josephine to Ann. She was positive that this occurred in March of 1931 at a birthday party of the McConnons and Rousseaus held at the home of the Rousseaus in Belmont, California. She testified that after the men had left the table she, Josephine, Kathleen and Ann had a conversation; that "Grandma McConnon gave Ann a paper and she told her to give it to her mother to keep 'for you.' And so Ann handed it to her mother"; that Kathleen then handed the paper to the witness who read enough of it to see that it was a deed from Josephine to Ann; that Kathleen expressed surprise and asked why Josephine had thus given her property to Ann; that Josephine replied: "That is my business." The witness was positive that the document was a deed; that it was dated in 1931; that it had been recorded when she saw it, and that Ann accepted it. She was sure that the name of Josephine McConnon appeared as grantor and that of Ann Rousseau as grantee, and she rather ambiguously testified that she recognized the signature as that of Josephine, but she was not positive that in March of 1931 she had been familiar with that signature, although she had become familiar with it since that time. On cross-examination she testified that she only "thought" it was Josephine's signature. This witness was quite detailed in her testimony about the delivery of the deed, but somewhat vague about other occurrences of later date. She was pretty sure that the deed referred to San Francisco property.[3] The witness also testified that later that same day she had another conversation with Josephine; that she asked Josephine why she had given the property to Ann rather than to her mother, Kathleen, who was then married to a disabled husband; that Josephine replied that Ann was her "namesake" (Ann's middle name is Josephine), and that she wished to keep the property out of the hands of Protestant women; that Kathleen was married to a Protestant and the two boys were likely to marry Protestants; that Ann undoubtedly was and would remain a good Catholic. This witness testified that over the years at undetermined times Josephine had repeated these statements to her.

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[1] No facts surrounding this reconveyance appear in the record. The deed was introduced by Ann, and that is all that the record discloses about it. Ann asserts, and respondents do not deny, that this reconveyance dated June 19, 1931, was void, inasmuch as Ann was then a minor. This assertion is in accordance with the settled law. Section 33, Civ.Code; Lee v. Hibernia Savings & Loan Soc., 177 Cal. 656, 171 P. 677; Hakes Investment Co. v. Lyons, 166 Cal. 557, 137 P. 911.

[2] This deposition was first introduced into evidence by counsel for Virginia Hurtado, without limitation. After it had been introduced, respondents urged that it was being offered under § 2055 of the Code of Civil Procedure. The appellant objected to it so being introduced and the trial court reserved its ruling, and did not thereafter rule upon the point. Thus, it seems that the deposition was read into evidence on behalf of respondents. Although the point is not urged by the parties, it should be mentioned that since Mrs. McCarthy was made a witness for the respondents, they were prohibited by law from impeaching her. But such prohibition did not extend to the introduction of evidence that contradicted her. Section 2049, Code Civ.Proc.; Norwood v. Kenfield, 30 Cal. 393; Greenleaf v. Pacific Tel. & Tel. Co., 43 Cal.App. 691, 185 P. 872; Callahan v. Danziger, 32 Cal. App. 405, 163 P. 65; Winslow v. Glendale Light etc. Co., 12 Cal.App. 530, 107 P. 1020. This is important because Mrs. McCarthy was very definitely contradicted by Virginia, Joseph and John, who, as will later appear, testified to facts, believed by the trial court, that it was impossible for Mrs. McConnon to have been in Belmont at any time even close to the time when the deed is asserted to have been delivered. It is partly upon this evidence that the trial court based its finding that the deed had not been executed or delivered.

The witness admitted a close relationship with Kathleen and Ann, admitted taking trips with them, and admitted that Kathleen and she had testified for each other in prior lawsuits. In one important respect this witness was directly contradicted by the testimony of Ann. Mrs. McCarthy testified that, prior to the taking of her deposition, she had refused to talk to "Mrs. Rousseau or anybody" about the case; that, although she was staying at the Rousseau home when her deposition was taken and had driven from Belmont to San Francisco with the Rousseaus that day, she had not discussed the case with them; that she had been asked to become a witness only after she had driven north with Ann's brother from her home in San Diego, in order to attend to her personal affairs, and did not even know about the litigation until after she arrived in Belmont. The witness also could not remember even talking the case over with Ann's lawyers before the deposition was taken. Ann, however, admitted, when called as a witness under section 2055 of the Code of Civil Procedure, that, prior to taking Mrs. McCarthy's deposition, she and her mother, father and brother had driven to San Diego for the purpose, among others, of interviewing Mrs. McCarthy to find out what she remembered about the delivery of the deed; that at that time Ann asked her if she remembered the events at the birthday party, to which she answered that she did. Thereupon, Kathleen asked Mrs. McCarthy if she would be willing to come to San Francisco and testify to what she remembered; that Mrs. McCarthy agreed to do so, and then Mrs. McCarthy drove north with the entire Rousseau family. She spent several weeks, before her deposition was taken, in San Mateo County, during which time she saw the Rousseaus frequently, and, on occasions during this period, stayed at the Rousseau home.

Ann, the appellant, was called as a witness by respondents under section 2055 of the Code of Civil Procedure. Although she was only 9 in March of 1931, being 29 at the time of trial, she had a clear and independent recollection of the delivery of the deed, and was quite clear that it had been delivered to her in March of 1931. As to the actual events of the delivery to her of the deed, of the handing of it to her mother, of her mother handing it to Mrs. McCarthy, and of what was then done and said, her testimony is substantially similar to that of Mrs. McCarthy. It should be mentioned, however, that this witness was quite vague and uncertain about all of the other happenings of that day.

Ann's mother, Kathleen, also called under section 2055, testified that the delivery of the deed occurred at the birthday party described by Mrs. McCarthy, was clear that this party was held early in March, 1931, and generally agreed with Mrs. McCarthy as to what was then done and said. She identified the copy of the recorder's deed as a copy of the original that had then been delivered to Ann. She testified that the original deed had been in her possession for many years; that it had been kept in an envelope in a safe in the post office at San Mateo where she was postmistress until 1939; that she left it there in the safe when she left that job; that she last saw the deed in November of 1939; that later when she removed her papers from the safe she did not remember removing the deed; that when she looked for it after Josephine's death it could not be found. Ann corroborated this story in some respects.

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[3] The only real property then or thereafter owned by Josephine in San Francisco is the Fell Street property. The decedent in 1931 and thereafter did own an unimproved lot in Santa Cruz County.

There was substantial and credible evidence introduced by respondents, and apparently believed by the trial court, to the effect that Mrs. McConnon could not have been present at the birthday party in March of 1931. Other than the birthday party neither Ann nor Kathleen could recollect any other visits to, or of, Josephine in the first three months of 1931. Both admitted that, during the late fall of 1930, Josephine was in Reno with Virginia who was securing a divorce. Virginia testified that after she and Josephine returned from Reno at the end of 1930 Josephine lived with her constantly until the middle of May, 1931, and that during this period Mrs. McConnon did not and could not have visited Belmont. All during this period, from the end of 1930 until the middle of May, 1931, when Josephine returned to her Fell Street home, Josephine spent all of her nights with Virginia in the same house. Virginia was positive that from the fall of 1930 until after May of 1931 there had been no contact at all between Josephine and the Rousseaus; that the Rousseaus during this period could not have known that she and Josephine had returned from Reno, and that her brother Joseph was the only one who knew that they had returned. She testified that from the beginning of 1931 to May of that year Josephine never left the home where she was living with Virginia alone, and so could not have been present in Belmont in March of 1931. Most of this testimony was strongly corroborated by Joseph.

Ann and Kathleen also testified that the relationship between Josephine and Ann before and after the delivery of the deed was close and affectionate, and remained so until Josephine's death; that Ann frequently visited her grandmother and accompanied her to various places; that in 1930 Ann was a frequent visitor to the home of her grandmother; that in 1932 or 1933 Ann lived with Josephine for a full year while attending school; that starting in 1942 or 1943 she spent two full years at the McConnon residence; that thereafter she considered the McConnon house her residence, and spent at least half of her time there. But this testimony was directly contradicted by others. Albert Hurtado, a son of Virginia, lived at the McConnon house from 1942 on. He testified that from that date Ann only occasionally visited her grandmother; that she did not regularly stay at the house; that she would occasionally stay overnight when her work in San Francisco made it inconvenient to return to Belmont; that she never stayed as long as a week. Virginia, who lived with her mother in most of 1942, and who lived with her constantly from 1944 until her death, also agreed that in 1942 Ann had never stayed at Josephine's home for longer than three days at a time, and that thereafter her visits were intermittent and of short duration.

Ann admitted that, after March of 1931 and up until Josephine's death in December of 1949, she had never mentioned the deed to any of the members of the family, but testified that her grandmother on several occasions, after March of 1931, told her that she did not want the others to know that the property had been deeded to her. John McConnon, who lived at the McConnon house until 1934, testified that he had never heard of the deed, nor had he ever heard the Rousseaus make a claim to the property, and Virginia stated that the deed was never mentioned in her presence by the Rousseaus during the decedent's lifetime.

There was other testimony that should be mentioned. Ann, in 1948 or 1949, filed an application for a bond purporting to list all of her assets, but she did not list the property here involved among such assets. Ann also admitted that after 1931 she never discussed the deed with her grandmother, although she stated that she did discuss with her the property generally.

Another fact should be here mentioned. In rebuttal Ann called Gilbert Ferrell, former district attorney of San Mateo County, who had handled various legal matters over the years for Kathleen. He testified that sometime in 1931 the Rousseaus came to him and exhibited a deed from Josephine to Ann, dated in January of 1931, which deed, according to his recollection, appeared to be "properly signed and acknowledged before a notary public and recorded in the City and County of San Francisco."

Ann places some reliance upon the fact that it was stipulated that May H. Farrell, apparently the notary who acknowledged the deed under which Ann claims, from 1931 to date had her business address with Tobin & Tobin, the legal firm that represents Virginia in this litigation. This notary was not produced by Virginia, or by anyone else, as a witness. Ann claims inferences unfavorable to respondents from the failure to produce this witness. Whether adverse inferences should arise from such failure was a question of fact for the trial court. The trial court could have found, and impliedly did so, that such inferences were more than offset by Ann's failure to testify as her own witness, and from her failure to call her mother or to introduce the deposition of Mrs. McCarthy.

The decedent resided in one of the Fell Street apartments from 1931 until her death. The evidence also shows that from 1931 until her death decedent was not only in possession of the premises, but managed them, and collected and disposed of the rents according to her own desires. While Ann testified somewhat ambiguously about helping her grandmother to plan to pay the taxes on the property out of income, and occasionally checked to see that they were paid, there is substantial evidence that Josephine always paid the taxes in cash, usually asking her son John to take the payments to the city hall, and that Ann had nothing to do with them. All taxes were paid. Josephine also paid all insurance premiums. In addition, Josephine, in her own name, executed and recorded mortgages on the property in 1935, 1937, and 1945 to secure debts of $2,500, $1,200 and $500 respectively, and in 1948 decedent declared a homestead on the property. Two of these mortgages were executed while Ann was a minor, but the 1945 mortgage was executed at a time when Ann was 23 or 24. Ann and Kathleen both admitted that Josephine had not discussed these transactions with them, nor did they otherwise know about them when they occurred.

[3] On August 31, 1948 (recorded September 14, 1948), Josephine executed a deed of trust to a title company to secure a promissory note of $8,000 in favor of her son John. He testified that in 1932 and 1933, at his mother's request, he had remodeled one of the buildings from a single family residence into apartments, and, in doing so, had worked for one solid year working nights, and had spent $5,000 of his own money. He also testified that he had not been paid or reimbursed for the labor or expenditures until he received the $8,000 note and deed of trust from his mother. This deed of trust was introduced into evidence by Ann. The trial court determined that this deed of trust was a first lien on the property. Respondents are not appealing and so do not challenge that determination. Appellant does. But inasmuch as we have determined, as will later appear, that the determination of the trial court that the deed through which appellant claims was never executed, it is apparent that appellant is in no way aggrieved by the determination that John has a lien on property in which she has no interest. Therefore, it is not necessary to pass upon the validity of the trial court's determination in reference to this lien. Its only significance on the present appeal is that it indicates that in 1948 Josephine must have believed that she owned more than a life estate in the property because a life tenant cannot, of course, encumber a remainder interest of record.

There were also introduced into evidence several wills executed by decedent subsequent to 1931 by which the decedent attempted to devise the property in question, which constituted substantially all of her estate, to persons other than Ann. By one of these wills the entire property was devised to Virginia, who, in another proceeding, is contending that the property belongs to her under that document.

[4–6] On this appeal, appellant contends that the recordation of her deed gave rise to the presumptions that it had been duly executed and delivered. Such cases as Willis v. Holback, 33 Cal.App.2d 145, 91 P.2d 140, Kuenzel v. Grettenberg, 88 Cal.App.2d 656, 199 P.2d 732, and Rich v. Ervin, 86 Cal.App.2d 386, 194 P.2d 809, discuss the general nature of these presumptions. All of these cases, in which the respective courts used broad language in reference to these presumptions, were affirmances where the presumptions were used, and properly so, to support an affirmative finding of delivery. But, of course, these presumptions are not conclusive, and may be rebutted by other evidence. Hill v. Hill, 91 Cal.App.2d 592, 205 P.2d 676. Here the trial court found that the deed through which appellant claims, although recorded, had not been executed or signed by Josephine, and that Josephine had not delivered it to Ann or to anyone else for her. If the finding that Josephine never executed the deed is supported, all presumptions relevant to delivery and presumed acceptance by a minor become immaterial. This finding is amply supported by substantial and credible evidence.

Appellant produced a copy of the deed as set forth in the recorder's record. That deed, of course, was wholly typed, including the signature, so that the authenticity of the signature of the grantor could not be determined. It shows on its face that it was "Recorded at the request of Grantee." The original was not produced. The explanations of how this valuable deed was mislaid and ultimately lost were certainly not very convincing and could and were disbelieved by the trial court.

[7, 8] Appellant argues at some length, however, that the due execution of the deed was established by the uncontradicted evidence of Mrs. McCarthy, and of Ann and her mother, and corroborated by Gilbert Ferrell. But the difficulty is that although the first three did testify as to the delivery of the deed, and had their evidence been believed it would have supported a finding in appellant's favor, there is substantial evidence to contradict this evidence and the presumptions here involved. It should not be forgotten that appellant did not see fit to produce any of this evidence, and that all three witnesses were produced by respondents. Moreover, the trial court was entitled to disbelieve appellant and her mother, because both were interested witnesses. So far as Mrs. McCarthy is concerned, the trial court was entitled to find, based upon the evidence of Ann and her mother, that she had deliberately falsified her testimony as to the circumstances under which she had appeared as a witness. While she told a detailed story about the delivery of the deed, her recollections of other events of later occurrence were vague and uncertain. These facts would have justified the trial court in disbelieving all of her testimony, and particularly that portion relating to the claimed delivery of the deed. Hughes v. Maciel, 138 Cal.App. 509, 32 P.2d 688. Thus, the trial court could, and apparently did, disbelieve the testimony of these three witnesses. If it be assumed that the presumptions arising from the presentation of a recorded deed would alone support a finding of due execution and delivery, such presumptions were substantially controverted by the other evidence. The evidence shows that the grantee over a period of eighteen years while the grantor was alive never asserted ownership of the property, while the grantor, by her actions, frequently asserted such ownership. The purported deed is an absolute one reserving no estate in the grantor, whatsoever. Yet for eighteen years the grantor absolutely controlled the property, and its income, mortgaged it, and even willed it away. Moreover, there is substantial and credible evidence that Mrs. McConnon could not have been present in Belmont in March of 1931 at the birthday party given on that date, and at which the deed is supposed to have been delivered.

Ferrell's testimony does not compel the conclusion that sometime in 1931 the grantees were in possession of a deed properly signed by Josephine McConnon. All that he testified to was that in 1931 Kathleen and Ann were in possession of a deed from Josephine to Ann, but there is no evidence that he knew that the deed had been signed by Josephine, or even that he was familiar with her signature. He did not testify that he knew anything about the claimed delivery of that deed, and so gave no testimony on that issue.

Inasmuch as we have concluded that the findings of non-execution and non-delivery are supported, the judgment must be affirmed. This makes it unnecessary to discuss the propriety of the findings of adverse possession, and the other points raised by appellant.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

122 Cal.App.2d 766

BRIGGS v. BRIGGS et al.

Civ. 4723.

District Court of Appeal, Fourth District,
California.

Jan. 25, 1954.

Rehearing Denied Feb. 16, 1954.

Hearing Denied March 25, 1954.

Action by former wife of defendant, divorced in 1949, to declare real estate, devised by another in trust to defendant and co-defendant for benefit of co-defendant with remainder to co-defendant's heirs or to whom she willed it, and deeded by co-defendant in 1943, in her individual capacity, to defendant, in his individual capacity, subject to trust, as community property of wife and defendant. The Superior Court, Orange County, Franklin G. West, J., granted judgment for defendants and plaintiff appealed. The District Court of Appeal, Mussell, J., held that since deed was made subject to trust and remainder interest in trust estate could only be disposed of in accordance with trust instrument and could not be divested by forfeiture of beneficiary's precedent interest, the deed was inoperative to convey any title to the property in question.

Affirmed.

1. Wills 🔑686(4)

Where trustor provided that testamentary trust corpus could be sold by trustees for benefit of widow, a co-trustee, but any remainder should go to her heirs or to whom she willed it, a deed of the property by widow in her individual capacity subject to trust, conveyed nothing.

2. Wills 🔑686(4)

Where testamentary trust corpus was left to beneficiary for life, and remainder, if any, was to go to beneficiary's heirs, or to whom she willed it, deed of property by beneficiary, subject to trust, did not divest remainder interest.

3. Trusts 🔑239

Where trustor provided that testamentary trust corpus could be sold by trustees for benefit of widow, a co-trustee, but any remainder should go to her heirs or to whom she willed it, even if deed executed by widow in her individual capacity, was also executed by her as a trustee, it was invalid, as both trustees must unite in any act to bind the trust property. Civ.Code, §§ 860, 2268.

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Harold A. McCabe, Fullerton, for appellant.

Hazlett & Plummer and John N. Hurtt, Los Angeles, for respondents.

MUSSELL, Justice.

Plaintiff, the former wife of defendant Garrett H. Briggs, brought this action to obtain a judgment determining that certain real property in Orange county is the community property of plaintiff and said defendant. She also seeks damages for the loss of her community property interest therein in the event that it cannot be conveyed to her.

On May 17, 1940, an order settling final account and for distribution was made and entered in the matter of the estate of Jesse O. Belton, deceased. By this order there was distributed to defendants herein, as trustees, certain property, of which the real property herein involved was a part, in trust, "for the sole and exclusive benefit and use of Nellie T. Belton, widow of decedent, to use and enjoy the corpus as well as the income at the times she has need for moneys during her life." It was further provided in said order that "If there be any residue in this estate, then the trust shall terminate and the remainder go to her heirs or to whom she so wills. * * * Said trustees are authorized at any time or times to sell the whole or any part or parts of the residuary real and personal estate, either together, or in parcels, and either by public auction or private contract, and upon such terms and subject to such conditions, and in such manner in all respects as they shall think fit, with power to buy in, or rescind, or vary any contract for sale, and to resell without being responsible for loss, and for the purposes aforesaid to execute all deeds, assurances or things as they shall think fit."

Some time in 1943 defendant Nellie T. Belton, in her individual capacity and not as trustee of said trust, executed to defendant Garrett H. Briggs, in his individual capacity and not as a trustee of said trust, a grant deed purporting to convey to defendant Garrett H. Briggs, subject to said trust and all the provisions and terms thereof, the real property here involved. This deed was never recorded and was destroyed by defendant Briggs in the "latter part of 1943 or early part of 1944".

On May 24, 1949, plaintiff Mary S. Briggs obtained an interlocutory decree of divorce against defendant Garrett H. Briggs. It is recited in this decree that Nellie T. Belton during the year 1943 conveyed the property here involved to Garrett H. Briggs; that he at no time reconveyed the property to Nellie T. Belton or to any person, association or corporation and "that no disposition at this time as to the said Orange county real property and appurtenant stock be made by this court and that this court ought not and does not at this time determine the respective rights and interests of the said husband and wife therein or thereto, and the court does not at this time make any division thereof as between said husband and wife; and that the community rights and interests, if any, of said husband and wife in and to said real property and appurtenant stock be determined and assigned in a subsequent action."

The trial court herein found the related facts to be true and concluded that "under the provisions of said order settling final account and for distribution the legal title to the real property covered by said grant deed was at the time of the execution and delivery thereof in the trustees named in said order for distribution, to wit, in Nellie T. Belton and Garrett H. Briggs as such trustees, and the equitable title to said real property, to wit, a life interest as beneficiary was in Nellie T. Belton in her individual capacity, and a future interest, namely, a contingent remainder, in said real property was in 'her heirs or to whom she so wills'."; that "since the grant deed executed by defendant Nellie T. Belton and to defendant Garrett H. Briggs by its terms expressly excludes therefrom the trust and its terms and provisions, and since none of the heirs of Nellie T. Belton, and none of the persons to whom she has willed, or may will, the property covered by said deed joined in the same as grantors, nothing passed or was conveyed by the execution and delivery of said deed"; and that "accordingly, neither plaintiff Mary S. Briggs, nor defendant Garrett H. Briggs acquired any interest in said real property by the execution and delivery of said deed, and plaintiff should take nothing under or by reason of her amended complaint in the above entitled action."

Plaintiff appeals from the judgment thereupon entered contending that the court was incorrect as a matter of law and that the deed from Nellie T. Belton to defendant Briggs conveyed title to the property to him. The conclusions reached by the trial court are correct and the judgment that plaintiff take nothing is supported by the evidence.

In Gray v. Union Trust Co. of San Francisco, 171 Cal. 637, 154 P. 306, 307, plaintiff, by two instruments of the same date, made by one of them a transfer to defendant in absolute form of certain real and personal property. By the second she declared the trusts upon which defendant, as trustee, was to hold the property. Plaintiff was an unmarried woman and her mother and other relatives were living and would inherit and succeed to the property if plaintiff died intestate. Plaintiff brought the action to terminate the trust, contending that it was determinable at her pleasure. The property subject to the trust came to plaintiff through the will of one Mary E. Bithell and the "original investment" of funds received from the estate could only be made with the concurrence of the trustor. The conveyance was made to defendant " 'to manage said trust property as hereinafter provided' " and after the original investment was made with the concurrence of the trustor, the trustee was empowered " 'thereafter from time to time to make investments and reinvestments as in its discretion may seem necessary and proper without consulting the trustor. * * * The net income and revenue and profit, less the charge for services of the trustee, shall be paid by said trustee to said trustor' ". The trust instrument also provided that " 'This trust shall be irrevocable and shall last during the lifetime of said trustor, and upon her death the trust property shall go to and vest as she shall provide in her last will and testament, and leaving no last will and testament, said property shall go to and vest in her heirs at law, according to the laws of succession of the state of California as such laws now exist.' " The Supreme Court held that:

> "Plaintiff's usufructuary interest in the whole estate during her life is her equitable life estate, to which is added the power of nominating those who shall take the legal and equitable fee at her death and thus terminate the trust. The trust itself is not a dry, naked trust, since active duties are imposed upon the trustee during the life of the plaintiff, and a no less active duty upon her death in causing to be determined, should she fail to nominate, those entitled to take the property. The settlor or trustor reserved no power of revocation, and the trust is therefore irrevocable by any act of plaintiff. (Citing cases.) * * * It is only when all the parties in interest are before a court, when each is sui generis, and all join in the application, that a court of equity ever terminates a valid trust. * * * We have in this trust apt language to create such a future estate, dependent for its enjoyment upon the termination of a precedent life estate. * * * There is in this trust a power of appointment or nomination reserved to the trustor. It can be exercised in but one way, and that is by her will. But such power of appointment does not prevent the vesting of the future estate in remainder. * * * But in truth these remainders are to be regarded as vested remainders, subject to divestiture only upon the exercise of the power of nomination by will reserved to the trustor. * * * This remainder although not capable of immediate enjoyment * * * and, therefore denominated a future interest, is nevertheless an estate in the property capable of being transferred in the same manner as a present interest."

[1–3] In the instant case, while the remainder is subject to divestiture by the power of nomination by will reserved to Nellie T. Belton and by sale and exhaustion of the funds received therefrom in accordance with the terms of the trust, it nevertheless was a remainder interest which could not be otherwise disposed of by her. The future interest of the contingent remaindermen who are to take the property upon the death of Nellie T. Belton could not be divested by her act of forfeiting her intermediate or precedent interest. Estate of Lefranc, 38 Cal.2d 289, 297, 239 P.2d 617. Nellie T. Belton was not empowered to make a valid deed to the trust estate, individually or as beneficiary. As noted, the deed involved was executed by Nellie T. Belton individually and not as trustee. If, as contended, she also executed it as trustee, the deed was invalid as both trustees must unite in any act to bind the trust property. Civ.Code, §§ 860 and 2268; Anthony v. Janssen, 183 Cal. 329, 191 P. 538. Furthermore, the deed involved was expressly executed "subject to the terms and conditions of the trust created by the will of Jesse O. Belton" and therefore was inoperative to convey title to the property contrary to the trust.

Appellant argues that the conveyance was authorized under the decision in Sinclair v.

Crabtree, 211 Cal. 524, 296 P. 79. In that case an assignment of an interest in the trust estate by the beneficiary was upheld. However, the beneficiary therein also was the owner of the future interest in the trust. This presented a factual situation not present in the instant case.

Appellant failed to allege or prove facts entitling her to damages which she seeks in the event that a community property interest cannot be conveyed to her.

The attempted appeal from the order (or motion) denying a new trial is dismissed. Pipoly v. Benson, 20 Cal.2d 366, 368, 125 P.2d 482, 147 A.L.R. 515.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

122 Cal.App.2d 567

PEOPLE v. THOMPSON et al.

Cr. 5055.

District Court of Appeal, Second District, Division 3, California.

Jan. 18, 1954.

Rehearing Denied Feb. 3, 1954.

Hearing Denied Feb. 17, 1954.

Prosecution charging violation of statute making it a felony for officer having custody of public record or paper to steal, destroy, secrete or mutilate the same. The Superior Court, Los Angeles County, Philip H. Richards, J., entered judgments of convictions and denied defendants' motion for new trial, and defendants appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained conviction as to defendant public officer, and that defendant nonofficer was subject to prosecution as an aider or abetter.

Judgments and orders affirmed.

Vallée, J., dissented in part.

1. Criminal Law 🔑60

Statute making an aider or abetter a principal is not superseded by a statute which defines a particular crime which does not require participation of two or more persons for its commission and which prescribes punishment for acts of certain participants only and which is followed by another statute prescribing punishment for acts of participant not subject to such statute defining a particular crime, and hence a person not subject to prosecution as principal under such statute defining a particular crime becomes liable as principal under the statute making aider or abetter a principal. Pen.Code, § 31.

2. Records 🔑21, 22

Nonofficer who aided and abetted officer in commission of offense under Government Code § 6200, making it a felony for an officer having custody of a public record or paper to steal, destroy, secrete or mutilate the same, was subject to prosecution as principal under Pen.Code, § 31, making aiders and abetters principals, notwithstanding Government Code, § 6201, making similar offense by nonofficers a lesser offense. Government Code, §§ 6200, 6201; Pen.Code, § 31.

3. Records 🔑21, 22

Evidence sustained conviction under statute making it a felony for an officer having custody of public record or paper to steal, destroy, secrete or mutilate the same. Government Code, § 6200.

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Smith & Wymore, Milo S. Smith, San Pedro, for appellant Thompson.

John J. Bradley and Max M. Solomon, Los Angeles, for appellant Lazarus.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Deputy Dist. Atty., Los Angeles, for respondent.

SHINN, Presiding Justice.

Appeals by Leslie Gullick Thompson and Rube Lazarus from multiple convictions for violations of section 6200 of the Government Code, and from orders denying their motions for new trial.

By section 6200 of the Government Code it is made a felony for an officer, having custody of a public record or paper, to steal, destroy, secrete or mutilate the same.[1] By section 6201 of the Government Code any person not an officer committing any of said acts is punishable as for a felony or a misdemeanor.[2] By information defendants were jointly charged in separate counts with nine offenses of violation of section 6200, and with nine offenses of violation of section 6201. The acts charged were the stealing, removing, destroying and secreting of certain traffic citation complaints on file with the traffic division of the municipal court. It was alleged, and was a fact, that Thompson was at the time a civil service employee, namely, a deputy clerk of said court, having custody of said traffic records. It was alleged in each count that defendant Lazarus willfully and feloniously aided and abetted in the commission of the charged offenses. Defendants were convicted of eight counts of violation of section 6200; they were acquitted of the offenses of violation of section 6201. Proceedings were suspended and the defendants were placed on probation.

As to defendant Lazarus, whose guilt consisted only of aiding and abetting defendant Thompson, it is contended that "* * * said section 6200 applies exclusively to officers having custody of the papers described in said section and appellant Lazarus is not such a person," and it is said that since section 6201 denounces as a crime the theft or destruction of a public record by one not an officer, section 31 of the Penal Code[3] cannot operate to make him a principal in the offenses charged against Thompson. It is not questioned by Lazarus that the evidence was sufficient to prove that he aided and abetted Thompson in the commission of the offenses of which they were convicted. His participation in those offenses would normally make him a principal under section 31, but, says Lazarus, section 31 does not apply because he could have been convicted of violation of section 6201, a lesser offense in the eyes of the law, which was prescribed by the legislature for exclusive application to the case of one not an officer who steals, destroys, secretes or mutilates a public record or paper. The effect of the enactment of section 6201, as contended for by Lazarus, would be to create an exception to the broad provisions of section 31, since it must have been the intention of the legislature to make the nonofficer punishable only for commission of the lesser offense. We are unable to agree with this contention.

In final analysis the appeal of Lazarus rests upon certain language in People v. Clapp, 24 Cal.2d 835, 838, 151 P.2d 237, 239: "If a statutory provision so defines a crime that the participation of two or more persons is necessary for its commission, but prescribes punishment for the acts of certain participants only, and another statutory provision prescribes punishment for the acts of participants not subject to the first provision, it is clear that the latter are criminally liable only under the specific provision relating to their participation in the criminal transaction. The specific provision making the acts of participation in the transaction a separate offense supersedes the general provision in section 31 of the Penal Code that such acts subject the participant in the crime of the accused to prosecution for its commission." It was held in that case that since section 275 of the Penal Code prescribes punishment for a woman who submits to an illegal abortion, and section 274 does not, the woman in question was subject to prosecution for an offense distinct from the crime of abortion, that she was not subject to prosecution as a principal in the act of abortion proscribed by section 274 of the Penal Code and therefore was not an accomplice of the doctor. This doctrine was extended, in People v. Buffum, 40 Cal.2d 709, 256 P.2d 317, to a charge of conspiracy to commit abortions, where it was held that the conspiring women were not accomplices of the doctor and another who conspired with him.

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[1] Sec. 6200. "Stealing, removing, altering, or destroying: Penalty. Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, wilfully destroying, mutilating, defacing, altering or falsifying, removing or secreting the whole or any part of such record, map, book, paper, or proceeding, or who permits any other person to do so, is punishable by imprisonment in the State prison not less than one nor more than 14 years."

[2] Sec. 6201. "Same: Offense by person not officer: Punishment. Every person not an officer referred to in Section 6200, who is guilty of any of the acts specified in that section, is punishable by imprisonment in the State prison not exceeding five years, or in a county jail not exceeding one year, or by a fine not exceeding one hundred dollars ($100), or by both such fine and imprisonment."

[3] Sec. 31. "Who are principals. All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed."

[1] The opinions in those cases should be read in the light of the facts outlined in the foregoing quotation. The case of the defendants is different. The rule there announced is that section 31 is superseded when it affirmatively appears from the legislation itself that the section was not intended to have application. The court was of the opinion that such intention was manifested by the omission from section 274 of a prescribed punishment for the woman who would of necessity be a participant in the offense of abortion and by the enactment of section 275, which prescribes punishment for submitting to an abortion. Unless we are mistaken the reasoning of the court would not apply to an offense which did not require the participation of two or more persons.

The offense defined in section 6200 is not one in which two or more persons necessarily participate. Section 6201 does not relate to participation by a nonofficer with an officer in a violation of section 6200. Since a violation of section 6200 could be committed by one person alone there was no occasion to prescribe punishment for a nonofficer who might be a participant. Hence there is no significance in the omission from the section of a prescribed punishment for one not an officer who might participate in the act.

[2] Inasmuch as the Clapp and Buffum cases are not in point we think there is no authority for the proposition that one who aids and abets another in the commission of a crime may not be prosecuted as a principal if, perchance, he would have been subject to prosecution for a lesser offense if he, alone, had committed the forbidden act. If it does not affirmatively appear from the legislation that the law which prescribes punishment for the lesser offense was intended to exclude prosecution for the greater such an intention cannot be read into it by way of interpretation. So far as the offenses of the defendants are concerned we cannot discover in the scheme of sections 6200 and 6201 an implied intention of the legislature to excuse a nonofficer who aids and abets an officer in a violation of section 6200 from any of the consequences which would fall upon the latter. The officer's crime involves a breach of trust and for that reason is made a more serious offense than a like act of a nonofficer. When the latter aids and abets in a violation of section 6200, in the eyes of the law he places himself in the category of an officer and becomes a principal in the greater crime by virtue of section 31. We conclude that Lazarus was properly convicted as a principal in the violations of section 6200.

[3] The appeal of Thompson raises the single point that there was insufficient evidence to prove his guilt. The brief of this appellant does not comply with Rule 15(a), Rules on Appeal. It does not purport to contain or refer to the evidence touching upon appellant's participation in the acts charged. The information charged destruction of traffic citation complaints issued against Nevius, Powell, San Juan Baca, Cosgrove, Hollingsworth, Hood, DeForest, Creswell and Cohen. All these persons testified for the People. As to their testimony and that of all the other witnesses except

Deputy Clerk Stoneman appellant's brief says their testimony "* * * at best shows the commission of the offenses or the circumstances thereof." The brief does not enlighten us as to the evidence of the "* * * commission of the offenses or the circumstances thereof", which is of considerable importance when an appellant relies solely upon a claim of insufficiency of the evidence.

In his argument appellant merely says that Lazarus was an accomplice and that he (Thompson) could not be convicted upon the uncorroborated testimony of an accomplice. Lazarus did not testify, nor did Thompson.

Since it is not questioned by appellant Thompson that eight of the nine complaints on file were destroyed there is no need to refer to the evidence of their destruction. Police officers testified that Lazarus admitted having taken the citations from the complaining witnesses, together with their money and to having given the citations to Thompson and divided the money with him. A book kept by Lazarus in which he recorded the several transactions was placed in evidence. Although the admissions of Lazarus to the officers fully implicated Thompson in the scheme we presume they were not offered as against Thompson.

Lazarus operated a parking lot opposite the traffic court. The scheme was that he would take citations from the citees, with money for fines, give the citations to Thompson, who would manage to dispose of the matters by removing the complaints from the files. Whatever money was saved would be divided between Lazarus and Thompson.

George Stoneman, a deputy clerk of the municipal court, testified to conversations with Lazarus and Thompson. He talked with Thompson in the presence of several officers. Thompson said he began working with Lazarus when the latter collected $4 for a taillight violation. He, Thompson, took the citation, got a fine suspended and divided the $4 equally with Lazarus; he said he had been engaged in the practice about three and a half months; Lazarus would place the citations under the floor mat of his (Thompson's) car; as soon as he could he would remove the record from the files in the master control, indicating that the citation had been taken to court; he destroyed the original citations; he had done this 30 or 40 times; he would get 50 per cent of the money. There was other evidence that Thompson had custody of the records, although not exclusive custody, and that they had been removed or destroyed. The evidence of the People was explicit as to the destruction of the records in question. The admissions of Thompson, with the circumstantial evidence, was legally sufficient to prove his guilt of the offenses charged. It was fortified by the fact that he did not take the stand.

The judgments and the orders denying the motions for new trial are affirmed.

WOOD, J., concurs.

VALLÉE, Justice.

I concur in the opinion and judgment as to Thompson. I would reverse the judgment as to Lazarus.

Rehearing denied; VALLÉE, J., dissenting.

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122 Cal.App.2d 638

PEOPLE v. BROPHY.

Cr. 2449.

District Court of Appeal, Third District, California.

Jan. 19, 1954.

The defendant was convicted on one count of an assault with a deadly weapon and he appealed from the judgment of the Superior Court, San Joaquin County, Dunne, J. The Court of Appeal, Schottky, J., held that misconduct of the prosecuting attorney in showing to the jury in his closing argument a bullet which had not been introduced in evidence was prejudicial error of such nature that constitutional provision for disregard of technical errors did not preclude reversal.

Judgment reversed and a new trial ordered.

1. Criminal Law 🔑788

In prosecution for assault with a deadly weapon, failure of prosecution to introduce evidence of finding of an unexpended cartridge in gravel pit which defendant allegedly entered during the episode did not require giving of instruction that less satisfactory evidence should be viewed with distrust on failure to produce more satisfactory evidence on particular point. Pen. Code, § 245; Code Civ.Proc. § 2061, subd. 7.

2. Criminal Law 🔑1173(2)

In prosecution for assault with a deadly weapon, refusal to give instructions to effect that testimony of a single witness is not necessarily to be outweighed by testimony of a number of witnesses on the other side was not prejudicial error. Pen.Code, § 245.

3. Criminal Law 🔑814(17)

In prosecution for assault with a deadly weapon, refusal of instruction on circumstantial evidence was not error where conviction rested primarily upon direct evidence. Pen.Code, § 245.

4. Assault and Battery 🔑86
Criminal Law 🔑1170(1)

In prosecution on two counts for assault with a deadly weapon, exclusion of evidence of bad reputation of one of alleged victims for peace and quiet was error, but did not require reversal in view of preponderance of evidence against defendant's theory of self-defense and fact that defendant was acquitted on charge of assaulting particular victim whose reputation was challenged. Pen.Code, § 245.

5. Criminal Law 🔑338(1)

Evidence which might have considerable weight if defendant's theory and testimony are believed by the jury should not be excluded.

6. Assault and Battery 🔑86
Homicide 🔑188(3)

In prosecution for homicide or for assault and battery, defendant, after laying proper foundation that he acted in self-defense, may introduce evidence of turbulent and dangerous character of deceased or party assaulted. Pen.Code, § 245.

7. Criminal Law 🔑1170½(5)
Witnesses 🔑268(3)

In prosecution for assault with a deadly weapon, where one of witnesses to altercation had testified that he had told officers everything he knew about the case, sustaining of objection to question asked by defendant's counsel on cross-examination of officer as to whether any of parties had stated anything about rock throwing mentioned at trial as part of the incident was error, as such evidence might have indicated that unfavorable facts were being withheld by witnesses, but error was not prejudicial in view of acquittal on one count and that alleged victim on other count took no part in rock throwing incident. Pen. Code, § 245.

8. Criminal Law 🔑338(1)

In prosecution for assault with a pistol, exclusion of testimony that defendant was expert marksman, on ground of irrelevancy, was error. Pen.Code, § 245.

9. Criminal Law 🔑719(1), 730(7)

In prosecution for assault with a pistol, where defendant's counsel in commenting upon evidence of firing of shot by defendant stated that bullet from that shot had not been produced, conduct of prosecuting attorney in showing the bullet to jury in closing argument constituted reversible error, notwithstanding instruction to jury to disregard statements of prosecuting attorney. Pen.Code, § 245.

10. Criminal Law 🔑726

Misconduct of prosecuting attorney in making remarks not warranted by evidence cannot be justified although made in reply to those of defendant's counsel.

11. Criminal Law 🔑1186(4)

In prosecution for assault with a pistol, where defendant's counsel in commenting upon evidence of firing of shot by defendant pointed out that bullet had not been produced, misconduct of prosecuting attorney in showing the bullet to jury on final argument was so flagrant that constitutional provision for disregard of technical errors did not preclude reversal. Pen.Code, § 245; Const. art. 6, § 4½.

Lawrence Edwards and Alvan E. Norris, Stockton, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

Appellant was charged by information with two violations of section 245 of the Penal Code, to wit: assault with a deadly weapon. The assaults were alleged to have been committed with a pistol upon the persons of Leon Calkins (Count 1) and James Shirley (Count 2) on October 10, 1952. Following a trial, appellant was found guilty on Count 2 and not guilty on Count 1. Appellant's motion for a new trial was denied and judgment was pronounced sentencing appellant to imprisonment in the state prison. This appeal is from the said judgment and from the order denying the motion for a new trial.

Appellant does not question the sufficiency of the evidence to support the judgment, but urges a number of grounds for a reversal of the judgment and order. Before discussing these contentions of appellant we shall give a brief summary of the evidence as shown by the record.

At the time of the alleged assaults, both appellant and the complaining witnesses, Leon Calkins and James Shirley, were doing hauling for Claude Woods, a road construction contractor. Appellant operated his own truck and Calkins and Shirley were working for Calkins' brother, Les Calkins, who owned several trucks. On October 10, 1952, around noon or shortly thereafter, appellant was waiting to load his truck at Claude Woods' gravel pit near Clements, about eleven miles northeast of Lodi, when he and Les Calkins got into an argument, apparently about the conduct of Calkins' drivers. Les Calkins summoned his brother Leon who was nearby. There is some dispute as to what was said between Leon and appellant, but in any event Leon told appellant to take off his glasses if he wanted to fight. Appellant then went over to his truck and returned with a hammer, whereupon the Calkins brothers left.

About 5:30 p. m. that same afternoon, appellant returned to the gravel pit property, driving there in a two-door Oldsmobile car. The pit proper was an excavation some six to ten feet lower than the surrounding land. There was a scale house on the upper level of the property, a short distance from the edge of the pit. Apparently it was not necessary to drive into or through the pit in order to reach the scale house from the highway. Les Calkins maintained a gas pump and other facilities in the pit for servicing his trucks, and Leon Calkins, James Shirley and Herb Ramer (another of Les Calkins' drivers) were in the pit working on trucks when appellant drove up. This was after regular working hours and no one else was present.

The combined testimony of Leon Calkins, Shirley and Ramer shows the following: Appellant drove into the pit, stopped his car some 50 to 60 feet from them and motioned for some one, apparently Calkins, to come over to the car, saying, "You're the one I want," or words to that effect. Calkins started toward the car, whereupon appellant turned the car around, apparently said something else and drove out of the pit, stopping the car between the scale house and the edge of the pit. Appellant then got out of the car and cursed Calkins who was about 40 feet away and down in the pit. Calkins and appellant threw rocks at each other; Calkins was hit once, on the leg, and he hit the door of appellant's car at least once. Appellant admitted picking up the first rock. During this rock fight appellant went to the car, opened the door, reached down by the seat and came out with a .32 caliber automatic pistol which he fired several times at Calkins. Five empty shell cases were found in the area where appellant stood. At the first shot, Calkins threw himself to the ground, near a wrecked truck. Ramer saw bullets hit the sand close to Calkins, and there were two marks on the truck frame which could have been made by bullets hitting the frame. According to Calkins and Shirley, appellant then came down the embankment toward them, carrying the pistol. At this point, Calkins jumped to his feet and ran.

He did not see what happened after that, but he heard another shot. Ramer was hiding behind a truck and he did not see appellant come down into the pit, but he heard him talk to Shirley and he later got a glimpse of him in the pit and saw that he had a pistol.

Shirley testified that appellant then pointed the pistol at him and threatened to kill him. Shirley was about 20 feet from appellant at the time and he told appellant that he (Shirley) had not done anything to him. Ramer, who was in a position to see Shirley but could not see appellant, heard appellant's threat to Shirley and the latter's reply, and Ramer also testified that Shirley covered his face with his hands and pleaded with appellant not to shoot. Shirley said he heard the gun "snap" and he "dove" for a truck. Both Shirley and Ramer then heard a shot fired, and they stayed behind trucks until after appellant left.

Appellant's testimony as to what transpired at the pit is quite different. He said that he went out to the plant to pick up a check at the scale house, that he parked his car between the scale house and the edge of the pit and that when he left the car to go to the scale house he saw Calkins, Shirley and Ramer down in the pit. Calkins hurled epithets at him and the three men started to advance toward him. He picked up a rock and Calkins then threw rocks at him. During this rock barrage appellant tried to get into his car from the right side but the door was locked, so he went around to the left side and got into the car. He was unable to find the car keys. Meanwhile Calkins kept advancing toward him; the other men had disappeared and appellant thought they were going up to the road to cut him off so that he could not drive out. It was then that appellant reached under the car seat, got the pistol and fired five shots, two of them aimed at the ground in the vicinity of Calkins and the other three fired over Calkins' head. Calkins was then about 35 feet from appellant. Appellant stated he had heard that Calkins was a good fighter, that he (appellant) was afraid they were going to beat him up, and that he fired the gun to stop them. He denied that he went down into the pit, or that he ever pointed the gun at Shirley or threatened him in any way. He admitted that he had never had any trouble with Shirley.

Appellant returned to his trailer home in Lodi, and Calkins, Shirley and Ramer also returned to Lodi where they notified the sheriff's office of the shooting. Two officers made an investigation and then went to appellant's trailer where they questioned him. Appellant denied knowledge of the shooting and also denied that he had or owned a pistol, although the gun was then lying on the bed in an adjoining room. He made similar denials when he was questioned later by the district attorney. Appellant took the gun to Long Beach and left it with his brother there. The gun was located before the trial and appellant admitted, at the trial, that he owned the gun and had fired the five shots evidenced by the empty shell cases found near the gravel pit. However, no bullet, empty shell case or ejected cartridge was found in the pit where appellant was said to have been standing when he assaulted Shirley. The pit surface at this location was composed of sand and gravel.

[1] Appellant's first contention is that the court erred in refusing, as "having no application," the following instruction offered by appellant:

> "When and if you should find that it was within the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point, you should view with distrust any weaker and less satisfactory evidence actually offered by him on that point."

Appellant contends that if he had been in the gravel pit and snapped the gun at Shirley (the gun presumably misfiring) and later fired the gun, as stated by Shirley, there should have been an unexpended cartridge and an empty shell case in the vicinity. There was evidence that the empty shell cases were ejected automatically upon firing, and that in case of a misfire the unexpended cartridge was ejected manually in order to load the gun with a fresh cartridge. The area was searched by the investigating officers, the Calkins brothers and possibly Shirley soon after the shooting and they found the five empty shell cases on the upper level where appellant stood when he fired at Leon Calkins. Ramer and Leon Calkins also searched the area the next morning. The prosecution failed to produce either the unexpended cartridge or the empty shell case and appellant's request for the instruction is based on this fact.

While it is true that section 2061, subdivision 7, of the Code of Civil Procedure provides that the said offered instruction should be given to the jury on all proper occasions, there is, of course, no showing that it was within the prosecution's power to produce the unexpended cartridge and/or empty shell case. These articles may have been trampled into the sand by the first search party, which searched the pit after dark, using flashlights, or appellant himself may have picked them up before he left the pit. It is a reasonable inference that if the prosecution could have found this evidence it would have used it. Furthermore, the testimony of Shirley, an eyewitness to the assault, must be considered stronger and more satisfactory evidence than the finding of a cartridge or shell case at the scene. We are, therefore, unable to agree with appellant's contention that the court erred in refusing to give said instruction.

[2] Appellant next contends that the court erred in refusing to give the following two instructions:

> "The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of witnesses and after weighing the various factors of evidence, you should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness."

> "You are not bound to decide in conformity with the testimony of a number of witnesses, who were present at the scene of alleged crime, which does not produce conviction in your mind, as against the declarations of a lesser number or a presumption or other evidence which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence."

While these instructions are usually given to the jury and might well have been given in the instant case, we do not believe that appellant was prejudiced by the court's refusal to give them. For said instructions merely state a commonplace proposition within the general knowledge of the jurors, namely that the testimony of every witness must be given the weight to which the jurors believe it to be entitled. Furthermore, the court did give the following instructions:

> "You are the sole judges of the value and effect of the evidence addressed to you. However, this power is not an arbitrary one, but it must be exercised with legal discretion and in accordance with the rules of evidence."

> "A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or his motives, or by contradictory evidence, and the jury are the exclusive judges of his or her credibility."

> "* * * The defendant in a criminal action is presumed to be innocent at all stages of the trial and even during your deliberations in the jury room, until the contrary is proved. This presumption places the burden on the people to establish his guilt beyond a rea-

> sonable doubt and to a moral certainty, and failing to do, he is entitled to an acquittal."

[3] Appellant next contends that the court erred in refusing the following instruction requested by him:

> "Proof sufficient to convict in this case must exclude every reasonable hypothesis other than that of guilt. If after considering all the evidence you believe there are two reasonable hypotheses, one consistent with the guilt of the defendant, and the other equally consistent with his innocence, I instruct you that it is your duty to acquit him."

The court's notation on the proposed instruction shows that it was rejected because there was no circumstantial evidence in the case. Appellant contends that there was such evidence and that the requested instruction should have been given or the court should otherwise have instructed the jury on the rules of law applicable to circumstantial evidence. However, it appears from the record that appellant's conviction on the second count rests primarily upon direct evidence, and that circumstantial evidence was only incidental or corroborative. In such a case the court is not required to instruct the jury regarding circumstantial evidence. People v. Klinkenberg, 90 Cal.App.2d 608, 632, 204 P.2d 47, 613; People v. Dargo, 93 Cal.App.2d 193, 198, 207 P.2d 1091.

While the requested instruction might well have been given we do not believe that its refusal was prejudicial error. Particularly applicable to appellant's contention is the following language of this court in People v. Corlett, 67 Cal.App.2d 33, at page 47, 153 P.2d 595, at page 601:

> "The court did not err in failing to instruct the jury, on its own initiative, upon the subject of circumstantial evidence. The jury was fully and fairly instructed that the defendant was presumed to be innocent and that the burden of proof of every essential element of the crime rested upon the prosecution to establish his guilt beyond a reasonable doubt. The jury was told that the burden did not shift from the prosecution on account of the defendant's claim that he shot Stafford in self-defense, or otherwise. This is not a circumstantial case. The proof of the assault itself was dependent almost entirely upon the direct evidence of the defendant and the prosecuting witness. Both were examined at great length. There was no occasion to give to the jury an instruction on the subject of circumstantial evidence. The instructions which were given correctly informed the jury upon all of the essential elements of the crime with which the defendant was charged and upon his theory of defense upon which the case was tried. The degree of proof required to support a verdict of conviction applies alike to both circumstantial and direct evidence. People v. Bailey, 82 Cal.App. 700, 706, 256 P. 281; 8 Cal.Jur. 191, sec. 266. In the case last cited it is said, 'The law makes no distinction between circumstantial evidence and direct evidence in the degree of proof required for conviction.' The prosecution relied, in this case, on direct evidence. Whatever circumstances that appear in evidence were merely incidental to or corroborative of the direct evidence of the eyewitnesses to the affray. It has been repeatedly held it is not error for the court to refuse to instruct juries upon the subject of circumstantial evidence where the cases depend chiefly on direct evidence. People v. Lapara, 181 Cal. 66, 70, 183 P. 545; People v. Lonnen, 139 Cal. 634, 73 P. 586; People v. Harvey, 109 Cal.App. 111, 292 P. 654; People v. De Voe, 123 Cal. App. 233, 11 P.2d 26; People v. Williams, 134 Cal.App. 232, 25 P.2d 259; 8 Cal.Jur. 369, sec. 404."

[4] Appellant next contends that the court erred in refusing to admit in evidence the testimony of witnesses Wolfe and Overton as to the bad reputation of Leon Calkins for peace and quiet. Respondent argues that this testimony was admissible, if at all, only as to the first count, which charged an assault upon Calkins, and that inasmuch as appellant was acquitted on the

first count, no possible prejudice could have resulted to him. Appellant in reply to this argument asserts that it was appellant's theory and evidence that Calkins, Ramer and Shirley were all advancing toward him and that Calkins admitted throwing rocks at him. He points to the testimony of Ramer that the three of them were "advancing to get a chance to get to even things up." Appellant argues that it was fairly inferable from the evidence that Calkins and Shirley were acting jointly with a common design and purpose, and, therefore, evidence as to Calkins' bad reputation for peace and quiet was admissible.

[5] It is clear that the chief defense of appellant was a plea of self-defense, and that it was the theory and testimony of appellant that Calkins and Shirley and Ramer were the aggressors, although it must be stated that the evidence preponderated heavily against this theory. However, in a criminal case the line should not be so sharply drawn as to exclude evidence which might have considerable weight if defendant's theory and testimony are believed by the jury.

[6] The general rule is well expressed in 64 A.L.R. at pages 1029, 1030, as follows:

> "The rule is supported by many authorities that on a trial for homicide, or for an assault and battery, the defendant, after laying a proper foundation by evidence tending to show that, in committing the homicide or assault, he acted in self-defense, may introduce evidence of the turbulent and dangerous character of the deceased or party assaulted. While the deliberate, unprovoked killing of a human being cannot in any measure be justified by the fact that he bore the reputation of a turbulent and violent person, the law recognizes the well-established fact in human experience that the known reputation or character of an assailant as to violence and turbulence has a very material bearing on the degree and nature of the apprehension of danger on the part of a person assaulted; also that one who is turbulent and violent may the more readily provoke or assume the aggressive in an encounter. Hence, as bearing on these issues, where a proper foundation has been laid, it is conclusively established in almost all jurisdictions that evidence of the turbulent and dangerous character of the victim of an assault or homicide is admissible." See, also, People v. Keys, 62 Cal.App.2d 903, 912, 145 P.2d 589; People v. Lamar, 148 Cal. 564, 573, 83 P. 993.

We believe that in the instant case the offered evidence as to the reputation of Calkins should have been admitted, but in view of the fact that the evidence preponderated so strongly against appellant's theory of self-defense, and the further fact that appellant was acquitted on the charge that he assaulted Calkins, we are not prepared to hold that its exclusion was reversible error.

[7] Appellant also complains that the trial court unduly restricted his cross-examination of the prosecution's witnesses Ramer and Officer Phillips. Phillips was one of the investigating officers and he interrogated Ramer during the investigation made on the evening of the shooting. Ramer had testified on direct examination that he had told his story to the police (Officers Phillips and Poulos). Upon his cross-examination Ramer first testified that he had told the officers everything he knew about the case. He was then asked if he had told either officer about the rock-throwing by appellant or Leon Calkins that night, and Ramer replied that he did not remember. Appellant contends that the court erred in sustaining respondent's objection to the following question asked by appellant's counsel on the cross-examination of Officer Phillips:

> "During your investigation of the matter, either at Lodi or while you were out at the pit, did any of the parties you have mentioned state to you anything about rock-throwing?"

Appellant argues that he was seeking to elicit whether, during the investigation the night of the alleged crime, the said witnesses had mentioned (1) the rock throwing episode which provoked the argument, or (2) that the defendant started into the pit prior to the shooting (a fact which the defendant emphatically denied), from which the inference could be drawn that the three were contriving the story or at least withheld pertinent facts when first talking to the police. Appellant contends that he had laid the proper foundation for impeachment in his questioning of both Calkins and Ramer, and that he had the right to determine through the officer involved whether said facts were disclosed or asked about. He cites Wigmore on Evidence, 3d Ed., Vol. 3, sec. 1042, where it is stated:

> "A *failure to assert* a fact, when it would have been natural to assert it, amounts in effect to an assertion of the nonexistence of the fact. This is conceded as a general principle of Evidence (*post,* sec. 1071). There may be explanations, indicating that the person had in truth no belief of that tenor; but the conduct is 'prima facie' an inconsistency.
>
> "There are several common classes of cases:
>
> "(1) Omissions *in legal proceedings* to assert what would naturally have been asserted under the circumstances.
>
> "(2) Omissions to assert anything, or to speak with such detail or positiveness, *when formerly narrating,* on the stand or elsewhere, the matter now dealt with."

In view of the fact that there was admittedly a rock-throwing incident between Leon Calkins and appellant prior to the alleged assaults, we believe that it was proper for appellant to inquire of Officer Phillips whether the witnesses who claimed to have seen the entire affray had mentioned the rock-throwing when he had interrogated them about the matter. The failure to tell about the rock-throwing might, as argued by appellant, reasonably cause the jury to infer that the witnesses Shirley, Calkins and Ramer did not disclose facts unfavorable to themselves to the investigating officer, and were trying to show appellant in the worst possible light, indicating prejudice against appellant, and that it might cause the jury to doubt other parts of the testimony of said witnesses.

The following language from People v. Goldberg, 110 Cal.App.2d 17, at page 26, 242 P.2d 116, at page 122, is quite applicable here:

> "* * * Although the counsel for appellant called direct attention to testimony on the prior trial that was not impeaching nor contradictory to that given on the present trial, it should have been apparent that what he was trying to show was that Patricia had testified on the present trial to a statement by appellant that she had not mentioned on the prior trial. That was a proper subject of cross-examination. Cross-examination is not a matter of privilege, but of right. People v. Hume, 56 Cal.App.2d 262, 132 P.2d 52; People v. Flores, 15 Cal.App.2d 385, 59 P.2d 517; People v. Ferdinand, 194 Cal. 555, 229 P. 341."

While we believe that the trial court should have permitted the question asked of Officer Phillips to be answered, in view of the fact that Shirley admittedly took no part in the rock-throwing incident and that appellant was acquitted as to the assault alleged against Calkins, we do not believe that the error was prejudicial.

[8] Appellant next complains that the trial court erred in excluding testimony by his witness Titherington as to appellant's proficiency as a marksman. The record shows that appellant elicited from Titherington testimony tending strongly to show that he was an expert both as to ballistics and in the use and accuracy of small arms, and also an expert on marksmanship. He then endeavored to show by the witness that he had tested the marksmanship of appellant with a similar weapon at the scene of the alleged assault and to prove by the witness that appellant was a good shot. The objection was made that the proposed evidence was incompetent, irrelevant and immaterial, and the trial court sustained the objection, stating that he could "see no theory upon which it could be admissible."

In support of the court's ruling respondent argues that "Even if he [Titherington] had been qualified as an expert witness as to the shooting ability of persons engaged in marksmanship contests, that would not support his qualification to give his opinion as to the marksmanship of an excited, frightened man, who was angry and who was pursuing unarmed men with the intention of shooting them, as was the situation presented in this case. The record discloses that as or before the defendant fired the last shot, the victim, James Shirley, had run some 30 feet and dived behind a truck. Under such circumstances, even a good shot could not be expected to achieve his aim with a short-barreled, automatic .32 calibre pistol."

Clearly this argument of respondent goes to the weight of the evidence and not to its admissibility. Its weight was a matter for the jury to determine. The fact that appellant was a good marksman and that none of the persons alleged to have been shot at were hit at the comparatively short distances that they were from appellant was evidence that the jury would have a right to consider.

[9] The final contention of appellant is that the prosecuting attorney was guilty of prejudicial misconduct in his final argument to the jury. Shirley had testified that they dug up one of the bullets which had been fired into the dirt near where Calkins was lying. Presumably this bullet was from one of the five cartridges fired by appellant from the upper level. There was testimony that appellant came down into the pit and fired a sixth shot in connection with the alleged assault upon Shirley. Ramer, Leon Calkins and Officer Phillips had testified on cross-examination that they had not found any unexpended shell or shell case in the pit area where appellant was said to have been when the sixth shot was fired. Both Calkins and Phillips mentioned that the area was covered with loose sand.

In his argument to the jury appellant's counsel pointed out that if appellant had been in the pit and snapped the pistol at Shirley (presumably misfiring) and then fired the sixth shot, the unexpended cartridge and the empty shell case would have been ejected, and counsel stressed the fact that no such evidence was found. Later in his argument he said:

> "Now, they talk about some bullets —pardon me. Mr. Shirley, I believe, said down here was where he picked up a bullet somewhere. He said down here somewhere. Now, where is the bullet? I fully expected him, after he got that, to come up here with it. If they had it it's their duty to produce it. Where is this bullet and where did he find it? They tell you in the next breath this was deep sand, you can't even find one in deep sand. Can't even find a foot mark and a footprint in it. He might have seen something like it, that's possible, but he said he kicked around there and picked up this bullet. I kept waiting and waiting for that bullet to show up. I never did see it. It was never offered in evidence."

The prosecuting attorney replied to this in his closing argument, as follows:

> "Now, quite a bit has been said about the testimony of Mr. Shirley, who found the bullets. Where is that bullet? There is the bullet. (Showing to jury) Mr. Edwards [appellant's counsel] knows it as well as I do. That bullet's so flattened—"

Whereupon, appellant's counsel objected that the prosecution was going outside the evidence in showing the bullet to the jury. The court sustained the objection and instructed the jury to disregard any statement in reference to the subject. Later, during its deliberations, the jury returned to the court room and expressed confusion regarding the two counts. The court explained the counts to them, whereupon one juror said that there was a part of the testimony that the jury could not agree upon. Either the same or another juror then said that there was a great deal of evidence that appellant did fire one shot at Shirley, and the court told the jurors that that was a matter for them to decide. A juror then remarked: "That is, the shell that did not explode apparently," and the court again said that that was a question for the jury.

[10] We believe that the displaying to the jury of the bullet which had not been

introduced in evidence, with the accompanying remark, was misconduct of the grossest sort, and that it was so highly prejudicial that no admonition of the trial judge to disregard it could erase from the minds of the jurors the undoubted electric effect of the production of the bullet and the remarks of the prosecutor in response to the argument of appellant's counsel. Misconduct of a prosecuting attorney in making remarks not warranted by the evidence cannot be justified even though they may be made in reply to those made by appellant's counsel. People v. Kirkes, 39 Cal.2d 719, 725, 249 P.2d 1. It is impossible to tell whether the jury understood that the bullet produced by the prosecutor came from one of the five shots fired from the upper level or from a sixth shot fired in the pit during the assault on Shirley. The evidence was conflicting as to whether appellant went into the pit and fired the sixth shot; he testified that he did not. If the prosecution had offered in evidence the bullet from the sixth shot, it would have controverted appellant's testimony, but not having offered it it was highly improper and extremely prejudicial.

What was said in the recent case of People v. Talle, 111 Cal.App.2d 650, 245 P.2d 633, may well be repeated here. The court said, 111 Cal.App.2d at page 677, 245 P.2d at page 649:

> "The argument of the district attorney, particularly his closing argument, comes from an official representative of the people. As such, it does, and it should, carry great weight. It must, therefore, be reasonably objective. It is no answer to state that defense counsel also used questionable tactics during the trial and therefore the district attorney was entitled to retaliate. Defense counsel and the prosecuting officials do not stand as equals before the jury. Defense counsel are known to be advocates for the defense. The prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige. It is their duty to see to it that those accused of crime are afforded a fair trial. The applicable rule was admirably stated in Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314, quoted with approval in Viereck v. United States, 318 U.S. 236, 248, 63 S.Ct. 561, 566, 87 L.Ed. 734: ' "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." '
>
> "District attorneys are, of course, to be commended for investigating crime and in prosecuting, with vigor, those accused of crime. But prosecutive zeal and honesty in belief of guilt are not a substitute for the orderly, lawful and constitutional processes and guarantees."

[11] Respondent concedes that the production of the bullet by the prosecutor was erroneous and was misconduct but argues that, in view of the fact that the court admonished the jury to disregard it, prejudice cannot be presumed. Respondent also argues that the evidence of appellant's guilt was so overwhelming that any errors committed would fall within the curative provisions of Artices VI, section 4½, of the California Constitution. We do not agree with either of these contentions. The evidence was not so overwhelming as to justify or excuse the flagrant misconduct of the prosecution. In our opinion the court should have severely reprimanded the prosecutor and declared a mistrial. But the

trial court not having done so it is the duty of an appellate tribunal to reverse the judgment, for the error complained of is of such a nature that Article VI, section 4½, of the Constitution cannot save the conviction.

The judgment and order are reversed and a new trial ordered.

PEEK, J., and PAULSEN, J. pro tem., concur.

122 Cal.App.2d 840

RIDGWAY v. CHASE et al.

Civ. 19781.

District Court of Appeal, Second District, Division 3, California.

Jan. 26, 1954.

Action by real estate broker, employed by defendants to procure a tenant, to recover commission. The Superior Court, Los Angeles County, James H. Pope, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Vallée, J., held, inter alia, that evidence was insufficient to sustain finding that broker had fulfilled his contract of employment.

Reversed.

1. Brokers 🔑39

The right of a broker to recover a commission must be measured by the terms of his contract.

2. Brokers 🔑39

A broker may, by special agreement, make his commission dependent upon a contingency or the happening of a condition precedent, and unless such contingency occurs or such condition happens, he has no right of recovery.

3. Brokers 🔑48

Generally, unless failure to secure lessee on terms proposed and within time provided is due to negligence, fraud, or fault of owner, a broker may not recover on his contract.

4. Brokers 🔑50

Where time for performance is definitely fixed by the contract, the transaction must be completed within that designated time to entitle broker to his commissions.

5. Brokers 🔑49(1)

A broker who does anything less than, or different from, what is designated in his contract, is not entitled to a commission.

6. Brokers 🔑52

Acceptance of owner's offer to lease must be unconditional to entitle broker to a commission.

7. Brokers 🔑52

General rule that a broker who produces a person who is ready, willing, and able to consummate a lease, has earned his commission, does not apply where acceptance by owner is conditional.

8. Brokers 🔑50

Rule of extension of a broker's contract is dependent upon a waiver.

9. Brokers 🔑50

The time for performance specified in a broker's contract may be waived by the principal where he, after time limit has expired, urges and encourages broker to continue his efforts, and broker does so continue with the knowledge, approval, and encouragement of the principal, and, as a result of broker's efforts, the purpose of his employment is effected.

10. Brokers 🔑50

Where contract employing broker to procure a tenant expired, by its terms, on January 31, 1949, and broker did not negotiate with any one before that date, fact that his principal permitted him to negotiate with a prospective tenant until July 14, 1949, did not constitute an extension of the contract period until that date, but merely constituted what might have been an extension of time by the principal had a lease with such prospective tenant been executed.

11. Brokers 🔑86(1)

In action by real estate broker, employed by defendants to procure a tenant, to recover commission, evidence was insufficient to sustain finding that broker fulfilled his contract of employment.

David C. Moore, Stanton, Stanton & Welbourn, and Louis B. Stanton, Los Angeles, for appellants.

Robert N. Gold and Marco & Harter, Beverly Hills, for respondent.

VALLÉE, Justice.

Appeal by defendants from an adverse judgment in an action by a real estate broker to recover a commission.

Plaintiff was a licensed real estate broker and also was a salesman for Consolidated-Hill, Inc., a concern engaged in selling market fixtures.

On January 31, 1949, the parties entered into a written contract[1] by which defendants employed plaintiff "for a period of Sixty (60) days from the date hereof [to and including April 1, 1949], and within ninety (90) days thereafter [to and including June 30, 1949] to parties with whom said Agent negotiated during said period, as my sole and exclusive Leasing Agent to procure a tenant for the exclusive business of operating a Food Market on the premises [description of a 20 acre unimproved parcel of realty owned by defendants] on the following terms and conditions: Percentage lease with guaranteed minimum rental to be approved by Owners." Other conditions prescribed by th contract were that if plaintiff procured a tenant in accordance with the terms of the contract, "or any other terms accepted by me," defendants agreed to pay him a commission, and in the event he received a contract for certain fixtures to be installed in the market, he would not charge a commission.

Plaintiff did not, within 60 days from January 31, 1949, negotiate the leasing of the property with anyone, nor did he thereafter, within 90 days, procure a tenant. On or after April 10, he commenced discussions with Messrs. Weisstein and Cummings, a copartnership, whom we refer to as the partnership, which continued into July, 1949. Plaintiff told Cummings he was acting for Consolidated-Hill, Inc., in the transaction and that he was going to get a commission on any market fixtures sold to the partnership. Plaintiff introduced the parties. After that he attended several meetings in which defendant Joseph N. Chase, referred to as defendant, and the members of the partnership discussed a lease of the property and what it should contain. Plaintiff testified defendant asked him to attend the meetings "and more or less assist him." At one of the meetings defendant asked the members of the partnership to purchase their fixtures and equipment for a contemplated building on the property from plaintiff, stating that if they did he would not be obligated to pay plaintiff a real estate commission. Plaintiff testified that at another meeting he told defendant he objected because the partnership would not purchase all of the fixtures from him; that he asked defendant if he would pay the real estate commission, and defendant said, "That's all right. I'll take care of this. I understand that. We will pay the commission." Plaintiff also testified that about July 12 he told defendant he was working without any contract, the time on his contract had been used up, and "I haven't really gotten any written contract. What are we going to do about my commission?"; that defendand said: "Well, that's all going to be taken care of under the July 14th agreement that we are preparing"; that he (plaintiff) replied: "No, I want my—I want to reinstate my broker's commission here." Plaintiff, at that time, had prepared a new "Owner's Authorization to Lease or Rent" which he had signed and which he presented to defendant for his signature since he wanted something new to be signed so as to protect his interest. Defendant did not sign it. Plaintiff did not deny he told defendant he was working without an agreement and that he wanted something new to be signed so as to protect his interest.

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[1] The contract reads:

"Owner's Authorization to Lease or Rent
"To: N. S. Ridgway, Jr., Agent
"Address: 1701 S. Grand Avenue, Los Angeles, California, Jan 31, 1949

"For and in consideration of services to be rendered by the above named Agent, I hereby employ said Agent for a period of Sixty (60) days from the date hereof, and within ninety (90) days thereafter to parties with whom said Agent negotiated during said period, as my sole and exclusive Leasing Agent to procure a tenant for the exclusive business of operating a Food Market on the premises known as The C-2 portion of the South half of Lot 189, Tract 1000, located at N.W. corner of Fulton Avenue & Riverside Drive, Van Nuys, California, on the following terms and conditions:

"Percentage lease with guaranteed minimum rental to be approved by Owners.

"Should said Agent procure a tenant for the premises herein described, in accordance with the terms herein, or any other terms accepted by me, I agree to pay said Agent a commission at the regular rate authorized by the Los Angeles Realty Board, and now in effect, and authorize the said Agent to notify his client of my acceptance upon receiving a written offer from him in conformity with the above agreement.

"It is further understood and agreed that in the event said Agent receives the contract for all the Refrigeration, Fixtures and Equipment (excluding cash registers) to be installed in the Market as herein described, there will be no Real Estate commission charged by said Agent. In the event said Agent does not receive the contract to install the aforementioned fixtures and equipment, I agree to pay said Agent the authorized Real Estate commission.

"Should suit be commenced to collect commission provided for in this agreement, I agree to pay all Attorney's fees and court costs.

"It is further understood and agreed that said Agent may act for other parties and receive compensation therefor."

On July 14, 1949, as a result of the negotiations, defendants and the partnership entered into a written contract by which they agreed to execute a lease of part of the property only, on specified terms and conditions. Among the terms and conditions were these: 1. By mutual agreement of the parties in writing, the property was to be divided later into a business area and a parking area. 2. Defendants agreed to construct a market building on a part (150′ x 150′) of the business area with a ground floor storage space, according to plans and specfications to be submitted to the partnership and to be approved in writing later by both parties. No time was fixed for commencement of construction. The document expressly provided that the market building and storage space "shall constitute the portion of the above described real property to be included in the lease, the subject matter of this agreement." 3. Defendants agreed, on or before completion of construction of the market building, to construct store buildings on the entire balance of the business frontage of the business area. The partnership was given the right to approve prospective tenants of the store buildings. 4. Defendants agreed to surface, install adequate lighting, and maintain in good repair, the parking area. No time was set for the doing of this work. The partnership agreed to pay, for maintaining the parking area clean, such proportion of the total cost therefor as the parking area bore to the floor area of the buildings in the business area. 5. "The term of the lease shall be either 15 years or 20 years, at the option of Lessees." The lease was to give the partnership an option to renew. 6. The annual rental, under the lease to be executed, was to be 1¼% of receipts from gross sales up to and including $1,000,000 and 1% of gross sales in excess of $1,000,000 to and including $2,000,000. Defendants represented that they intended to obtain a maximum loan on the property and market building "to be demised" to the partnership, and the latter agreed to pay as a minimum rental a sum equal to the minimum amount to be paid monthly on the loan. "The said lease shall provide" for rental payments to be made monthly in advance. 7. Defendants guaranteed to construct multiple dwellings with not less than 250 apartments on adjacent real property (not part of the 20 acres described in plaintiff's contract of January 31, 1949) and to complete said construction not later than December 30, 1950. 8. The partnership agreed to purchase all the refrigeration equipment and market fixtures to be installed in the demised premises, excluding specified ones, from Consolidated-Hill, Inc. On July 23, 1949, the latter provision was amended. By the amendment, the partnership agreed to purchase from Consolidated-Hill, Inc., not less than $32,500 of its refrigerated display cases to be installed in the demised premises. The amendment was signed by defendants and the partnership and was "Approved and Accepted: Consolidated-Hill, Inc. By N. S. Ridgway, Jr."

An attorney for defendant, who assisted in preparing the agreements, testified that after the July 14 agreement was executed and before the amendment of July 24, the partnership insisted on changing the provision of the agreement of July 14 by which it agreed to purchase practically all of the refrigeration equipment and market fixtures from Consolidated-Hill, Inc.; that plaintiff agreed to $32,500; that plaintiff said he wanted to be protected in his compensation; and that nothing was said about real estate broker's commission.

The matters agreed to in the agreement of July 14 were never consummated. The lease contemplated by the agreement was never entered into. No such instrument was ever prepared. The parties never agreed on a division of the property into a business area and a parking area. They never agreed as to the type of construction, or the size or location of the food market. They never came to an agreement as to whether the lease should be for 15 or 20 years. No time for the commencement of the lease was ever agreed upon. Preliminary plans for the market were drawn, but final plans were never drawn. No agreement was ever reached as to any date when the market building was to be constructed. No firm loan commitment was ever obtained. The parties never agreed on a figure as to what the minimum monthly rental would be. It was stipulated "that everything to be approved by the parties in a lease to be subsequently executed has never been done." Plaintiff did not procure a tenant on the terms specified in the contract of January 31, 1949, or on any other terms.

Cummings testified that he and his partners, on many occasions after July 14, told defendant they were ready, willing, and able to enter into a lease in accordance with the terms of the agreement of that date. However, the members of the partnership changed their minds several times with respect to the size of the building. The estimated cost ran from $180,000 to $240,000. Defendant completed the construction of the multiple dwellings on the adjacent property prior to December 30, 1950. At the time the agreement of July 14 was executed, the property was encumbered with a $35,000 deed of trust. In connection with the construction of the dwellings on the adjacent property, defendant further encumbered the property to the extent of about $64,000. The $35,000 encumbrance was removed in June, 1951. At the time of trial, the $64,000 encumbrance had been reduced to $15,000.

In December, 1950, plaintiff informed defendant that he was no longer connected with Consolidated-Hill, Inc.; that the sole consideration for his efforts was the purchase of the equipment from Consolidated-Hill; that he was still in the negotiations and should be protected, and asked for some sort of listing to protect himself. No listing was given.

Defendant testified that in December, 1950, he was ready to go ahead with the construction of the market building; that he then had a tentative commitment of $200,000. On February 2, 1951, he made application to the National Production Authority for permission to purchase materials to construct the food market. The application was denied.

On June 26, 1951, defendant advised the partnership that "due to practical and legal reasons it has been, and is impossible" to enter into such a lease as was contemplated by the partnership.

The court found: "[P]laintiff broker had fully performed his contract and was entitled to its benefits." "[T]he defendants waived the provisions of the broker's contract of January 31, 1949, pertaining to the time within which the lease was to be executed." The proposed lessees, at all times since July 14, 1949, have been ready, willing, and able to execute the lease. Defendants have refused, without cause, to enter into a lease in accordance with the agreement of July 14, 1949. The court concluded: "A broker employed to obtain a lessee upon terms of 'percentage lease with guaranteed minimum rental to be approved by owners or any other terms accepted by owner' has performed his agreement when he procures a lessee ready, willing and able to execute a lease in accordance with the terms required but is prevented from executing the lease by the refusal of the lessor. * * * A principal who accepts a proposed lessee after the time fixed in the broker's contract for the procurement or negotiation of lease, and himself negotiates with the proposed lessee and enters into an agreement with him, waives the restriction of time fixed in the broker's contract unless he informs the broker before he enters into negotiations that he will not accept the proposed lessee as the result of the broker's procurement." Judgment for plaintiff followed. Defendants appeal.

Plaintiff's position is that the agreement to lease of July 14, 1949, constituted performance by him of the contract of January 31, 1949. Defendants claim that under the terms of the contract of January 31, 1949, plaintiff was to procure a lease of the 20 acres; that not having done so, he is not entitled to recover.

Plaintiff's contract was special, not general. He was employed as defendants' "Leasing Agent" to procure a tenant for the exclusive business of operating a food market on the 20 acres under a percentage lease, with a guaranteed minimum rental to be approved by defendants. If he procured a tenant on any other terms, they were to be accepted by defendants. His contract was not to procure a person ready, willing, and able to enter into a lease; it was to procure a lease. His compensation was dependent on his procuring a lease. See, Peterson v. Montgomery Holding Co., 89 Cal.App.2d 890, 202 P.2d 365.

[1-6] The right of a broker to recover a commission must be measured by the terms of his contract. McGill v. Fleming, 32 Cal.App.2d 601, 604, 90 P.2d 341; Denbo v. Weston Investment Co., 112 Cal.App.2d 153, 157, 245 P.2d 650. A broker may, by special agreement, make his commission dependent upon a contingency or the happening of a condition precedent, and unless such contingency occurs or such condition happens, he has no right of recovery. Denbo v. Weston Investment Co., 112 Cal.App. 2d 153, 157, 245 P.2d 650. The general rule is that unless the failure to secure a lessee on terms proposed and within the time provided is due to negligence, fraud, or fault of the owner, a broker may not recover on his contract. Ford v. Palisades Corp., 101 Cal.App.2d 491, 497, 225 P.2d 545. "Where the time for performance is definitely fixed by the contract, the transaction must be completed within that designated time to entitle the broker to his commissions. In 2 Mechem on Agency, page 2026, section 2439, it is said in that regard: 'It is also indispensable that the purchaser should be found within the time limited, for if the broker's exertions do not produce the buyer until after that time has expired, it is not enough, even though that buyer may subsequently become the purchaser, unless the principal has caused the delay, or unless he waives it.'" Heffernan v. Merrill Estate Co., 77 Cal.App.2d 106, 115, 174 P.2d 710, 715. If a broker does anything less than, or different from, what is designated in his contract, he is not entitled to a commission. Merkeley v. Fisk, 179 Cal. 748, 756, 178 P. 945. The acceptance of the owner's offer to lease must be unconditional to entitle a broker to a commission. Edwards v. Billow, 31 Cal.2d 350, 358-361, 188 P.2d 748; Love v. Gulyas, 87 Cal.App. 2d 608, 615, 197 P.2d 405.

Howard v. Burrow, 77 Cal.App. 4, 245 P. 808, is determinative of the case. The contract in that case, dated March 28, 1944, was "to obtain a tenant on a five year lease. * * * This contract to remain in force for ten days from date." Within the ten days the broker introduced a prospective lessee to the principal. A discussion was had between the principal and the prospective lessee regarding the lease, but no agreement was reached at that time, nor on or prior to April 7, 1924, the end of the term of the broker's contract. On April 9, 1924, the principal and the prospective lessee executed an unenforceable agreement to lease. The broker was present at the discussion leading to the execution of the unenforceable agreement. No lease was ever executed. The court held, 77 Cal.App. at page 7, 245 P. at page 809:

> "If we assume, for the purpose of this case, that such is the fact and that said paper [of April 9, 1924] was an agreement, it will be noted that that paper was executed two days after the respondent's contract had expired. Such being the fact the respondent could not recover under his contract. * * *
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> "In what we have said above, we assumed that the writing dated April 9, 1924, was a valid enforceable contract. Under the settled law of this state and of many other states we went too far in making that assumption. The Campe Company was to make the alterations and improvements. The plans and specifications had not been prepared. When they were prepared it is manifest that they should be prepared by, and to the satisfaction of, the Campe Company. By the clear language of the written instrument dated April 9, 1924, they were also to be approved by Mr. Burrow. There was, therefore, a material element in the writing on which the minds of the parties had not met. However, it was of the very essence of the respondent's contract that he should bring the parties to an agreement. Ayres v. Thomas, 116 Cal. 140, 144, 47 P. 1013. There is a long line of cases in this state holding that writings in such form are incomplete and not enforceable as executory contracts to enter into a lease. Morrison v. Rossignol, 5 Cal. 64, 65; Stanton v. Singleton, 126 Cal. 657, 664, 59 P. 146, 47 L.R.A. 334; Wineburgh v. Gay, 27 Cal. App. 603, 605, 150 P. 1003; Durst v. Jolly, 35 Cal.App. 184, 189, 169 P. 449. And the same rule has been applied to executory contracts of sale. Klein v. Markarian, 175 Cal. 37, 40–41, 165 P. 3. Speaking of the rule in general, in 1 Williston on Contracts, § 45, the author says: 'Although a promise may be sufficiently definite when it contains an option given to the promisor or promisee, yet if something is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the very terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise. It should be observed, however, that though such a promise is invalid, it will not necessarily invalidate an entire agreement of which it forms a part.' A leading case in New York is a parallel case. Mayer v. McCreery, 119 N.Y. 434, 23 N.E. 1045. In that case Mr. Justice Peckham, speaking for the court, said: 'It is, in substance, an agreement that *if the parties shall thereafter agree upon plans for the alteration of the building*, that thereupon a lease of the building upon the terms specified in the letters will be given by the defendant to the plaintiff.'"

See, also, Peterson v. Montgomery Holding Co., 89 Cal.App.2d 890, 893–894, 202 P.2d 365; Pohl v. Mercurio, 93 Cal.App.2d 236, 239, 208 P.2d 1020; Ellis v. Klaff, 96 Cal.App.2d 471, 478, 216 P.2d 15; Kerr Glass Corp. v. Elizabeth Arden Corp., 61 Cal.App.2d 55, 141 P.2d 938; Klein v. Markarian, 175 Cal. 37, 40–41, 165 P. 3.

In McGill v. Fleming, 32 Cal.App.2d 601, at page 604, 90 P.2d 341, at page 343, this court stated:

> "The trial court properly concluded that the parties contemplated the payment of the brokers' commissions only upon the effective consummation of the leases. We are not unmindful of the general rule that a broker earns his commission when he has secured an acceptable lessee for the lessor, one who is ready, able and willing to lease the property upon the terms on which the broker is authorized to negotiate the lease. The present case, however, is not the ordinary one in which a broker is employed to secure a lessee in the open market. In this case the prospective lessee was named in the form

of lease which had been prepared and also in the agreement sued upon. In this agreement the lessor became bound to pay the commission 'for consummating' the transaction. The right of the broker to recover commissions must of course depend upon the terms of his employment. The word 'consummate' means to bring to completion. Connor v. Riggins, 21 Cal.App. 756, 132 P. 849. In order to consummate the transaction it was necessary that a binding and valid lease be secured, one which bound the lessee to comply with definite terms agreed upon by the parties. It is not reasonable to construe the words 'for consummating the lease' as referring to the signing of the lease forms which had already been drawn up, for those documents were not binding upon either defendant or the company.

"It will be noted that in the so-called leases the lessor purports to lease *a building,* one which was not then in existence. The floor plan and specifications were to be mutually agreed upon between the parties and approved in writing within thirty days, otherwise either party could be relieved from all obligations. The plans and specifications were naturally of great importance to defendant, since they might require a greater or lesser expenditure of funds in the erection of the building. Obviously they were also of importance to the company. Plaintiff's contention that he became entitled to his commissions upon the signing of the forms of leases does violence to a reasonable construction of the language used in the agreement, particularly in view of the circumstances surrounding the transaction. If the commission became due upon the signing of the instruments in question there would have been no need for employing the language 'for consummating' the leases and for requiring that the payment of the commissions be made after the erection of the buildings.

"In Leventritt v. Cowell, 21 Cal.App. 597, 132 P. 627, the factual situation was very similar to that of the case under review. The litigation there involved 'a contract for a lease to be executed in the future, and in which the lessees had not fully agreed to the terms of the lease, for the contract provided that the plans and specifications for the buildings were yet to be approved and "O.K.'d" by the lessees'. It was held that the broker could not recover. See, also Ball v. California Conserving Co., 189 Cal. 326, 207 P. 1011; Alison v. Chapman, 36 Cal.App. 759, 760, 173 P. 389; Peak v. Jurgens, 5 Cal.App.2d 573, 576, 43 P.2d 569."

[7] The cases which hold that where a broker produces a person who is ready, willing, and able to consummate a lease he has earned his commission, are not in point. That rule does not apply where the acceptance by the owner is conditional. Edwards v. Billow, 31 Cal.2d 350, 359–360, 188 P.2d 748. "The general rule is that an agent performs his part of such a contract when he produces a purchaser able, ready, and willing to buy upon the terms specified by the owner. Upon a general contract of employment, certainly, the owner may make concessions to a purchaser without loss of the commission to the broker, but there is a distinction, in fact recognized by the authorities, between a general and special contract of employment in a matter of this kind. It appears that, where the broker has undertaken a special task by his contract of employment, and fails to perform it, the fact of having first introduced the buyer and seller will not entitle him to recover." Backman v. Guadalupe Realty Co., 78 Cal.App. 347, 352, 248 P. 296, 298. See, also, 12 C.J.S., Brokers, § 86c, p. 198. Defendant did not unconditionally accept the proposed lessee. There was no unqualified legally binding agreement to lease.

[8–10] Plaintiff claims that defendants waived the limitation of time fixed by his contract. The rule of extention of a broker's contract is dependent on a waiver. Love v. Gulyas, 87 Cal.App.2d 608, 615, 197

P.2d 405. The time for performance specified in a broker's contract may be waived by the principal where he, after the time limit has expired, urges and encourages the broker to continue his efforts, and the broker does so continue with the knowledge, approval, and encouragement of the principal; and, as a result of the broker's efforts, the purpose of his employment is effected. Baker v. Curtis, 105 Cal.App.2d 663, 669, 234 P.2d 153. The contract of January 31, 1949, by its very terms, terminated on April 1. Plaintiff did not negotiate with anyone within that time. He claims that because he found the partnership and defendant permitted him to negotiate with its members until July 14, when the so-called agreement to lease was executed, the contract period was extended until July 14. The acts of the parties did not constitute an extention of the contract period. They merely constituted what might have been an extention of time by defendant had a lease with the partnership been executed. If defendants were waiving the time, they were doing so only on the condition that a lease with the partnership eventuated. See Love v. Gulyas, 87 Cal.App.2d 608, 618, 197 P.2d 405.

We should comment that the finding that defendants waived the provisions of the contract of January 31, 1949, pertaining to the time within which the lease was to be executed, is a misplaced conclusion of law. No facts were found on which such a conclusion could be predicated. The conclusion as to when a principal waives the restriction of time fixed in a broker's contract is not a correct statement of the law. See Ford v. Palisades Corp., 101 Cal.App.2d 491, 225 P.2d 545; Baker v. Curtis, 105 Cal.App.2d 663, 234 P.2d 153.

[11] We hold that the finding to the effect that the contract of employment as broker was fulfilled is not supported by the evidence. Cf. Kritt v. Athens Hills Development Co., 109 Cal.App.2d 642, 646, 241 P.2d 606.

Reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

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122 Cal.App.2d 613

SMITH et al.

v.

EAST BAY MUNICIPAL UTILITY DIST.

Civ. 15627.

District Court of Appeal, First District, Division 2, California.

Jan. 19, 1954.

Rehearing Denied Feb. 18, 1954.

Hearing Denied March 17, 1954.

Action by lower riparian owners against utility district for damages sustained because of overflow allegedly caused by district's negligence in operating its dam and reservoir. The Superior Court, County of Contra Costa, Hugh H. Donovan, J., entered judgment upon verdict for owners, and the district appealed. The District Court of Appeal, Kaufman, J., held that evidence, which revealed that foreign waters were diverted into reservoir at time when such foreign waters necessarily increased amount of water being discharged from reservoir, was sufficient to sustain jury's verdict for owners.

Judgment affirmed.

1. Negligence ⚷2

Plaintiffs must show existence of a duty of care by defendant before they can show negligence.

2. Waters and Water Courses ⚷143

Right of an appropriator to use water is limited to amount reasonably required for the beneficial uses, does not extend to waste of water or to unreasonable use or method of use of diversion, and riparian rights attach only to amount of flow that may be used consistently within constitutional provision pertaining to riparian rights. Water Code, § 100; Const. art. 14, § 3.

3. Waters and Water Courses ⚷171(2)

Generally, a dam owner may permit flood waters to pass over dam in such quantities as flowed in.

4. Waters and Water Courses ⚷179(4)

In action by lower riparian owners against utility district for damages sustained because of overflow allegedly caused by District's negligence in operating its dam and reservoir, evidence was sufficient to establish that more water had been released from dam than had naturally flowed into dam from that part of creek which was located above dam. Water Code, § 100; Const. art. 14, § 3.

5. Waters and Water Courses ⚿171(2)

Utility district, in operating dam and water reservoir, had duty toward lower riparian owners not to permit a greater flow of water over the dam than that which would naturally have flowed into dam from creek whose waters were backed up by dam. Water Code, § 100; Const. art. 14, § 3.

6. Waters and Water Courses ⚿173

An apparently permanent change in flow of stream usually leads to costly adjustments by those interested since they come to regard the artificial condition as permanent, and, therefore, it is reasonable that such persons should receive as much protection as if the condition were natural. Water Code, § 100; Const. art. 14, § 3.

7. Waters and Water Courses ⚿168

Owner of water reservoir has duty not to unnecessarily cause or allow any water to escape from reservoir if owner's facilities are capable of handling the water in the reservoir, and owner is obligated not to divert into reservoir any foreign waters if it would necessitate discharging any water from reservoir. Water Code, § 100; Const. art. 14, § 3.

8. Waters and Water Courses ⚿179(4)

In action by lower riparian owners against utility district for damages sustained because of overflow allegedly caused by district's negligence in operating its dam and reservoir, evidence, which revealed that foreign waters were diverted into reservoir at time when such foreign waters necessarily increased amount of water being discharged from reservoir, was sufficient to sustain jury's verdict for owners. Water Code, § 100; Const. art. 14, § 3.

◆

Harold Raines, John B. Reilley, Oakland, for appellant.

Nichols, Richard, Allard & Williams, Eugene Morgan, Oakland, for respondents.

KAUFMAN, Justice.

Appellant, East Bay Municipal Utility District, the defendant below, appeals from a judgment against it of $3,360 in a suit for damages to plaintiffs' property alleged to have been caused by an overflow of San Pablo Creek resulting from defendant Utility District's negligence in the operation of San Pablo Dam and Reservoir. Judgment upon the jury's verdict in favor of plaintiffs was entered on April 7, 1952. Defendant District appeals from the judgment on the ground of the insufficiency of the evidence to support the verdict.

Plaintiffs and respondents, Edward and Florence Smith, husband and wife are owners of a parcel of property in Contra Costa County located on both sides of San Pablo Creek, between one and one-half to two miles downstream from San Pablo Reservoir. Respondents acquired this property in 1947. It was equipped as a recreation area with dance hall, swimming pool, dressing rooms, boat house and merry-go-round. Respondents intended to use it as a picnic grounds. When they acquired it, there was no water in the creek. Up until January 1947 there was never more than a foot and a half to 2 feet of water in it. The creek banks indicated that the highest level of water in the past had been about 3 and one-half feet. Within a day or two prior to the date of the damage, there was water coming down the channel at a depth of from 6 to 8 inches and the channel was clear of debris.

Plaintiff Edward Smith testified that damage was caused first to his swimming pool. Water had to rise to a height of 5 feet in the creek in order to flow into the swimming pool. The water rose to a height of 6 feet 6 inches in the creek. The witness' best recollection was that this occurred before January 15, 1951, it might have been as early as January 10, but it was probably between January 12 and 15. The swimming pool's filter plant was damaged by the deposit of silt. The merry-go-round was also damaged by silt deposits; 2 boats were damaged; and 14 cords of wood were washed away. Of the 3 foot bridges across the creek, two were weakened, and one was washed away. Some supplies of cement and fertilizer were also damaged.

Called as a witness for defendant under § 2055, Code of Civ.Proc., Smith testified that he had purchased plank 2 years before for the purpose of bulkheading the creek and putting a deck on the bridge. He had built a bulkhead opposite the swimming pool and was going to build more further up the creek. He said his purpose was for a fill for walks on the sides and so the water when it came up would not pile brush around the trees beside the creek.

Below the picinc area on plaintiffs' property is a small earth dam covered by cement about 4 feet in height. On each side of it are flood gates 5 feet square. The dam is 20 feet wide between the flood gates. If the gates were closed, water would back up 40 to 50 yards behind the dam, but prior to the damage complained of he had opened the flood gates and secured them in this position.

Mrs. Smith's testimony as to the amount of water in the creek at all times prior to the date of the damage was substantially the same as her husband's. She stated that between January 10 and 15, 1951, the water from the creek flowed into the swimming pool for about 3 days, and then gradually receded.

Joseph De Costa, a civil engineer who has been employed by defendant District since 1929, is manager of the Distribution Division which has charge of the operation of the District's reservoirs, filtration and pumping plants with the exception of Pardee and Lafayette Reservoirs.

He testified that appellant District has 4 storage reservoirs—Chabot: total capacity 4 billion gallons; Lafayette: 7/10ths billion gallons; Upper San Leandro: 13 and a-half billion gallons; San Pablo: 14 billion gallons. Daily consumption is about 112 million gallons. The water stored in the local reservoirs can maintain the system for between 6 to 9 months if not replenished. On January 1, 1951, available storage in Chabot, Lafayette and Upper San Leandro Reservoirs was 5 and six-tenths billion gallons; on January 15, 1951, it was 5 and four-tenths billion gallons.

Pardee Dam and Reservoir in the Sierra Nevadas is the chief source of the District's water supply. Two aqueducts terminating at the Orinda Filtration Plant bring the water into the area. A maximum of 160 million gallons per day can be brought in. The amount to be brought in is determined by local consumption and available storage. It is De Costa's duty to determine how much water is to be released from Pardee into the aqueducts. Between January 1 and 15, 1951 an average of about 90 million gallons a day was taken into the aqueducts. Measurement is made by Venturi meters located in the pipe lines.

When water from Pardee is processed at the Orinda Filtration Plant, none of it goes into San Pablo Reservoir, but if consumption drops appreciably the difference between what is coming in and what is filtered goes into San Pablo Creek and into San Pablo Reservoir. Thus Pardee water will run by gravity into San Pablo Reservoir, but it must be pumped from the aqueduct into the other reservoirs in the system. Once water is in San Pablo Reservoir it cannot be transferred to any of the other reservoirs.

San Pablo Reservoir was created by the erection of a dam approximately 200 feet high, and 1,200 feet in length across the stream bed of San Pablo Creek. An open spillway near the right abutment of the dam was designed to carry 4 billion gallons of water a day. The floor of the spillway is at an elevation of about 315 feet above sea level. Water begins to go over the spillway when the water in the reservoir is at an elevation of 314.98 feet above sea level. Water from the spillway runs down a cement lined ditch or trench into San Pablo Creek. At the left abutment of the dam is a diversion tunnel which goes through the dam and empties into San Pablo Creek. Water can be discharged through this tunnel only by means of gate valves which are at elevations of 265 and 290 feet above sea level, and can be used whenever there is any head above the floor of the gate valve. No water was released through these valves between January 1 and 15, 1951. These valves are considered to be a safety factor to be used in case of earthquake or enemy action.

Water from San Pablo Reservoir is released to the San Pablo Filter Plant in El Cerrito by means of a tunnel through the Berkeley hills. It has a capacity of 54 million gallons a day. It has between 5 to 6 million gallons storage capacity for filtered water only. The amount this plant delivers into the distribution system depends on the consumption demand.

The San Pablo Reservoir is supplied by water from 2 sources—the local drainage area of San Pablo Creek and water from Pardee diverted at the Orinda Filtration Plant.

De Costa testified that the District's purpose is water supply and not flood control. It is therefore the policy to keep the reservoirs as full as possible as insurance against interruption of supply. He was aware early in January 1951 that the water would very probably go over the spillway. After January 10 water was being drawn off to the San Pablo Filtration Plant at the rate of 50 million gallons a day. To have put water from Pardee into the other reservoirs would have involved costly pumping. He admitted that the District had all the water it needed in the San Pablo Reservoir without bringing in any Pardee water, and that the flow to the Orinda Plant could have been controlled so that no surplus would have flowed past into San Pablo Creek, but that no effort was made to do this. Repair work was planned in the aqueduct, and as the aqueduct was to be shut down for awhile, the plan was to keep the reservoir well filled.

The only evidence in the record on the volume of water coming in to San Pablo Reservoir from the watershed and from Pardee during the time the damage occurred is that supplied by De Costa's chart and explanations thereof. For the first 8 days in January the water stood at elevations between 314.81 and 314.88 feet. (Water begins to flow over the spilling at 314.98 feet). Pardee water was being brought in at between 5.3 to 5.8 million gallons per day. San Pablo Creek was discharging water into the reservoir at rates varying from 7.6 to 25.8 million gallons. San Pablo Filtration Plant was taking between 14.9 to 23.9 million gallons. Rainfall for three days of that period was .65 of an inch, .04, .02,—on the remaining days it was none or a trace. But on January 9, 1951 the intake of Pardee water was raised from the previous average of a little over 5 million to 25.1 million gallons. On that day there was also .97 inch rainfall, and .2 of a million gallons went over the spillway.

Venturi meters measure the amount of water taken into the filtration plants and in the aqueduct, hence an accurate measurement is possible of the amount coming into San Pablo Reservoir from Pardee, and the amount taken into the San Pablo Filtration Plant. The amount coming in by natural flow from San Pablo Creek is computed by a formula based on the rise in the elevation of the water surface of the reservoir, the draft to the San Pablo Filtration Plant and the amount coming in from Pardee. The water elevations are obtained from the continuous water level recorder. These water level readings can be taken accurately within one-tenth of a foot. The witness estimated that there would be roughly 22 million gallons in one-tenth of a foot in the reservoir.

De Costa testified that water went over the spillway every day between January 13 and 26, except on January 15 and 16. He explained the "ponding effect" of a dam—the fact that temporary storage is provided because on any given day less water will go over than the amount coming in, because of the necessity of the incoming water spreading over the 848 acres of the reservoir's surface.

Called as a witness for defendant, De Costa stated that if there had been no San Pablo dam, the flow of water past the point where the dam is now located would be the same as that represented on the chart as maximum 2 hour inflow and that this would have flowed on past plaintiffs' property plus the run-off in the drainage area between the dam and their property. He was unfamiliar with the creek in the area of plaintiffs' property, and did not know how deep it would be flowing at the rate shown in the chart. He stated that there are 32 square miles of watershed above San Pablo Dam, and the watershed between the dam and plaintiffs' property is 3½ square miles. The records of the District showed that between July 1, 1950 and July 30, 1951, the run-off for the San Pablo watershed above the dam was 175% of normal, and that of this only 8½% went over the spillway and was not stored.

[1] Appellant contends that it cannot be held liable in this action without proof of negligence. The doctrine of Fletcher v. Rylands, L.R. 1 Ex. 265, is not followed in California, Sutliff v. Sweetwater Water Co., 182 Cal. 34, 186 P. 766; 26 Cal.Jur. 154, § 358. Respondents alleged that appellant had the right to discharge accumulated waters in "reasonable" amounts, that defendant "did so carelessly and negligently operate, maintain, and control" its dam "so as to cause and permit an excessive amount of water to accumulate behind said dam" and that on or about January 15, 1951 they carelessly and negligently allowed a large and excessive volume of water to escape flooding plaintiffs' property and proximately resulting in damage. Plaintiffs must first show the existence of a duty of care owed by defendant before they can show negligence. Routh v. Quinn, 20 Cal.2d 488, 491, 127 P.2d 1, 149 A.L.R. 215. This they have attempted to do by stating that defendant had the right to discharge water in "reasonable" amounts. Appellant argues that no such duty to discharge water only in reasonable amounts had been placed upon the owner of a dam in California, nor in any other state that has considered the question. The duty is only negative—that is he must not augment the flow of the water in time of flood by releasing stored water.

[2] The right to appropriate waters is limited to the waters reasonably necessary for the purpose for which appropriated. Calif.Const. art. XIV, § 3; Sec. 100, Calif. Water Code, Ch. 1, Div. 1. Defendant District is an appropriator of water licensed by the state. The rights of an appropriator have been further elaborated in Peabody v. City of Vallejo, 2 Cal.2d 351, 367, 40 P.2d 486—the right to use water is limited to the amount reasonably required for the beneficial uses; it does not extend to waste of water; it does not extend to unreasonable use or unreasonable method of use or unreasonable method of diversion; riparian rights attach only to the amount of flow that may be used consistently with this section of the Constitution.

[3] Appellant cites the general rule in this country that the owner of a dam may permit flood waters to pass over the dam in such quantities as flowed in. Leading cases in several jurisdictions hold in accord: Crawford v. Cobbs & Mitchell Co., 121 Or. 628, 253 P. 3, 257 P. 16; Teeter v. Nampa & Meridian Irr. Dist., 19 Idaho 355, 114 P. 8; De Kalb County v. Tennessee Electric Power Co., 17 Tenn.App. 343, 67 S.W.2d 555; Bruton v. Carolina Power & Light Co., 217 N.C. 1, 6 S.E.2d 822. In Ireland v. Henrylyn Irr. Dist., 113 Colo. 555, 160 P.2d 364, it was held that the downstream owner does not have the right to require the owner of an upstream reservoir to improve the downstream owner's situation by using the reservoir for flood control. See, also, Iodice v. State, 277 App.Div. 647, 102 N.Y.S.2d 742; Id., 303 N.Y. 740, 103 N.E. 2d 348.

These duties, appellant contends, are not altered by the fact that foreign waters are commingled with the natural waters of a stream, if no more water is released than the amount natural to the flow of the stream. It has been so held in People v. City of Los Angeles, 34 Cal.2d 695, 214 P.2d 1, 3. That case also pointed out that Los Angeles by completing a new dam did not increase its obligations with respect to Owens Valley Waters, and cited Ireland v. Henrylyn Irr. Dist., 113 Colo. 555, 160 P.2d 364, 366, supra, as authority. It would seem that in the absence of facts creating an estoppel, that the rule to be applied in California in regard to the owner of a dam is that of the Ireland case. The case of People v. City of Los Angeles goes on to state that there would be no additional obligation "unless the city operated the dam long enough and in such a manner that lower owners could reasonably rely on the continuance of that operation."

Respondent contends that the duty of the owner of a dam who is also an appropriator of water is set forth in Natural Soda Products Co. v. City of Los Angeles, 23 Cal.2d 193, 143 P.2d 12, as well as in People v. City of Los Angeles, supra. People v. City of Los Angeles declares that "The Natural Soda Products Co. case established that the city, by its long continued diversion of the waters of the Owens River, incurred an obligation to continue that diversion within the reasonable capacity of its aqueduct system, at least so long as it continued to maintain its aqueduct. As between the city and the state's lessees on the lake bed such diversion was recognized as the new natural condition with respect to the waters of the Owens River."

In the instant case water had gone over the spillway but four times in the past thirty-five years. All of the water from the watershed could have been stored if appellant had ceased importing Pardee water.

Appellant has argued that an appropriator of water is limited to the amount of water he can beneficially use, but in the Natural Soda Products Co. case it was said that these constitutional and statutory provisions are to insure a reasonable division of the water supply, and do not require a particular disposition of surplus water, "least of all a disposition harmful to the recipient." [23 Cal.2d 193, 143 P.2d 16.] The constitutional mandate forbids a disposition that would waste water and damage valuable natural resources.

Where a "new natural condition" is established because of long continual diversion of water, then the dam owners' duty would appear to be as contended for by respondents. Appellant says that there is no evidence in the record that appellant held out to respondents that it would divert the entire flow of San Pablo Creek to the maximum capacity of its system. There is, however, the evidence that water went over the spillway only 4 times in several years, and that the high water mark on the creek bed was only 3 and one-half feet.

Appellant contends finally that the evidence conclusively shows that defendant violated no duty toward plaintiffs, since no more water went over defendant's spillway than came into the reservoir from the natural flow of San Pablo Creek. De Costa's chart showed that more water was drawn out to the San Pablo Filter Plant every 24 hours than the amount taken in from Pardee, hence the amount of water going over the spillway could not have been increased by the foreign water. The watershed run-off for each of the days from January 9 through January 15, 1951 is shown to be greatly in excess of the spillway discharge. Appellant says that if plaintiffs reject this evidence which they elicited from the witness under § 2055, Code Civ.Proc., then they face a failure of proof, and if they accept it, it conclusively disproves an essential element in their case.

Respondent urges that the testimony of De Costa was disbelieved by the jury in view of the large margin of error which he admitted to in the measurement of the elevation of the water in the reservoir. He admitted to a margin of error of one-tenth of a foot or 22 million gallons. Respondents apply this to the figures for January 12. If the elevation of the water in the reservoir is corrected to 315.02 from 315.12, then it appears that almost two-tenths of a foot of has escaped from the reservoir in 24 hours. Fifty and five-tenths million gallons were taken out to the Filtration Plant, and 13.8 million gallons were brought in. The two-tenths of an inch drop represents 44 million gallons. Since the reservoir was full all of the 13.8 gallons imported would also leave the reservoir. Therefore a total of 57.8 million gallons left the reservoir in addition to all the water coming in from the watershed run-off. Since 50.5 million went to the Filtration Plant, 7.3 million gallons more escaped from the reservoir than was coming in from the natural watershed. Respondent thus contends that at least on January 12, it can be shown that more water left the dam than came in from the natural watershed, and this would be evidence to support the verdict.

Respondent also relies on the following facts to support the verdict:

(1) Water in San Pablo Creek overflowed its banks below San Pablo Dam, damaging respondent's property.

(2) Water in San Pablo Creek above the dam did not overflow its banks.

(3) During the entire time that water passed over the spillway, appellant was putting large quantities of water into the reservoir that did not come from the natural watershed run-off.

The obvious inference is that more water passed through the creek below the dam than above, and this can only be explained by the increase in flow caused by the Pardee water.

[4, 5] We conclude that there is evidence in the record from which the jury could infer that more water was released from the dam than naturally flowed into the dam from San Pablo Creek. The appellant was under a duty toward respondents not to permit a greater flow of water over the dam than that which would naturally flow into the dam from San Pablo Creek.

The duty of the owner of a dam who is also an appropriator of the water behind the dam is clearly set forth in Natural Soda Products Co. v. City of Los Angeles, 23 Cal. 2d 193, 143 P.2d 12, and a later case arising out of the operation of the same dam, People v. City of Los Angeles, 34 Cal.2d 695, 214 P.2d 1.

In People v. City of Los Angeles, supra, Justice Traynor, who also wrote the opinion in the first case, says 34 Cal.2d at page 697, 214 P.2d at page 3:

> "The Natural Soda Products Co. case established that the city, by its long continued diversion of the waters of the Owens River, incurred an obligation to continue that diversion within the reasonable capacity of its aqueduct system, at least so long as it continued to maintain its aqueduct."

If there is a duty incurred in that case, certainly here a similar duty was incurred by the appellant. The facts in the present case are very similar to the facts in the Natural Soda Products case. Only four times in 35 years of operation did any water pass over the spillway of the San Pablo Dam; a picture of the dam was introduced in evidence and clearly showed that it had every appearance of permanence. Respondents and their predecessors in interests, in reliance on the continued diversion of the water, had expended considerable sums in improving their property. The water that was "imported" from Pardee, or an amount equal thereto, necessarily passed over the dam during the time that this flood occurred. It was not necessary that any of the Pardee water be put into the reservoir; therefore, all the water that came in from Pardee reservoir, or an amount equal thereto, was allowed to go over the dam without necessity. It could either have been shut off or it could have been stored in available storage space elsewhere.

[6] Our Supreme Court aptly pointed out in Natural Soda Products Co. v. City of Los Angeles, 23 Cal.2d 193, at page 197, 143 P.2d 12, at page 16 that "a change in the flow of a stream that appears to be permanent usually leads to costly adjustments by those interested, as they come to regard the artificial condition as permanent. It is therefore reasonable that they should receive as much protection as if the condition were natural."

[7, 8] The duty imposed by the Natural Soda Products case is a duty not to unnecessarily cause or allow any water to escape from the reservoir so long as their facilities are capable of handling the water in the reservoir. The duty goes further in that it is obligated not to divert into the reservoir any foreign waters if it would necessitate discharging any water from the reservoir. Here foreign waters were diverted into the reservoir when they must of necessity have increased the amount of water being discharged from the reservoir. From these facts the jury was entitled to find negligence and breach of duty on the part of appellant.

In view of the foregoing we are satisfied that there is no prejudicial error in the record and that there is evidence in the record to support the finding of negligence on the part of appellant.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

122 Cal.App.2d 519

DE CAMPOS et al.
v.
STATE COMPENSATION INS. FUND.

Civ. 15251.

District Court of Appeal, First District,
Division 1, California.

Jan. 15, 1954.

As Modified on Denial of Rehearing
Feb. 11, 1954.

Action on compensation insurance policy by insured partnership, wherein the insured defended and counterclaimed on ground of misrepresentation, concealment and breach of warranty in failing to inform insurer that particular person was a partner and employee. The Superior Court of the City and County of San Francisco, Frank T. Deasy, J., rendered a judgment for defendant and plaintiffs appealed. The District Court of Appeal, Fred B. Wood, J., held that the insurer could defend and recover on its counterclaim regardless of its failure to rescind, and that the evidence supported findings that the Industrial Accident Commission's determination against the insurer was not res judicata.

Affirmed.

1. Workmen's Compensation 🔑1072

In action by partnership on compensation policy, wherein insurer counterclaimed for compensation paid to dependents of person not named as partner or employee, evidence supported findings of partnership's misrepresentation, concealment and breach of warranties in withholding information that such person was a partner and employee.

2. Contracts 🔑271

One induced by false representations to execute a contract need not disaffirm but has option of rescinding or affirming and recovering damages for fraud.

3. Contracts 🔑324(1)

A cause of action for damages arises upon breach of contract, regardless of whether contract may be treated by injured party as terminated.

4. Election of Remedies 🔑12

One injured by breach of contract does not lose his right to damages if he ineffectually seeks to disaffirm the contract.

5. Contracts 🔑326

An action for damages for breach of contract rests on theory that contract is still in force.

6. Election of Remedies 🔑3(3)

Rescission and recovery of damages are inconsistent remedies for breach of contract, but in seeking rescission, damages may be prayed for in the event rescission cannot be had.

7. Workmen's Compensation 🔑1072

Breach of promissory warranty in compensation policy to report all wages paid employees and to pay premiums thereon would damage insurer only in the amount of unpaid premiums, but breach of affirmative warranty that named persons were the only partners in insured partnership, would at least afford a defense to action upon the contract.

8. Insurance 🔑256(1), 261

Material facts intentionally concealed or false representations with intent to mislead insurer constitute fraud which, at insurer's option, avoids the policy, and rescission provided for is not an exclusive remedy.

9. Fraud 🔑33

Insurer is not limited to setting up fraud as defense in action on policy, but has right of action for deceit or may seek relief in equity for injuries sustained.

10. Workmen's Compensation 🔑1072

Compensation insurer which was compelled to make payments to dependents of insured partnership's employee-partner could recover damages from partnership for misrepresentation, concealment and breach of warranty, regardless of whether failure to rescind occurred by insurer's deliberate choice or by lapse of time and force of circumstances, and estoppel was not involved. Labor Code, §§ 3706, 3710–3712, 4554.

11. Workmen's Compensation 🔑1072

Failure to disclose that particular person was member and employee of insured partnership was material, as affecting compensation insurer's right to recover damages after being compelled to make payments to dependents of such person. Insurance Code, §§ 334, 338, 359, 360, 441, 444, 445, 447.

12. Insurance ⚿247, 248

Statutory specification of circumstances under which party to insurance contract may rescind does not mean that rescission in such case is the exclusive remedy, but such provisions are superimposed upon provisions of law governing contracts generally. Insurance Code, §§ 334, 338, 359, 360, 441, 444, 445, 447, 650; Code Civ.Proc. § 338; Civ.Code, §§ 1572, 1689, 1709, 1710, 3281, 3300, 3333.

13. Insurance ⚿247
Statutes ⚿223.2(15)

The statute providing that right to rescind policy may be exercised at any time before commencement of action on contract must be read in conjunction with other applicable provisions, and as thus read means that insurer may rescind at any time within statutory period if no action has been commenced upon the policy. Insurance Code, § 650; Code Civ.Proc. § 338; Civ. Code, §§ 1572, 1689, 1709, 1710, 3281, 3300, 3333.

14. Appeal and Error ⚿1035

Where pleadings and briefs indicated some confusion concerning theory of case and suggestion of erroneous theory, but facts were all pleaded as proved, case was fully tried, and all facets of every conceivable issue were adequately developed during trial, reviewing court applied principle that mere mistaken or incomplete statement of legal theory should not prevent granting of any relief consistent with case made by pleadings and embraced within issues. Code Civ.Proc. § 580.

15. Appeal and Error ⚿1039(1)

The matter of pleading becomes unimportant when case is fairly tried upon merits and under circumstances indicating that nothing in the pleadings misled unsuccessful litigant to his injury. Insurance Code, § 650.

16. Workmen's Compensation ⚿1791

In action on compensation policy, evidence supported finding that prior proceedings before Industrial Accident Commission did not involve the same issues of misrepresentation, concealment and breach of warranty by insured as were involved in insurer's defense and counterclaim, and hence Commission's decision against insurer did not preclude consideration of such issues in the instant action.

17. Workmen's Compensation ⚿1792

That compensation insurer and insured were co-defendants in proceeding before Industrial Accident Commission did not prevent Commission's determination of issues properly before it from becoming res judicata as between insurer and insured, as well as between either of them and dependents of deceased employee.

18. Workmen's Compensation ⚿1791

Express or implied determination in compensation proceeding that there had been no rescission of compensation insurance policy would not necessarily be a determination of issues of misrepresentation, concealment and breach of warranty raised by defense and counterclaim in subsequent action by insured against insurer on the policy.

◆

R. Edward Burton, San Francisco, for appellants.

Donald Gallagher, Royle A. Carter, Allan Sapiro, San Francisco, for respondent.

FRED B. WOOD, Justice.

William Ralph Payne, a partner-employee of Mary Len Mine, a copartnership, died as the result of injuries received during the course of his employment. His dependents instituted a proceeding before the Industrial Accident Commission against the employer and against the State Compensation Fund as the employer's insurance carrier. The commission awarded them compensation to be paid by the State Compensation Insurance Fund and discharged the employer.

In that proceeding the employer and the insurance carrier appeared separately and were represented by different attorneys.

Subsequently, the employer brought the present action against the carrier to recover $4,428.60, the amount of counsel fees and costs expended or incurred by the employer in the workmen's compensation proceedings, claiming that the carrier by its policy of workmen's compensation insurance had agreed to defend on behalf of plaintiff all claims or suits against plaintiff but failed and refused to do so in the proceeding mentioned.

The defendant by its pleadings (1) denied that as between the employer and the carrier the insurance policy was at any time in force in respect to the injury or death of William Ralph Payne, because of asserted misrepresentation and concealment by the employer of material facts with reference to the risk and violation by the employer of specific affirmative warranties as to the person insured, and breach of promissory warranties to report all the employees' earnings and pay premiums thereon; (2) alleged that the employer, having first breached the contract, was in default and could not require the carrier to further perform, nor could the employer recover damages for the alleged subsequent breach by the carrier; (3) alleged and claimed damages from the employer in the amount of compensation which the carrier had paid to the dependents of Payne; and (4) alleged that the employer by its conduct had waived the right, if any it had, to have the proceeding before the Industrial Accident Commission defended by the carrier, and is now estopped to claim any such right. The employer joined issue upon the counterclaim of the carrier (treating it as a cross-complaint) and pleaded in bar the decision of the Industrial Accident Commission, alleging that it involved the same issues as those set forth in the counterclaim herein, particularly the issue concerning the validity of the policy of insurance and the liability of the carrier, including the issue of alleged fraud, and that the commission's decision was in favor of the employer and against the carrier.

The trial court found in favor of the defendant and against the plaintiff upon all these issues and rendered judgment accordingly, awarding defendant damages in the amount of $5,985.

[1] (1) *In respect to the alleged misrepresentation, concealment, and breach of warranties,* the findings of the trial court are supported by substantial evidence of the following significant facts: December 23, 1940, plaintiffs filed an application for workmen's compensation insurance with the defendant State Compensation Insurance Fund. This application listed only De Campos, Seitzinger, Fleming, and Broyer as copartners doing business under the firm name of Mary Len Mine. In fact, the partnership also included W. R. Payne as general partner. One reason for not listing Payne as a partner was the fact that his credit was not good and it was feared that the defendant would not insure if he were listed as a partner. Defendant issued its policy December 30, 1940, in favor of the partnership, listing the four partners named on the application, not including Payne whose name was not listed on the application.

By the terms of this policy the defendant agreed "to be directly and primarily liable to employees covered by this Policy, or in the event of their death, to their dependents, to pay the compensation, if any, for which the insured employer is liable" and "to defend, in the name and on behalf of the Insured, claims or suits against the Insured for compensation or for damages, whether groundless or otherwise, which may be instituted against the Insured by or on behalf of employees covered by this Policy or their dependents, and to pay all costs of such defense," subject to the following conditions, among others: "The premium is to be based upon the entire remuneration earned during the Policy Period by all officials and employees except those specifically excluded from coverage under this Policy. The Insured shall keep complete and accurate records of the remuneration earned by all officials and employees classified according to the kind of work performed; such records to be kept for examination by the Fund. Failure to keep such records on the part of the Insured shall entitle the Fund to apply, to the entire remuneration earned, the premium rate applicable to the most hazardous work performed." That unless "specifically stated in the Schedule or covered by endorsement hereon, this Policy does not cover the following * * * persons * * *: If the

Insured be a * * * copartnership, any member of such * * * copartnership * * *." The Policy specified as the name of the employer "Victor James De Campos, Thomas Charles Seitzinger, Marvin Robert Fleming and Albert Broyer, jointly and not severally, a copartnership."

Payne was also an employee of plaintiff. The policy required the insured to file payroll accounts of all employees, and the premium was based upon these amounts. Compensation paid to Payne was not included in the payroll accounts reported to the defendant, and therefore no premiums were paid on the earnings of Payne.

After issuance of the policy, Allen W. Lowe, one of the insurer's safety engineers, visited the mine in January and in May, 1941. He talked with one of the partners. No mention was made of Payne or his membership in the partnership or of the fact that he was working in the mine. Lowe had the names of the partners as listed in the policy. Had there been any mention made of an additional partner Lowe would have reported that fact to his principal. Lowe learned and reported to his principal that one Theodore Navas had a mill on the property and was milling plaintiff's ore on a contractual basis. March 7, 1941, the insurer issued an endorsement to the policy, declaring that the policy did not extend to or cover injuries or death resulting therefrom, that might be sustained by Theodore Navas. Lowe also discovered and reported that one Buck Shibel was hauling ore for the plaintiffs upon a contractual basis. June 11, 1941, the insurer issued a similar endorsement declaring that the policy did not extend or cover injuries, or death resulting therefrom, that might be sustained by Buck Shibel. The insurer had no opportunity to issue such an endorsement in relation to Payne for it received no information concerning him until after his injury and death.

Payne was injured July 15, 1941, in the course of his employment, and died as a result of such injury. Not until after this injury did defendant know or have any information tending to indicate that Payne was a member or an employee of the insured partnership.

Defendant was induced to issue this policy of insurance to plaintiff by and through the misrepresentation that the four persons named in the policy as the employer were the only members of the copartnership, and the concealment from defendant of the fact that Payne was also a member of the partnership and one of the owners and operators of the business, and plaintiff continued to conceal that fact from defendant until after the death of Payne.

[2-6] These facts and the findings based upon them, support the legal conclusion that defendant has a cause of action against the plaintiff to compensate "for all the detriment proximately caused" by plaintiff's wrongful misrepresentation and concealment and breach of affirmative and promissory warranties. See Civil Code, §§ 3300 and 3333. If we view this as an action sounding in tort, it is consistent with the concept of an affirmance by the defendant of the contract of insurance. If a defrauded party is induced by false representations to execute a contract, he need not disaffirm the contract. He has the option of rescinding the contract or of affirming it and of recovering damages for the fraud. See authorities cited in Squire's Dept. Store, Inc. v. Dudum, 115 Cal.App.2d 320, 323, 252 P.2d 418. If this should be regarded as an action sounding in contract, it is still an action for damages. A cause of action for damages arises upon the breach of a contract. (12 Am.Jur., 964, Contracts, § 388; Restatement of Law of Contracts, Vol. I, § 327.) Regardless of whether a contract may be treated by the injured party as terminated, a breach of the contract gives rise to a cause of action in his favor. (6 Cal. Jur. 463-467, Contracts, § 276, Notes 1 and 2). He does not lose his right to damages if he ineffectually seeks to disaffirm the contract. (Same, pp. 388-389, § 233, notes 6 and 7.) An action for damages rests on the theory that the contract is still in force. House v. Piercy, 181 Cal. 247, 251, 183 P. 807; Cook v. Nordstrand, 83 Cal.App.2d 188, 188 P.2d 282. The two remedies (rescission and damages) are inconsistent, but in seeking rescission damages may be prayed for in the event rescission cannot be had, Davis v. Rite-Lite Sales Co., 8 Cal.2d 675,

678–679, 67 P.2d 1039; Bancroft v. Woodward, 183 Cal. 99, 101–102, 190 P. 445.

In our case the insurer did not rescind. It resisted Payne's dependents' claims before the Industrial Accident Commission on the basis or theory that Payne was not covered by the policy, not that there was no policy. It lost that contention, was ordered to pay and did pay compensation to those dependents. It seeks to recoup the amount of that payment from the plaintiff-employer as damages proximately caused by the plaintiff-employer's deceit.

These facts bear a certain similarity to those which obtained in Gise v. Fidelity & Casualty Co., 188 Cal. 429, 206 P. 624, 22 A.L.R. 1476. There the insurer, after paying to the insured's employee the amount awarded the latter by the Industrial Accident Commission, recovered that amount from the insured as the detriment suffered by the insurer proximately caused by the insured's breach of a provision of the policy which obligated him to employ no person in violation of the law as to age. That this was the basis of recovery seems clear from the following statement of the court: "It seems only reasonable to hold, and, in the absence of authority to the contrary, we are of the opinion, that, when the plaintiff, in plain disregard of the terms of the policy of insurance, employed Clark, in violation of the law as to age, the defendant, not having in any way consented thereto, and, not being estopped to deny its liability in the matter in so far as the plaintiff was concerned, a burden was cast upon defendant which it would not have had to assume but for the unwarranted and illegal act of the plaintiff. It was not contemplated by the parties to the contract that such a situation would arise. On the contrary, it was expressly stipulated against. It seems only reasonable to hold, therefore, that the facts presented by the appeal of the defendant call for the application of the simple rule of law that one party to a contract, who is caused to suffer loss by reason of the violation of its terms by the other party thereto, may recover from the one at fault the amount he has been damaged thereby." 188 Cal. at pages 435–436, 206 P. at page 627, 22 A.L.R. 1476.

[7–9] That was the allowance of damages for the breach of a promissory warranty, an action sounding in contract. In our case the breach of the promissory warranty to report all wages paid employees and to pay premiums thereon might damage the insurer in the amount only of the unpaid premiums. Breach of the affirmative warranty that the four named were the only partners, as a broken or unfulfilled condition, would at least afford a defense to an action by the insured upon the contract. The element of fraud is equally significant. "Material facts intentionally concealed or false representations made in reference to them with intent to mislead the insurer is fraud, which, at his option avoids the policy; and, where it is provided that a concealment will warrant the rescission of a contract of insurance, rescission is not an exclusive remedy, as contended by respondent Commission, and the insurer may set up the concealment in an action on the policy. 32 C.J. p. 1271. In California [Reclamation] Co. v. New Zealand Ins. Co., 23 Cal. App. 611, 138 P. 960, it was held: 'Rescission is not the exclusive remedy of one who has become entitled to avoid a contract by reason of acts or omissions of the other party to it which are fraudulent in their nature. He may cancel the contract by its rescission; *or he may seek affirmative relief in a court of equity for any injury sustained by the wrongful act or omission of the other; or he may set up the fraud by way of defense to an action brought to enforce the apparent liability.* [Citations.]'" General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland v. Industrial Accident Commission, 196 Cal. 179, 189–190, 237 P. 33, 37; emphasis added. See also Maggini v. West Coast Life Ins. Co., 136 Cal.App. 472, 478, 29 P.2d 263; E. A. Boyd Co. v. United States Fidelity & Guaranty Co., 35 Cal.App.2d 171, 181, 94 P.2d 1046. Upon principle the insurer is not limited to setting up the fraud merely by way of defense. He has his right of action for deceit to recover the damages suffered, or may seek relief in equity for injury sustained by the wrongful act of the insured, in this case the amount of the compensation which the insurer paid to the dependents of Payne.

That is quite as effective as was the insurer's right of action for damages for breach of contract in the Gise case.

The plaintiff in our case would disallow the value of the Gise case as a precedent because there the contract of insurance contained a clause which declared that no default of the insured employer with respect to any of the provisions or conditions of the policy would in any way affect the right of an employee or his dependents to recover from the insurer the compensation provided by law. That clause merely precluded rescission of the contract. It did not create the right of action for damages. The latter sprang into being upon the insured's breach of his promissory warranty and, because of the clause mentioned, became the only available remedy instead of one of two alternative remedies.

[10] Similarly, in our case, the insurer, not having rescinded, asserts its right of action for damages. Whether the failure to rescind occurred by deliberate choice of the insurer or by lapse of time and force of circumstances is immaterial. The insurer well may have deemed it good business to pay this particular risk, recoup the amount thereof from the insured, and continue with its coverage of other risks at the mine. It is not for a defaulting employer to tell the aggrieved insurer which of several available remedies it shall elect to pursue, or that if it neglects to make a timely rescission it shall forfeit its right to damages. There is here no element of estoppel involved. Indeed, the insured employer is better off than if the insured had rescinded, assuming it possessed the right to rescind. For then the employer would have been subject to an action for damages in addition to the liability for compensation, Lab.Code, § 3706, and various other potential penalties and liabilities. Lab.Code, §§ 3710–3712 and 4554.

[11] In our case there seems no reasonable doubt concerning the materiality of the misrepresentation, concealment and breach of warranty. "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries." Ins.Code, § 334. "An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind." Ins.Code, § 338. "If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time the representation becomes false." Ins.Code, § 359. "The materiality of a representation is determined by the same rule as the materiality of a concealment." Ins.Code, § 360. "A statement in a policy of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty thereof." Ins.Code, § 441. "A warranty may relate to the past, the present, the future, or to any or all of these." Ins.Code, § 444. "A statement in a policy, which imports that there is an intention to do or not to do a thing which materially affects the risk, is a warranty that such act or omission will take place." Ins.Code, § 445. "The violation of a material warranty or other material provision of a policy, on the part of either party thereto, entitles the other to rescind." Ins.Code, § 447.

[12, 13] This specification in the Insurance Code of circumstances under which a party to an insurance contract may rescind does not mean that rescission in any such case is the exclusive remedy. These provisions of the Insurance Code are in the nature of special provisions pertaining to insurance contracts, which are superimposed upon those provisions of law which govern contracts generally. For example, § 650 of the Insurance Code, which states that "Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this part such right may be exercised at any time previous to the commencement of an action on the contract", must be read in conjunction with § 338 of the Code of Civil Procedure, § 1689 of the Civil Code, and other applicable provisions. As thus read it means that "the insurer may rescind at any time

within the statutory period providing no action has been commenced upon the policy." Federal Life Ins. Co. v. Cary, 20 Cal.App.2d 257, 261, 67 P.2d 129, 131.

It seems clear, therefore, that the rights of rescission which the Insurance Code recognizes and limits are not in derogation of other remedial rights which are recognized and implemented by other provisions of law, including but not limited to §§ 1572, 1709, 1710, 3281, 3300, and 3333 of the Civil Code.

It follows that the judgment herein correctly awarded the defendant reimbursement from plaintiff of the moneys paid to the dependents of Payne pursuant to the final decision of the Industrial Accident Commission, unless that decision operated to preclude the defendant from later prosecuting its action for damages against the plaintiff.

In respect to the employer's claim for reimbursement for the expenditures made or incurred by it in conducting its own defense on its own behalf in the proceeding before the Industrial Accident Commission, the facts already narrated are pertinent and applicable. Reasonably soon after learning that Payne was a partner-employee of the insured copartnership, and that Payne's dependents had filed an application with the Industrial Accident Commission, defendant disavowed liability to defend the proceeding before the commission on plaintiff's behalf and so informed plaintiff. Upon receipt of such information the plaintiff undertook and prosecuted its own defense in that proceeding. For reimbursement, it relies upon the contract, invokes defendant's express promise to defend the employer against compensation claims of its employees and their dependents. But at the threshold of the suit plaintiff is confronted with its own warranties including the affirmative warranty that the four persons named as partners were the only members of the insured and that Payne was not a member. Compliance with the terms of this warranty is a condition precedent to a right of recovery in so far as this particular risk is concerned. Noncompliance defeats recovery. See discussion of "warranties" in insurance contracts, in McKenzie v. Scottish Union & National Ins. Co., 112 Cal. 548, 554–555, 44 P. 922. The conclusion is irresistible that the trial court correctly decided that plaintiff is not entitled to reimbursement from the defendant.

[14, 15] At this point it is desirable to make note of the fact that there appears to be some confusion upon the part of the litigants concerning the theory of the case. Both in the pleadings and in the briefs there appear statements here and there suggestive of the concept that, although bound by the contract for the benefit of the dependents of the insured employee, defendant sought to rescind that contract as between it and the plaintiff as concerns the coverage of Payne. However, the facts were all pleaded and proved, the case was fully tried, and all facets of every conceivable issue were adequately developed during the trial. We think, therefore, that this is a case in which no mere mistaken or incomplete statement of a legal theory should prevent the granting of "any relief consistent with the case made by the complaint [or answer, counterclaim, or cross-complaint] and embraced within the issue." Code Civ.Proc. § 580. "Moreover, the matter of pleading becomes unimportant when a case is fairly tried upon the merits and under circumstances which indicate that nothing in the pleadings misled the unsuccessful litigant to his injury." Buxbom v. Smith, 23 Cal.2d 535, 543, 145 P.2d 305, 308. In this connection we may and do adopt the words of the reviewing court in the Buxbom case: "A careful review of the entire record in this case in the light of the foregoing observations compels the conclusion that the relief awarded plaintiff [defendant] is commensurate with the injuries shown to have been sustained." 23 Cal.2d at page 543, 145 P.2d at page 308.

[16] (2) *The evidence supports the finding that the proceeding before the Industrial Accident Commission did not involve the issues of misrepresentation, concealment, and breach of warranty by the insured employer as involved in the present action.* It follows that the commission's

decision did not preclude consideration and determination of those issues in the present action.

[17] By this statement, we do not mean to suggest that the Industrial Accident Commission was without jurisdiction to decide such questions if appropriately presented or necessarily involved in the proceeding before it wherein Payne's dependents appeared as applicants and the parties to the present action as codefendants. See French v. Rishell, 40 Cal.2d 477, 254 P.2d 26, particularly including the authorities cited at pages 480, and 27 respectively, and Truck Insurance Exchange v. Industrial Accident Commission, 36 Cal.2d 646, 652, 226 P.2d 583. The fact that the insured and the insurer were co-defendants in the proceeding before the Industrial Accident Commission did not necessarily prevent the commission's determination of issues properly before it from becoming res judicata as between them as well as between either of them and the dependents of Payne. See Lumbermen's Mut. Casualty Co. v. Bissell, 220 Mich. 352, 190 N.W. 283, 287, 28 A.L.R. 874, 876; Fidelity & Casualty Co. of New York v. Vantaggi, 300 Mich. 528, 2 N.W.2d 490, 492; Employers' Liability Assur. Corporation v. Matlock, 151 Kan. 293, 98 P.2d 456, 127 A.L.R. 461. In the case last cited the court applied principles enunciated in Employers' Liability Assur. Corporation Limited, of England v. Industrial Accident Commission, 177 Cal. 771, 171 P. 935, and in General Accident etc. Corporation v. Industrial Accident Commission, supra, 196 Cal. 179, 237 P. 33.

[18] For the purpose of the present discussion we may assume that the decision of the Commission that the insurance contract was in effect at the time of Payne's accident and covered his dependents, impliedly determined there had been no cancellation or rescission,[1] and that such determination binds the insurer in all subsequent actions or proceedings, whether between it and Payne's dependents or between it and the insured employer. However, in such a case, a determination, express or implied, that there had been no rescission would not necessarily be a determination of the issues of misrepresentation, concealment, and breach of warranty joined in the present action. In the former proceeding the insurer may not have pleaded or proved rescission or an attempt to rescind, or, his attempted rescission, if any, may have failed for lack of proper or timely notice of rescission. It will profit us, therefore, to examine the record of the former proceeding, to the extent that it was put in evidence herein, to ascertain what light it throws upon these questions.

That record includes no pleading by the insurer in which it alleged that it had rescinded the contract of insurance nor does it include any evidence that the insurer had given formal notice of rescission. There was testimony that the insurer's attorney informed the insured employer that the insurer would not undertake the defense of the employer in the proceeding before the Industrial Accident Commission. That did not necessarily import an intent upon the part of the insurer to rescind the insurance contract. The Industrial Accident Commission rendered three decisions: the first, upon the original hearing; the second, upon a rehearing; the third, in response to the remittitur from the District Court of Appeal following the decision of the latter upon review of the commission's second decision, reported in Mary Len Mine v. Industrial Accident Commission, 64 Cal.App.2d 153, 148 P.2d 106. In none of the decisions of the commission nor in the decision of the District Court of Appeal, do we find the subject of rescission of the insurance contract mentioned,—nothing that suggests that the question of rescission was considered or decided by the commission or by the court. Instead, those decisions reflect consideration of the question whether or not Payne, being a partner, was excluded as a risk because of the stipulation in the contract to the effect that unless "specifically stated in the Schedule or covered by endorsement hereon, this policy does not cover the following * * * persons * * *; if the insured be a * * * copartnership, any member of such * * * copartnership * * *" The District Court of Appeal found this clause ambiguous and, applying the principle that an ambiguity in an insurance contract should be construed most strongly against the insurer, determined that the policy included Payne as a partner who was working for wages irrespective of profit. In addition, there was evidence before the commission which indicated that the insurer recognized the continued existence and effectiveness of the policy by collecting and receiving from the insured employer premiums covering at least the remainder of the policy year which ended December 30, 1941, approximately 5½ months after the accident which caused Payne's death. Plaintiff introduced in evidence a large portion of the transcript of the hearings held by the commission, including all but 37 of 316 pages of the record of proceedings had after the commission had granted a rehearing. Examination of that transcript does not indicate that the commission was considering any question of fraud or rescission. Indeed, it was the employer's counsel who sought, unsuccessfully, to bring such questions into the case, saying "there is an issue on insurance contracts; the direct issue is between these insured employers and the * * * Fund as to that policy * * *" (Ex. 8 herein; Tr. of Feb. 26, 1943, p. 12; upon rehearing.) The referee replied, "We are only concerned * * * with the status up to the time of the injury." The insurer's attorney commented, "That is our position." (Idem, p. 12.) After some discussion the referee ruled that any action taken by the parties to the insurance contract after the date of the injury could not affect the person for whose benefit the policy was made "because it is only up to the date of injury that the status as it existed concerns us." (Idem, p. 13.) Later, the employer's counsel asserted, "The court has indicated many times the commission has jurisdiction to determine controversies concerning insurance policies." The referee ruled, "They have, but it isn't before us." (Idem, p. 18.) These and other portions of the transcript support an inference that the commission's referee did not consider that he had before him for consideration and determination any issues between the employer and the insurer concerning fraud, concealment, breach of contract, or rescission. At the trial in the superior court, plaintiff did introduce some oral testimony to the effect that such questions were in issue before the commission. That was but secondary evidence, the conclusion or opinion of the witness. Some of it was limited by the trial court to the single issue of the reasonable value of the services rendered by the employer's counsel in the proceedings before the commission. It was not of any considerable weight and at most produced a mere conflict in evidence. Plaintiff introduced documentary evidence indicating that the insurer did seek to raise these issues, or some of them, before the District Court of Appeal upon review of the commission's decision. That would be too late if timely presentation had not been made to the commission. The absence of reference thereto in the reviewing court's decision suggests that that court so viewed it. This record amply supports the trial court's finding that the decision of the Industrial Accident Commission was not res judicata of the issues of misrepresentation, concealment and breach of warranty. The judgment must be affirmed.

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[1] The insurer could not rescind after Payne's dependents filed their claim with the Commission, if such filing was the "commencement of an action on the contract" within the meaning of § 650 of the Insurance Code and if § 650 was applicable to the insurance contract here involved.

In view of our conclusions upon the two main points upon this appeal it is not necessary to consider other questions discussed by the parties.

The judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

42 Cal.2d 55

FLYNN v. FLYNN.

L. A. 22305.

Supreme Court of California.
In Bank.
Jan. 8, 1954.

Proceeding on divorced husband's motion to modify terms of property settlement agreement which had been ratified and specifically incorporated into divorce decree. The Superior Court of Los Angeles County, Elmer D. Doyle, J., entered order denying the motion, and the husband appealed. The Supreme Court, Traynor, J., held, inter alia, that since property settlement agreement was incorporated into divorce decree and it provided, within maximum and minimum limits, that husband should pay wife ten percent of his gross income unless such income should continue for one year or more at less than $90,000 per year without fault on his part, in which case husband was given right to petition court for reduction of payments, court had jurisdiction to modify provision for monthly payment but could do so only to extent agreement authorized modification.

Affirmed.

Carter, J., dissented in part.

Prior opinion 252 P.2d 358.

1. Judgment ⚿582

Merger is the substitution of rights and duties under the judgment or the decree for those under the agreement or cause of action sued upon.

2. Divorce ⚿255

Where divorce decree provided that property settlement agreement between the parties was specifically incorporated and made a part of the decree, the parties and the court intended that the agreement should be merged in the decree.

3. Judgment ⚿219

A document may be incorporated, either expressly or by apt reference, into judgment or decree so as to make it an operative part of the court order.

4. Judgment ⚿219

A document may effectively be incorporated by reference into judgment or decree even though it is not part of the permanent records of the court.

5. Divorce ⚿249(2), 254

Fact that property settlement agreement was not part of permanent records of court did not prevent it from being incorporated into divorce decree by reference.

6. Divorce ⚿245(1)

Where property settlement agreement was incorporated in divorce decree and provided, within maximum and minimum limits, that husband should pay wife ten percent of his gross income unless such income should continue for one year or more at less than $90,000 per year without fault on his part, in which case husband was given right to petition court for deduction of payments, court had jurisdiction to modify provision for monthly payment but could do so only to extent agreement authorized modification. Civ.Code, § 139.

Jerry Giesler, Beverly Hills, and Robert E. Ford, Los Angeles, for appellant.

Loeb & Loeb, Herman F. Selvin and Harry L. Gershon, Los Angeles, for respondent.

TRAYNOR, Justice.

On October 11, 1941, plaintiff Liliane Carre Flynn and her husband, defendant Errol Flynn, executed a separation agreement providing for a division of their community property and the support and maintenance of plaintiff and the minor child of the parties. The agreement also provided that in any action for divorce brought by either party "this agreement may be approved by [the] court and that the terms and provisions hereof may be made and become a part of and incorporated in any decree which may be made by such court, and the parties ordered to comply with the provisions hereof." In 1942, plaintiff was awarded a divorce from defendant, and the interlocutory decree provided that "The property settlement agreement between the parties hereto dated October 11, 1941 and received in evidence herein, is hereby ratified, approved and confirmed and the same is hereby specifically incorporated herein and made a part of this decree, and defendant is hereby ordered to make all of the payments provided therein to be paid by him, at the times and in the manner therein provided, and plaintiff and defendant are hereby ordered to comply in all respects with each and all of the terms and provisions of said agreement and to perform all their obligations thereunder as therein provided." The final judgment incorporated the foregoing provision of the interlocutory decree by reference.

In 1950 defendant petitioned the court to order a reduction in the monthly payments provided in the agreement on the ground of changed circumstances. In October, 1951, the court entered its order denying defendant's motion on the ground that it lacked jurisdiction to modify the interlocutory decree because the property settlement agreement was incorporated by reference only. Defendant has appealed.

Defendant contends that the quoted provision of the interlocutory decree merged the agreement into the decree and that therefore the court had continuing jurisdiction under section 139 of the Civil Code to modify the provisions for support and maintenance. Plaintiff contends, on the other hand, that since the agreement was incorporated by reference only, a merger did not occur, and that in any event modification was precluded by the terms of the agreement.

[1] Merger is the substitution of rights and duties under the judgment or the decree for those under the agreement or cause of action sued upon. See, Restatement, Judgments, § 47, comment a; Hough v. Hough, 26 Cal.2d 605, 610, 160 P.2d 15; Timm v. McCartney, 30 Cal.App.2d 241, 248, 85 P.2d 920. The question as to what extent, if any, a merger has occurred, when a separation agreement has been presented to the court in a divorce action, arises in various situations. Thus, it may be necessary to determine whether or not contempt will lie to enforce the agreement, whether or not other judgment remedies, such as execution or a suit on the judgment, are available, whether or not an action may still be maintained on the agreement itself, and whether or not there is an order of the court that may be modified under the provisions of section 139 of the Civil Code.

[2] In any of these situations it is first necessary to determine whether the parties and the court intended a merger. If the agreement is expressly set out in the decree, and the court orders that it be performed, it is clear that a merger is intended. Plummer v. Superior Court, 20 Cal.2d 158, 165, 124 P.2d 5; Lazar v. Superior Court, 16 Cal.2d 617, 620, 107 P.2d 249. On the other hand, the parties may intend only to have the validity of the agreement established, and not to have it become a part of the decree enforceable as such. See, Plummer v. Superior Court, 20 Cal.2d 158, 164, 124 P.2d 5; Howarth v. Howarth, 81 Cal.App.2d 266, 272, 183 P.2d 670; Baxter v. Baxter, 3 Cal.App.2d 676, 685, 40 P.2d 536; Schnerr v. Schnerr, 128 Cal.App. 363, 368, 17 P.2d 749. Whether or not a merger is intended, the agreement may be incorporated into the decree either expressly or by reference. If a merger is not intended, the purpose of incorporation will be only to identify the agreement so as to render its validity res judicata in any subsequent action based upon it. Howarth v. Howarth, 81 Cal.App.2d 266, 272, 183 P.2d 670; Baxter v. Baxter, 3 Cal.App.2d 676, 685, 40 P.2d 536; see, Queen v. Queen, 44 Cal.App.2d 475, 479, 482, 112 P.2d 755. If a merger is intended, the purpose of incorporation is, of course, to make the agreement an operative part of the decree. In the absence of an express order to perform all or part of the agreement, it may be difficult to determine whether or not a merger was intended. See, Plummer v. Superior Court, 20 Cal.2d 158, 165, 124 P.2d 5; Lazar v. Superior Court, 16 Cal.2d 617, 620, 107 P.2d 249; 1 Armstrong, California Family Law, pp. 423–427; cf., Kent v. Superior Court, 106 Cal.App.2d 593, 595–596, 235 P.2d 420; Young v. Superior Court, 105 Cal.App.2d 65, 66–67, 233 P.2d 39; Shogren v. Superior Court, 93 Cal.App.2d 356, 364, 209 P.2d 108. In the present case, however, there can be no doubt as to the intent of the parties and the court that a merger should occur. Thus, the decree provided that the agreement "is hereby specifically incorporated herein and made a part of this decree,

and defendant is hereby ordered to make all of the payments provided therein to be paid by him. * * *"

[3–5] Once it is determined that a merger was intended, it is necessary to decide whether the decree has the requisite formalities to permit its enforcement in place of the agreement it was intended to supersede. It is settled that a document may be incorporated either expressly or by apt reference into a judgment or decree so as to make it an operative part of the order of the court. Federal Farm Mtg. Corp. v. Sandberg, 35 Cal.2d 1, 3, 215 P.2d 721; Title Ins., etc., Co. v. Miller & Lux., 183 Cal. 71, 89, 90, 190 P. 433; Horton v. Winbigler, 175 Cal. 149, 158–159, 165 P. 423; Hogue v. Fanning, 73 Cal. 54, 57, 14 P. 560; Kelly v. McKibben, 54 Cal. 192, 193–194; Kittle v. Lang, 107 Cal.App.2d 604, 612, 237 P.2d 673; Petry v. Superior Court, 46 Cal.App.2d 756, 760, 116 P.2d 954; Ex parte Weiler, 106 Cal.App. 485, 488, 289 P. 645. Plaintiff contends, however, that a document may not effectively be incorporated by reference unless it is part of the permanent records of the court. She points out that since in this case the agreement was merely introduced in evidence as an exhibit, it could be withdrawn or destroyed, and that therefore interested parties could not by searching the records of the court "construct a complete picture of the rights and obligations of the parties." See, Price v. Price, 85 Cal.App.2d 732, 735, 194 P.2d 101. These considerations may justify modifying the interlocutory decree on appeal to require that the agreement be attached to the decree. We do not believe, however, that they are sufficient to require us to hold that the decree, now final, is insufficient to effect its clearly stated intent.

It is unnecessary to decide whether the fact that the agreement was incorporated by reference only prevents its enforcement by contempt proceedings. See, Shogren v. Superior Court, 93 Cal.App.2d 356, 364, 209 P.2d 108; cf., City of Vernon v. Superior Court, 38 Cal.2d 509, 513–514, 241 P.2d 243. Greater certainty and clarity may be required to support such proceedings than are necessary to support other judgment remedies or establish the agreement as part of the order of the court for modification purposes. See, Plummer v. Superior Court, 20 Cal.2d 158, 164–165, 124 P.2d 5; 39 Calif.L.Rev. 250, 252. Moreover, we are not here concerned with the rights of third parties who may have dealt with plaintiff or defendant with respect to the specific property covered by the agreement in ignorance of its terms. We are concerned only with the provisions of the agreement providing for monthly payments in litigation between the parties themselves. Under these circumstances, the necessity of referring to an extrinsic document presents no insuperable barrier to giving effect to the decree, as is demonstrated by the many cases where the court in modification proceedings has taken extrinsic evidence to determine whether the provision for monthly payments was one for alimony subject to modification or part of a property settlement not subject to modification. See, e. g., Tuttle v. Tuttle, 38 Cal.2d 419, 420–422, 240 P.2d 587; Codorniz v. Codorniz, 34 Cal.2d 811, 815, 215 P.2d 32. Thus, in cases in which it is difficult or impossible accurately to determine from the permanent records of the court alone the intended character of the payments involved, courts do not hesitate to consider all of the admissible extrinsic evidence correctly to interpret their decrees. Certainly no greater difficulties are presented by permitting reference to an extrinsic document to give effect to the clearly expressed intent of the decree. Thus in this case, the decree may be given its intended effect by referring to an adequately identified document, and the fact that the document is not a part of the permanent records of the court does not vitiate the decree. Goatman v. Fuller, 191 Cal. 245, 251, 216 P. 35; De Sepulveda v. Baugh, 74 Cal. 468, 474, 16 P. 223; Kittle v. Lang, 107 Cal.App.2d 604, 612, 237 P.2d 673; McLean v. Ladewig, 2 Cal.App.2d 21, 25–26, 37 P.2d 502; see also, Newport v. Hatton, 195 Cal. 132, 156, 231 P. 987; Rosenthal v. Matthews, 100 Cal. 81, 83, 34 P. 624. Price v. Price, 85 Cal.App.2d 732, 194 P.2d 101, is contrary to the foregoing authorities and is disapproved.

[6] An examination of the property settlement incorporated by reference in the

interlocutory decree makes clear that it is an integrated bargain of the type considered in Dexter v. Dexter, Cal.Sup., 265 P.2d 873, and Fox v. Fox, Cal.Sup., 265 P.2d 881. Accordingly, the provision for monthly payments may not be modified contrary to its terms. The agreement provides that defendant shall make payments totalling $18,000 per year or ten percent of his gross income as therein defined, whichever is less. In no event, however, is he to pay less than $9,000 per year unless his gross income falls below the sum of $90,000 per year and so continues for a period of one year or more, for any reason except his wilful refusal or neglect to seek, obtain, or accept employment. If his income does fall below $90,000 per year for other than the excepted reasons and so continues for a year or more, the agreement provides that he may petition the court in the divorce action to reduce the payments until his income again rises to $90,000 a year or more. Since the parties have provided that the court may modify the payments ordered pursuant to the terms of their agreement, the court has jurisdiction to do so in accordance with the agreement. Miller v. Superior Court, 9 Cal.2d 733, 740, 72 P.2d 868; Hogarty v. Hogarty, 188 Cal. 625, 628, 206 P. 79; see, Fox v. Fox, Cal.Sup., 265 P.2d 881. At the time the order was entered in this case, however, the record indicates that, although defendant had been unable to work for several months, his income had not remained below $90,000 for one year, and therefore an order reducing the payments would have been improper. He may renew his motion for a reduction in the monthly payments in accordance with the terms of the property settlement agreement any time the facts so justify.

The order is affirmed.

GIBSON, C. J., and SHENK, EDMONDS and SPENCE, JJ., concur.

SCHAUER, Justice (concurring).

I concur in the judgment. I do not agree that by the mere fiat of a declaration in a judgment, when upon the face of the judgment itself the falsity of the declaration is manifest, this court or anyone else is bound, or even entitled, to accept the falsity as verity.

The statement in the decree in this case that "The property settlement agreement between the parties hereto * * * is hereby specifically incorporated herein and made a part of this decree" undoubtedly was intended to be verity but the most casual inspection of the entire judgment (or the judgment roll) discloses that in truth the agreement is *not* "incorporated" therein or "made a part" thereof. "In no case is a judgment effectual for any purpose until entered." (Code Civ.Proc. § 664.) To enter a judgment means to copy it in the "judgment book" so that it becomes a permanent and public record (see Code Civ.Proc. § 668), so that he who reads may know its content. Any portion of a judgment not entered in the judgment book would be ineffectual for any purpose. If the clerk by error omitted to enter any part of a judgment which had been filed, the error of the ministerial officer could be corrected; but if he has performed his duty and the judgment as entered is truly the judgment as rendered, and that judgment has become final, then neither this court nor any other court or person has power to add words to the language of that judgment.

Neither do I agree with implications in the majority opinion that a court may arbitrarily disregard the whole or any portion of a property settlement agreement which has been fairly executed. Husband and wife are competent to contract with each other in respect to property rights to the same extent "which either might if unmarried." (Civ.Code, §§ 158, 159.) When divorce is contemplated, public policy favors the settlement of property rights by agreement. The most basic rules governing freedom to contract and the integrity of contracts require that agreements between competent parties, fairly entered into and with a good consideration, be respected.

The trial court correctly denied defendant's motion.

CARTER, Justice (concurring and dissenting).

I concur in the affirmance of the order, but dissent as to some of the reasoning set forth in the majority opinion.

In the case at bar, the interlocutory decree provided that "The property settlement agreement between the parties hereto dated October 11, 1941, and received in evidence herein, is hereby ratified, approved and confirmed and the same is hereby specifically incorporated herein and made a part of this decree, and defendant is hereby ordered to make all of the payments provided therein to be paid by him, at the times and in the manner therein provided, and plaintiff and defendant are hereby ordered to comply in all respects with each and all of the terms and provisions of said agreement and to perform all their obligations thereunder as therein provided." This provision of the interlocutory decree was incorporated in the final judgment by reference. In the majority opinion it is held that the agreement entered into between the parties was an integrated property settlement agreement which could not be modified by the court in the absence of another agreement between the parties. With this holding, I agree. I do not agree that the paragraph above quoted is sufficient to merge the agreement into the interlocutory decree of divorce.

I am also of the opinion that if the decree does not embody the agreement either in substance or in *haec verba* it is not an operative part of it and may not be enforced as a part of the decree. This is true even though the agreement may have been introduced in evidence and approved by the court. If the agreement is merely introduced in evidence as an exhibit, as it undoubtedly was here, it could be withdrawn or destroyed and interested parties could not, by searching the records of the court "construct a complete picture of the rights and obligations of the parties". Price v. Price, 85 Cal.App.2d 732, 735, 194 P.2d 101, 103.

In Howarth v. Howarth, 81 Cal.App.2d 266, 183 P.2d 670, the question was whether an action for support money would lie on an agreement for support where the court granting the divorce decree (Utah) approved the agreement but did not embody it in the decree. It was held that an action would lie on the agreement but not the decree. See, also, Taylor v. Taylor, 39 Cal.App.2d 518, 103 P.2d 575; Robertson v. Robertson, 34 Cal.App.2d 113, 93 P.2d 175; Ross v. Ross, 1 Cal.2d 368, 35 P.2d 316. It should be obvious that where the agreement has not been properly embodied in the decree but the court purports to order performance of it and makes no other provision for support or division of property, it either has not passed upon the questions of support, or has, in effect, denied alimony. Indeed, where a decree has made no provision for alimony, the court cannot later modify it to provide for alimony. This is true unless the court in some authorized manner has reserved jurisdiction to do so. In re Estate of Brooks, 28 Cal.2d 748, 171 P.2d 724; Monroe v. Superior Court, 28 Cal.2d 427, 170 P.2d 473; Long v. Long, 17 Cal.2d 409, 110 P.2d 383; O'Brien v. O'Brien, 130 Cal. 409, 62 P. 598; Howell v. Howell, 104 Cal. 45, 37 P. 770. The mere confirmation or approval of the agreement without embodying it in the decree, at most, determines that the agreement is valid and may be enforced in a separate action between the parties. Price v. Price, 85 CalApp.2d 732, 194 P.2d 101. If the agreement is an integrated property settlement agreement, or if it is a valid agreement entered into between the spouses for the support and maintenance of one of them, it may not, even if embodied in the decree, be modified without the consent of both parties. See Fox v. Fox, Cal.Sup., 265 P.2d 881; Dexter v. Dexter, Cal.Sup., 265 P.2d 873.

A separation agreement, whether it involves property rights or support allowances, or both, has not been embodied in the decree for the purpose of merger, or enforcement by contempt proceedings unless it is set forth in full, or in substance, in the decree itself or is physically attached to the decree and expressly made a part thereof by the language of the decree and compliance with its terms is ordered by the decree. As was said in Price v. Price, supra: "* * * there is a difference for if there is an actual *incorporation* of the agreement into the decree, the decree standing alone then carries within itself the complete measure of the rights and obligations of the parties. In the court's files, the decree or judgment itself supplies all the information necessary to whomsoever may be interested. If recorded it announces to the world the respective interests of the parties in any property involved.

"If on the other hand the agreement is *made a part of the decree by reference* only the above is not true. One searching the file could not construct a complete picture of the rights and obligations of the parties from the decree or judgment alone. Reference might be to an exhibit attached to a *pleading,* to another judgment, or even to an agreement offered in evidence and withdrawn and not available as a part of any public record. In such a case it would not follow that the value attaching to such an unincorporated document would be 'only historical'. It or a true copy thereof would of necessity have to be sought out and produced in order to determine what the complete judgment actually provided. If it could not be produced, or its terms definitely established, then that part of the judgment represented by it could not be enforced. In particular it could not be enforced by contempt proceedings." (Emphasis added.) In the majority opinion, it is said that the Price case, being contrary to the following authorities, Goatman v. Fuller, 191 Cal. 245, 251, 216 P. 35; De Sepulveda v. Baugh, 74 Cal. 468, 474, 16 P. 223; Kittle v. Lang, 107 Cal.App.2d 604, 612, 237 P.2d 673; McLean v. Ladewig, 2 Cal.App.2d 21, 25–26, 37 P.2d 502; Newport v. Hatton, 195 Cal. 132, 156, 231 P. 987; Rosenthal v. Matthews, 100 Cal. 81, 83, 34 P. 624, is disapproved.

In Goatman v. Fuller, supra, an erroneous description of certain real property involved in a lease was carried over into the findings and judgment in an action on the lease. The trial court granted plaintiff's motion to amend the complaint, findings and judgment *nunc pro tunc* to give the correct description. The court there said [191 Cal. 245, 216 P. 39]: "Moreover, there is no contention in this case but that the description of the land originally contained in the judgment is erroneous. Therefore the only effect of a reversal of the order would be to remit respondents to an action in equity, in which they unquestionably would be entitled to have the judgment amended. Young v. Fink, 119 Cal. 107, 50 P. 1060; In re McGrew, supra [183 Cal. 177, 190 P. 804]. To obviate any such further proceedings, let the order be affirmed."

In De Sepulveda v. Baugh, supra, a quiet title action was involved. A certain tract was described by metes and bounds with an exception which was described as being recorded in certain numbered books, on certain numbered pages, in the records of Los Angeles County. The court there held that while the description was not an "ideal" one, it was not uncertain or doubtful and that the judgment was not "void." The reference here was to public records.

In Newport v. Hatton, supra, an action to establish the right of plaintiffs in certain land and to the proceeds of the sale thereof was involved. The question was which 75 acres of the south half of a certain quarter section was involved. There the court refused to declare the judgment a nullity because of the defective description and said that whether or not the description was defective must be tested by rules of evidence applied ordinarily to the subject.

In Rosenthal v. Matthews, supra, another description of land was involved. The complaint definitely and correctly described the premises; the judgment described it correctly but excepted from its effect certain parts of the land " 'as were sown to grain by the defendant during the fall of 1890 and the winter of 1891.' " The court held that the land could be identified by extraneous evidence "as in cases of the removal or destruction of stakes or other monuments called for in deeds and patents."

In McLean v. Ladewig, supra, a quiet title action was involved. It was held there that when property is well described by name, a conveyance by that designation is sufficient and a subsequent particular description could not be held to be used in the sense of restriction.

In Kittle v. Lang, supra [107 Cal.App.2d 604, 237 P.2d 678], it was said: "It is true that findings, as well as the judgment based thereon, should be definite and certain. At least they should be sufficiently clear and definite to enable a party to comply with their requirements. * * * The judgment here involved is merely an order to the defendant to turn over to plaintiff such part of the personal property assets of the partnership now in defendant's possession as are described in Exhibit I, which exhibit is made a part of the findings and judgment by reference. Defendant admitted he still had in his possession much of this equipment but claimed title to it under the terms of the quitclaim deed, which deed the court found was ineffective as to this particular personal property.

"As between the parties to this action, we believe the findings and judgment, in this respect, are sufficiently clear and definite to enable defendant to comply with its requirements."

It is quite apparent that the Kittle case is the only one of these at all like the case at bar or the Price case which has been erroneously disapproved. In all the others, defective descriptions of real property were involved and, in all of them, it was possible to make certain the deficiency. In a divorce action where the property settlement agreement of the parties is not sufficiently incorporated into the interlocutory and final decrees, an action may still be brought on the *agreement* itself but, in my opinion, may not be brought to enforce the judgment because there is nothing in the judgment to enforce. It is also apparent that a majority of this court really believes that the agreement was insufficiently incorporated in the decree for they say: "These considerations may justify modifying the interlocutory decree on appeal to require that the agreement be attached to the decree. We do not believe, however, that they are sufficient to require us to hold that the decree, now final, is insufficient to effect its clearly stated intent."

This case adds a great deal to the confusion which has heretofore existed as to what constitutes an incorporation. To say that the facts here present a sufficient incorporation and then to say that the interlocutory decree, which is now final, may be *modified on appeal to require attachment of the agreement* thereto is the height of absurdity. It also is an effective trap designed to catch both wary and unwary attorneys who are trying to honestly and conscientiously protect their clients' interests. Under the holding here, it is absolutely impossible for attorneys to know whether this court will, years later, determine that there was an incorporation, or *order* one whether or not it was intended at the time of the interlocutory decree.

In my opinion there was no incorporation here.

The proper rule and the rule which should prevail is that a valid agreement between husband and wife fixing the right of support or alimony following divorce, even though it is not integrated with a property settlement, cannot be altered by the court in the ensuing divorce action, or, if incorporated in the decree, the latter may not be modified, unless the agreement so provides. Such an agreement may, of course, be disregarded if it is tainted with fraud or there is overreaching. However, after merger in the decree, the decree is not subject to modification except to the extent that ordinary judgments are subject to attack. This is the logical result which flows from Adams v. Adams, 29 Cal.2d 621, 177 P.2d 265. We there held that separation agreements in which the support and maintenance provisions are so interwoven that they constitute a part of a division of the property of the parties, and thus not in the nature of alimony, are not subject to modification either before or after merger except as mentioned in the above stated rule. It was said in the Adams case, 29 Cal.2d at page 624, 177 P.2d at page 267, that: "Property settlement agreements occupy a favored position in the law of this state and are sanctioned by the Civil Code. Hill v. Hill, 23 Cal.2d 82, 89, 142 P.2d 417; Hensley v. Hensley, 179 Cal. 284, 287, 183 P. 445; Civ.Code §§ 158, 159. Such agreements are usually made with the advice of counsel after careful negotiations, and the courts, in accord with legislative sanction, prefer agreement rather than litigation. Hill v. Hill, supra, 23 Cal.2d at page 89, 142 P.2d 417. When the parties have finally agreed upon the division of their property, the courts are loath to disturb their agreement except for equitable considerations. A property settlement agreement, therefore, that is not tainted by fraud or compulsion or is not in violation of the confidential relationship of the parties is valid and binding on the court. Hough v. Hough, 26 Cal.2d 605, 614, 160 P.2d 15; Hogarty v. Hogarty, 188 Cal. 625, 628, 206 P. 79; In re Estate of Belknap, 66 Cal.App.2d 644, 651–652, 152 P.2d 657; Baxter v. Baxter, 3 Cal.App.2d 676, 681, 40 P.2d 536; Brown v. Brown, 83 Cal.App. 74, 82, 256 P. 595; McCahan v. McCahan, 47 Cal.App. 176, 183, 190 P. 460.

"* * * The contract may even provide solely for support and maintenance without reference to a division of property. These contracts, if equitable, are enforceable even though not presented to the court in a divorce action." Those principles were stated as to "property settlement agreements," yet they are equally applicable to agreements for alimony. It is true that agreements settling property rights are specifically authorized by the statute but the same is also true as to agreements for alimony. Section 158 of the Civil Code provides that: "Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried". Section 159 reads: "A husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, and *except that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them* and of their children during such separation." (Emphasis added.) And further indicating the propriety of such agreements, section 175 provides: "A husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified, by his misconduct, in abandoning him; nor is he liable for her support when she is living separate from him, by agreement, unless such support is stipulated in the agreement." Such agreements are enforceable and binding upon the parties, if equitable, even though not presented to the court in the divorce action. Adams v. Adams, supra, 29 Cal.2d 621, 624, 177 P.2d 265; Sanborn v. Sanborn, 3 Cal.App.2d 437, 39 P.2d 830; Brown v. Brown, 83 Cal.App. 74, 256 P. 595.

There are cases that hold or state that the incorporation of a support agreement in the divorce decree does not prevent the modification of the decree. See Adams v. Adams, supra, 29 Cal.2d 621, 177 P.2d 265; Hough v. Hough, supra, 26 Cal.2d 605, 160 P.2d 15; Puckett v. Puckett, 21 Cal.2d 833, 136 P.2d 1; and cases cited in those cases. Those cases are based on the theory that the court in an action for divorce has general power over alimony and that such power cannot be taken away by agreement of the parties as to alimony either when considering the question in the divorce action, or in considering the question of modification of the decree, where the agreement has been incorporated in the decree, because it has power to determine fault upon which an award of alimony may depend, Civ.Code, § 139; and that there is a public policy against the possibility that the care of the spouse will become a public charge where the agreement does not make adequate provision. In regard to permanent alimony, section 139 of the Civil Code provides that when the divorce is granted for an offense of the husband, the court "may" provide for the wife's support by him and "may" modify its orders on that subject. The court "may" require the payment of temporary alimony—support during the pendency of the action. Civ.Code, § 137. It will be noted that the authority of the court is stated in permissive rather than mandatory language. The wording does not exclude the propriety of the parties contracting on the subject or the court being bound by the contract. Those sections must be read in conjunction with section 159, supra, which expressly authorizes those contracts. It is not to be supposed that the Legislature would expressly authorize those contracts and at the same time leave it to the whim or caprice of the divorce court whether any effect was to be given to them. The right of freedom of contract given by section 159, supra, certainly eliminates any argument that a married woman is not competent to contract or that she needs any protection by the court that is not afforded to other contracting parties. Moreover, it must be noted that the court in the divorce action is given the authority to divide the community property of the spouses according to various fault factors (Civ.Code, § 146, which provides that community property "shall" be assigned as there set forth), yet it is held by a legion of cases that a contract dividing such property when presented to the court in the divorce action is *binding* on the court. Adams v. Adams, supra, 29 Cal.2d 621, 177 P.2d 265, and cases cited supra. The same construction should be given to sections 137 and 139 of the Civil Code. It is true that nothing is said in section 146, as there is in section 139, about modifying the property division orders of the court which is understandable, because that is done by one act and does not involve the doing of a series of acts in the future like monthly payments for support, and I am referring to the holdings that the property division *contract* is binding on the court *when presented* in the divorce action. The fact that the code sections authorize giving consideration to fault of the parties in the award of alimony requires no different result because the same is true of a community property division, and as the parties are free to contract as to support, Civ.Code, § 159, supra, they may in their negotiations give consideration to that factor. I would hold, therefore, that there is nothing in the Civil Code sections discussed which prevents giving effect to a purely support contract, nor which makes the decree subject to modification when the contract is merged therein.

The policy factors are not persuasive. The statute, Civ.Code, § 159, expressly declares the policy that the parties may contract on this subject. If they may, effect should be given to their contracts. Being fully advised, they have made their choice on the question of support. Having made the arrangement, they are entitled to have it be given stability in order that each may arrange his future affairs with some degree of certainty. If future contingencies might alter the situation they may provide for them in their contracts. Indeed, terms in the contract giving flexibility to it would be desirable and easily achieved. Courts do not make new contracts or disregard contracts which the parties have made on a subject concerning which they may lawfully contract. 6 Cal. Jur. 326 et seq.

Of course, the parties need not contract unless they desire to do so. They may leave the determination to the court. If they do contract but do not present it to the court in the action and the court makes a determination on the subject of support, then they have waived the contract as fixing their rights and obligations; the decree then is the measure of their rights and duties. If the contract is presented to the court and is approved but not embodied in the decree as heretofore described, then their remedy is on the contract and not the decree. Such is the case at bar.

42 Cal.2d 36

DEXTER v. DEXTER.

L. A. 22499.

Supreme Court of California.
In Bank.
Jan. 8, 1954.

Divorced wife's petition for increase in amount of monthly payments due her under divorce decree which incorporated property settlement agreement providing for such payments. The Superior Court, Los Angeles County, Louis H. Burke, J., and Lewis Drucker, Judge pro tem, entered order refusing modification on ground that it had no jurisdiction to modify amount of payments and entered order for attorney's fees and costs on appeal, and both parties appealed. The Supreme Court, Traynor, J., held, inter alia, that where property settlement agreement provided for support and maintenance of wife and children and stated that parties intended to settle both division of their property and their rights and duties with respect to support and maintenance and that each party waived all rights to support, care and maintenance other than as specially provided in the agreement, the provision for monthly payments was an integral part of the property settlement agreement, not a separable agreement for payment of alimony, and was not subject to modification by court after divorce decree which ratified the agreement.

Affirmed.

Carter, J., dissented in part.

Prior opinion 253 P.2d 999.

1. Husband and Wife ⚷39, 278(1)

A husband and wife may contract with respect to their property and if they are living separate and apart, they may provide for support and maintenance of either of them and their children. Civ.Code, §§ 158, 159.

2. Divorce ⚷245(1), 309

Where provisions for support and maintenance has been made an integral or inseverable part of division of spouses' property under property settlement agreement, and court in divorce action has approved the agreement, its provisions cannot thereafter be modified without consent of both of the parties. Civ.Code, §§ 158, 159.

3. Divorce ⚷245(1), 309

Where property settlement agreement provided for support and maintenance of wife and children and stated that parties intended to settle both division of their property and their rights and duties with respect to support and maintenance and that each party waived all rights to support, care and maintenance other than as specially provided in the agreement, the provision for monthly payments was an integral part of the property settlement agreement, not a separable agreement for payment of alimony, and was not subject to modification by court after divorce decree which ratified and incorporated the agreement. Civ.Code, §§ 139, 158, 159.

4. Husband and Wife ⚷278(5)

The amicable adjustment of property and support and maintenance rights, rather than litigation of such rights, was sufficient consideration to support property settlement agreement, so that fact that community property was divided equally had no effect on validity of provision of agreement whereby both parties waived all rights to support and maintenance other than as provided in the agreement.

5. Divorce ⚷222

Where trial court which had issued divorce decree incorporating property settlement agreement had jurisdiction in wife's proceeding for modification of payments made to her under the agreement and decree to determine the character of the payments involved, that is to determine whether they were alimony so as to be subject to revision by court, the divorce action was still "pending" within statute authorizing court to award attorney fees in pending divorce action. Civ.Code, § 137.3.

See publication Words and Phrases, for other judicial constructions and definitions of "Pending".

6. Divorce ⚷284, 288, 312.4, 312½

Although, in wife's proceeding for modification of payments made to her under divorce decree which incorporated property settlement agreement providing for such payments, it was held that the payments were not subject to modification, where wife had not waived in such agreement any right she might have to attorney's fees and costs, and court had jurisdiction to determine whether payments involved were alimony so as to be subject to modification, court did not abuse discretion in awarding wife costs and attorney fees on appeal.

◆

Hightower & Martin, Irving M. Walker, John L. Martin, Mark Mullin and John L. Martin, Los Angeles, for plaintiff and appellant.

Macfarlane, Schaefer & Haun and William Gamble, Los Angeles, for defendant and appellant.

TRAYNOR, Justice.

On May 25, 1944, plaintiff Mary Dexter and her husband, defendant Raymond Dexter, executed an agreement providing for the division of their community property and the support and maintenance of plaintiff and the children of the marriage. The agreement recited that the parties were separated and had lived apart for some time, that the separation appeared to be permanent, and that "The said parties desire to effect a division of their community property and to provide for the support and maintenance of [plaintiff] and said children by friendly agreement, instead of resorting to court for said purpose." It then provided that certain enumerated property should be conveyed to and become the separate property of plaintiff. The next paragraphs provided that "[Defendant] agrees to pay to [plaintiff] for her support and maintenance and the support of their adult daughter and minor son, the sum of one hundred fifty dollars ($150.00) per month. * * * In addition thereto first party agrees to pay for the daughter's Sorority dues and other expenses the sum of twenty-five ($25.00) per month, commencing June 1, 1944, and continuing thereafter so long as said daughter remains an undergraduate in college, and unmarried, but not to exceed (2) years from June 1, 1944.

"When the minor son of the parties hereto leaves school and goes to work, or when and if he goes into the military forces of the United States, then the monthly payment of [plaintiff] shall be decreased to one hundred dollars. * * *

"In addition to the above amounts, [defendant] agrees, at his expense, to fix up the guest or maid's house at the premises above described, and to repair the fence on said property.

"Upon the marriage of [plaintiff], all payments to her for her support and maintenance shall cease, but the payments for the minor son and daughter shall continue on the terms hereinabove provided. Upon the death of [plaintiff], all payments hereunder shall cease and [defendant] will assume any obligation for the support of said children.

"(4) All money and property of the parties hereto, other than that agreed to be conveyed to [plaintiff], shall be conveyed to [defendant], and shall become the separate property of [defendant]. * * *

"(6) Other than as expressly provided for herein, the respective parties hereto do hereby release the other party hereto respectively from any and all right of support, care and maintenance, as the husband or wife, respectively, of the other party. It is the intention of the parties hereto to make a final settlement herein of all rights of support, care and maintenance, one against the other, and to release the other party respectively from all rights of such support, care and maintenance other than as herein provided. * * *

"(8) Neither party hereto waives any cause of action for divorce which he or she, respectively, has against the other party hereto.

"In any action for divorce or maintenance hereafter brought by either party, [plaintiff] waives any right to alimony, temporary or permanent, other than such amount as is provided for hereinabove for her support.

"[Defendant] assumes and agrees to pay all attorneys fees incurred by the parties hereto in the execution of this agreement and agrees to pay all court costs and reasonable counsel fees incurred by [plaintiff] in any action for divorce which she may file against [defendant.]"

Shortly after this agreement was executed plaintiff filed an action for divorce on the ground of extreme cruelty. She attached the agreement to the complaint and prayed that it be approved, that defendant be directed to comply with it, and that alimony be awarded in accordance with its terms. Defendant defaulted and an interlocutory decree was entered. The decree approved the agreement, ordered defendant to comply with it, and provided that pursuant to its terms, "defendant is ordered to pay the plaintiff monthly the sum of $150.00 * * * commencing June 1, 1944; provided, however, that when the son Norman Greenaway Dexter, leaves school and goes to work, or when he goes into the military forces of the United States, the said monthly award shall be reduced to the sum of $100.00 per month." The decree also expressly incorporated the provision with respect to the payment of $25 per month for the college expenses of the adult daughter of the parties. A final decree was entered approximately one year later. In 1952 plaintiff petitioned the court to increase the amount of the monthly payments to $800 on the ground of changed circumstances. The court entered its order refusing modification on the ground that it had no jurisdiction to modify the amount of the payments. Plaintiff appealed and secured an order for attorney fees and costs on appeal, and defendant appealed from the latter order.

Plaintiff contends that the payments ordered to be made pursuant to the agreement are alimony subject to modification by the court under section 139 of the Civil Code. Defendant, on the other hand, contends that they constitute an integral part of the property settlement agreement of the parties and are not, therefore, subject to modification.

[1, 2] A husband and wife may contract with respect to their property, Civil Code, § 158, and if they are living separate and apart they may provide for the support and maintenance of either of them and their children. Civil Code, § 159. Moreover, as between the husband and wife, if the provisions for support and maintenance have been made an integral or inseverable part of the division of their property, and the court in a divorce action has approved the agreement, its provisions cannot thereafter be modified without the consent of both of the parties. Tuttle v. Tuttle, 38 Cal.2d 419, 420–422, 240 P.2d 587; Adams v. Adams, 29 Cal.2d 621, 625, 177 P.2d 265; Puckett v. Puckett, 21 Cal.2d 833, 841–842, 136 P.2d 1; Ettlinger v. Ettlinger, 3 Cal. 2d 172, 175–178, 44 P.2d 540; Sasanoff v. Sasanoff, 120 Cal.App.2d 120, 260 P.2d 840; Hamilton v. Hamilton, 94 Cal.App. 2d 293, 299, 210 P.2d 750; Alexander v. Alexander, 88 Cal.App.2d 724, 726–727, 199 P.2d 348; Holloway v. Holloway, 79 Cal. App.2d 44, 46–47, 179 P.2d 22; Kohl v. Kohl, 66 Cal.App.2d 535, 540–541, 152 P.2d 494; Landres v. Rosasco, 62 Cal.App.2d 99, 105–106, 144 P.2d 20; Rich v. Rich, 44 Cal. App.2d 526, 530, 112 P.2d 780.

[3] It is clear that the parties executed such an agreement in this case. They expressly stated that they intended finally to settle both the division of their property and their rights and duties with respect to support and maintenance, and each party waived "any and all right to support, care and maintenance" other "than as expressly provided for herein." It would be contrary to the clearly expressed intention of the parties to hold that the provision for monthly payments constituted a separable agreement for the payment of alimony subject to the continuing jurisdiction of the court to modify.

Plaintiff contends, however, that since the monthly payments were to terminate on her death or remarriage and were described as alimony in the prayer of her complaint, they should be so treated. She points out that if they were intended as a division of property it would have been more reasonable for the agreement to provide that they should continue until a given amount had been paid. These considerations would be more persuasive if the issue presented was whether, on the one hand, the monthly payments were solely part of a division of the community property, or, on the other hand, solely alimony. When, as in this case, however, the parties have made the provision for support and maintenance an integral part of their property settlement agreement, the monthly payments will ordinarily have a dual character. To the extent that they are designed to discharge the obligation of support and maintenance they will ordinarily reflect the characteristics of that obligation and thus have the indicia of alimony. See, Puckett v. Puckett, 21 Cal.2d 833, 838, 136 P.2d 1; Ettlinger v. Ettlinger, 3 Cal.2d 172, 174, 44 P.2d 540; Kohl v. Kohl, 66 Cal.App.2d 535, 537, 152 P.2d 494. On the other hand, to the extent that they represent a division of the community property itself, or constitute an inseparable part of the consideration for the property settlement, they are not alimony, and accordingly cannot be modified without changing the terms of the property settlement agreement of the parties.

Plaintiff contends, however, that when the provision of the agreement for monthly payments was expressly incorporated into the interlocutory decree and defendant was ordered to perform it, it became merged in the decree, and that therefore, under the rule stated in Hough v. Hough, 26 Cal.2d 605, 160 P.2d 15, it was subject to modification pursuant to section 139 of the Civil Code. In the Hough case, however, it had become res judicata that the payments there involved were alimony and not an integral part of a property settlement. Accordingly, the court was not called upon to review the correctness of that determination, and it held that an agreement for alimony that had been merged in a divorce decree could no longer be enforced in an independent action. In the present case, on the other hand, there has been no previous adjudication in modification proceedings that the monthly payments are alimony. Moreover, the interlocutory decree itself did not purport to determine the character of the payments. It merely ordered defendant to make them pursuant to the terms of the agreement and thus made clear that judgment remedies including contempt would be available for the enforcement of his obligations.

In the absence of an order for the payment of alimony in the interlocutory decree, such as the order that had been found to be present in the Hough case, see also, Werner v. Werner, 120 Cal.App.2d 248, 260 P.2d 961; Dunning v. Dunning, 114 Cal.App.2d 110, 114, 249 P.2d 609; Pearman v. Pearman, 104 Cal.App.2d 250, 253, 231 P.2d 101; Weedon v. Weedon, 92 Cal.App.2d 367, 369–370, 207 P.2d 78; Gosnell v. Webb, 60 Cal.App.2d 1, 3–5, 139 P.2d 985, or a reservation of jurisdiction to make such an order in the future, the court cannot, after the interlocutory decree has become final, add a provision for alimony or modify the amount of payments ordered pursuant to a property settlement agreement. Accordingly, if plaintiff was dissatisfied with her contract whereby she had made the support and maintenance provisions an integral part of the settlement of property rights and had tenable grounds for setting it aside, she should have attacked the agreement before the interlocutory decree was entered. She cannot, however, after having secured its approval by the court and having accepted the benefits thereof, now seek relief inconsistent with its terms. Patton v. Patton, 32 Cal.2d 520, 523–524, 196 P.2d 909; Adams v. Adams, 29 Cal.2d 621, 627–628, 177 P.2d 265.

[4] In support of her motion for an increase in the monthly payments, plaintiff filed an uncontradicted affidavit stating that under their agreement the parties divided the community property equally. She contends that a provision waiving all support and maintenance except as is provided in a property settlement agreement is invalid unless it is given in exchange for a greater share of the community property than that to which the party would otherwise be entitled. Although it was that type of agreement that was present in the Adams case, the rationale of that decision applies equally to other types of integrated bargains. Thus if the wife agreed to accept less than her share of the community property in exchange for greater support and maintenance payments, it would be unjust to her subsequently to hold that the payments were alimony subject to reduction on motion of the husband. See, 1 Armstrong, California Family Law, p. 801. Moreover, at the time a property settlement is made, the parties may be uncertain as to which of their property is community rather than separate, and they will ordinarily not know how the court in the divorce action will find the facts or how it would, in the absence of an acceptable agreement, exercise its discretion in dividing the property and awarding alimony. The amicable adjustment of these doubtful questions with respect to the property and support and maintenance rights of the parties may alone supply sufficient consideration to support their entire agreement. Bennett v. Bennett, 219 Cal. 153, 159, 25 P.2d 426. Thus in the present case, the parties recited that they desired to settle their property and support and maintenance rights "by friendly

agreement, instead of resorting to court for said purpose." Moreover, since plaintiff secured her divorce on the ground of extreme cruelty, had the parties not settled their rights by agreement, the court could in its discretion have awarded plaintiff all of the community property and less alimony than she received under her agreement. In such case, however, the alimony would be subject to reduction in the event of changed circumstances. Plaintiff was entitled to agree instead to an equal division of the community property in exchange for support and maintenance payments that could not be reduced. Accordingly, the fact that the community property was divided equally has no bearing on the validity of the provision of the agreement whereby both parties waived all rights to support and maintenance other than as provided therein. Tuttle v. Tuttle, 38 Cal.2d 419, 420, 240 P.2d 587; Sasanoff v. Sasanoff, 120 Cal.App.2d 120, 260 P.2d 840; see also, Hamilton v. Hamilton, 94 Cal.App.2d 293, 299, 210 P.2d 750; Holloway v. Holloway, 79 Cal. App.2d 44, 45–46, 179 P.2d 22.

[5, 6] Defendant contends that if the payments are not subject to modification, the court had no power to order him to pay plaintiff's costs and attorney fees on appeal. The trial court had jurisdiction, however, to determine in this proceeding the character of the payments involved, and accordingly, the divorce action is still pending within the meaning of section 137.-3 of the Civil Code. Lerner v. Superior Court, 38 Cal.2d 676, 685, 242 P.2d 321; Wilson v. Wilson, 33 Cal.2d 107, 115, 199 P.2d 671. Since plaintiff did not waive any right she might have to attorney fees and costs in her agreement and no abuse of discretion has been shown, the order awarding costs and attorney fees on appeal must be affirmed.

The orders are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice (concurring and dissenting).

I concur in the judgment affirming the orders in this case but I disagree with some of the reasoning leading thereto.

The trial court here entered its order refusing modification of the support provisions incorporated in the interlocutory and final decrees of divorce on the ground that it had no jurisdiction to modify the amount of the payments.

Prior to entering its order, the trial court sustained defendant's objection to the introduction of evidence on the ground that the rights of the parties were governed by their contract.

The majority here say that: "The trial court had jurisdiction, however, to determine in this proceeding the character of the payments involved, * * *." This is inconsistent with its holding that the orders are to be affirmed. If the trial court could determine the character of the payments which were provided for in the agreement entered into between the parties, then it improperly sustained defendant's objection to the introduction of evidence on that issue, and the case should have been reversed. Not only is the majority opinion in this case inconsistent in itself, but it is inconsistent with the case of Fox v. Fox, Cal.Sup., 265 P.2d 881, where it was said: "Plaintiff contends, however, that since the payments were labeled alimony, were to cease on her remarriage, and were subject to modification in the event of a reduction of defendant's pension, there is evidence to support the trial court's implied finding that they were solely alimony subject to modification. *In the absence of conflicting extrinsic evidence, the interpretation placed upon the agreement by the trial court is not binding on this court on appeal.* * * *" (Emphasis added.) The clear implication from this is that the character of the payments is a question of fact to be determined by the trial court upon evidence offered by the parties for that purpose. It is admitted that "there has been no previous adjudication in modification proceedings that the monthly payments are alimony. Moreover, the interlocutory decree itself did not purport to determine the character of the payments. It merely ordered defendant to make them pursuant to the terms of the agreement and thus made clear that judgment remedies including contempt would be available for the enforcement of his obligations."

With the holding of the majority that this was a property settlement agreement entered into between the parties which the court had no power to modify, I agree. It is said that plaintiff "cannot, however, after having secured its approval by the court and having accepted the benefits thereof, now seek relief inconsistent with its terms." The factual situation here presented shows that the trial court approved the agreement entered into between the parties in its entirety and ordered that it be performed. It also shows that the support provisions for plaintiff were "pursuant to the terms of said agreement" set forth in the interlocutory decree of divorce which was granted to the plaintiff. The rule in such a case should be that if the entire agreement is approved by the court and part of its provisions are incorporated in the decree and ordered to be performed, those portions included in the decree may be enforced by contempt proceedings. The balance of the provisions, approved by the court but not incorporated in the decree, may be enforced by separate action. It should also be the rule that where the terms of a property settlement or separation agreement or an agreement for support and maintenance have been approved by the court as valid and enforceable and incorporated in the decree, the court may not, in that action, or in a later action, modify its terms and provisions. Once presented to the court, approved by it, incorporated in the decree and the performance thereof ordered, the parties are bound by their agreement with respect to support and maintenance, or alimony, as the case may be.

There are several code provisions, sections 158, 159, 175, which all grant to the parties the right to contract with each other. In the absence of fraud or overreaching there is no reason why a contract providing for support and maintenance should not be given the dignity accorded to other contracts. A majority of this court accords that dignity to a property settlement agreement which provides for monthly payments but holds that the trial court has power to determine the character of the payments. In the present case that statement is a non sequitur since the majority sustains the trial court's action in refusing to admit evidence concerning the character of the payments. Where we disagree is that I believe that once the parties have entered into an agreement whether it purports to divide the property, or provide for support and maintenance payments without a division of the property, which is found to be fair and equitable, the subject is forever closed and the parties are bound by the terms of their agreement. Incorporation in the decree has only the effect of making the remedy on the judgment and not on the agreement which has become merged therein. In the event of lack of incorporation, the remedy is on the agreement which should have the same dignity as other contracts.

In these three cases, Dexter v. Dexter, Fox v. Fox (265 P.2d 881), Flynn v. Flynn (265 P.2d 865) this court had an opportunity to clarify the law so that stability might be given to property settlement agreements and agreements for support and maintenance. Not only do the majority holdings in these three cases not settle the law, but they add untold confusion. The import of the Flynn decision is that an appellate court may order a property settlement agreement, which is not even in the record, attached to a judgment of divorce after that judgment has become final. As I pointed out in my dissent there, there was no adequate incorporation and the parties should have resorted to an action on the agreement itself for the sum and substance of their rights and duties, it having been approved by the court in the divorce action. The import of this case is that the question of the character of the payments involved in the agreement of the parties now merged in the divorce decree is a question of fact for the trial court which it may determine without any evidence on the subject other than the agreement itself. This result naturally flows from its affirmance of the trial court's action in refusing to admit plaintiff's evidence on the subject. The logical inference, of course, to be drawn from the action of the trial court is that it impliedly considered the agreement to be one of property settlement. Then we have the Fox case wherein it is said that in the absence of conflicting extrinsic evidence the finding of the trial court on the character of the payments is not binding on an appellate court. If no evidence is necessary, or admissible, then this court, or any District Court of Appeal, may make its own determination as to the character of the payments agreed upon by and between the spouses to the end that litigation in these matters will be endless and the law on the subject will be without any stability whatsoever. As I pointed out in my dissent in the Flynn case, how will attorneys know how to advise, or act for, their clients in cases of this kind? The obvious answer is that they will not have the remotest idea whether to incorporate the entire agreement in *haec verba*, or in substance, or attach it physically to the decree of divorce or whether, no matter how it is done, the trial court, or any appellate court will not determine that if monthly payments are provided for that those payments constitute alimony subject to modification.

Left open in the majority opinions in all three cases, but there by implication, is whether the parties may contract with each other as to alimony, or support and maintenance, where no property division as such is involved. If the parties agree on a certain sum to be paid monthly, or annually, or semi-annually, in lieu of any lump sum provision, that agreement, if fair and equitable, should have the same stability as where there has been a division of property by agreement. So far as alimony per se is concerned, if the parties cannot or for some reason do not themselves reach an amicable agreement on the subject, the trial court has the power to make such provision in the decree. In this event, the amount would, of course, be subject to modification under the continuing jurisdiction of the court. Why the parties should not be able to make a binding agreement for the payment of alimony or money purely for support and maintenance, is not made clear by the majority.

The majority opinion in each of these cases leaves the obvious implication that if such an agreement is incorporated in the decree, its provisions will be subject to modification, but if it is not so incorporated, it may not be modified. This implication follows from the majority holding that if the agreement is incorporated, the court has power to determine the character of the payments, that is, whether they are for alimony or a part of a property settlement. Why the difference? Is not a fair, just and valid agreement to pay alimony or support money just as binding as one which also contains provisions for a property settlement? Either agreement could provide for its modification under specified conditions. But in the absence of such provision it would remain unchanged. Why should not such an agreement for alimony alone be binding on the court if it is incorporated in the decree and approved?

My position is that if the parties have agreed to a division of their property, or for support and maintenance for one of them without a property division, and that agreement has been approved by the court as fair and equitable, whether incorporated in the decree, or not, their agreement sets forth the full sum of their rights and obligations and may not be modified without a subsequent agreement made by them. If they have not agreed on support and maintenance, the court may, upon application, provide for alimony which is then subject to modification under the rules applicable thereto, or if they have not agreed upon a property division the trial court may, on trial of the divorce action, divide the property of the parties in accord with settled principles of law applicable to the case.

I would affirm the order refusing modification in this case because the parties had, by their agreement, the pertinent provisions of which were incorporated in the decrees of divorce and approved by the court as fair and equitable, set forth their rights and liabilities. With respect to defendant's appeal from the order granting plaintiff her attorneys' fees, defendant agreed in the agreement entered into between the parties to pay all attorneys' fees and costs incurred by plaintiff in any action for divorce which might be filed. The agreement contains no waiver on the part of plaintiff as to any further attorneys' fees and the order granting such fees should be sustained inasmuch as any allowance therefor is discretionary with the trial court and there is here no claim of abuse of that discretion.

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42 Cal.2d 49

FOX v. FOX.

L. A. 22431.

Supreme Court of California.
In Bank.
Jan. 8, 1954.

Divorced wife's proceeding for modification of monthly payments due under property settlement agreement which was incorporated into divorce decree. The Superior Court, Los Angeles County, Otto J. Emme, J., entered an order for the wife, and the husband appealed. The Supreme Court, Traynor, J., held that where spouses entered into property settlement agreement which provided for monthly payments by husband to wife and which provided that wife would not seek alimony other than that provided for by the agreement, and divorce decree approved the agreement and expressly incorporated it, court after entry of decree did not have jurisdiction to change provisions as to monthly payments, though payments were designated in agreement and divorce decree as alimony.

Reversed.

Carter, J., dissented in part. Prior opinion 253 P.2d 1030.

1. Divorce 🔑245(1)

Where spouses entered into property settlement agreement which provided for monthly payments by husband to wife and which provided that wife would not seek alimony other than that provided for by the agreement, and divorce decree approved the agreement and expressly incorporated it, court after entry of decree did not have jurisdiction to change provisions as to monthly payments, though payments were designated in agreement and divorce decree as alimony.

2. Divorce 🔑286

In absence of conflicting extrinsic evidence, interpretation placed by trial court upon property settlement agreement which provided for monthly installments to be paid by husband to wife and which was incorporated into divorce decree as to whether payments were alimony subject to modification was not binding on Supreme Court.

3. Husband and Wife 🔑279(1)

Labels adopted by spouses in property settlement agreement in regard to payments to be made to wife are not conclusive as to nature of payments, in view of fact that agreement must be considered as a whole.

4. Divorce 🔑225

Where property settlement agreement which was incorporated into divorce decree provided that wife would not call upon husband to pay any part of attorney's fees other than that specified in the contract, trial court, in proceeding by wife for modification of payments due under the agreement, erred in awarding attorney's fees in violation of terms of contract.

Wright, Wright, Green & Wright, Lloyd Wright, Charles A. Loring and Dudley K. Wright, Los Angeles, for appellant.

Stahlman & Cooper and Wallace E. Wolfe, Los Angeles, for respondent.

TRAYNOR, Justice.

In 1947, plaintiff filed an action for divorce against defendant on the ground of extreme cruelty and prayed for a division of the community property and alimony. Thereafter the parties executed a separation agreement, and plaintiff amended her complaint to allege that by the terms of the agreement "all of the community property and rights therein and rights of support have been adjusted, settled and compromised." She prayed that "the Court approve and incorporate in the decree the terms of that certain Agreement and Property Settlement made, executed and entered into by the Plaintiff and Defendant on the 13th day of April, 1948, and require by the terms of its decree that the Defendant comply with the terms in said decree for him to be performed." Defendant defaulted, and an interlocutory decree was entered approving the agreement and expressly incorporating the provisions for the payment of alimony, which defendant was ordered to perform. The final decree was entered one year later. In 1952, plaintiff petitioned the court to increase the monthly payments from $400 to $700 per month on the ground of changed circumstances and requested attorney fees for presenting her motion. After a hearing the court entered its order increasing the monthly payments to $500 per month and awarding $100 attorney fees, and defendant has appealed.

Defendant contends that, although the monthly payments were labeled alimony both in the agreement and in the decree based thereon, it is clear from an examination of the agreement as a whole that the provision for them was an integral part of a property settlement agreement and may not therefore be modified. We agree with this contention.

In their agreement the parties recited that they desired finally to settle all of their property rights and stated that "in consideration of the premises and of the covenants, agreements, releases, waivers and transfers herein made and herein agreed to be made by the parties hereto, one to the other, it has been and is hereby agreed between the parties as follows: * * *

"*Third:* It is understood and agreed that this settlement is to obtain at all times between the parties hereto regardless of any change in the marital relations between them and the happening of any other event shall not abrogate or affect this instrument.

"*Fourth:* Nothing in this agreement shall be construed as precluding either party from bringing or defending or appearing in any suit for divorce, and in the event a divorce be granted to either party, this agreement may be incorporated in and become a part of any such decree of divorce entered. * * *

"*Sixth:* Husband agrees to pay to the wife, as alimony, the sum of four hundred dollars ($400) per month, commencing May 12th, 1948, and continuing thereafter to and including the month of December, 1953, (except as otherwise herein provided) at which time all obligation on the part of the husband to make the aforesaid or any other payments to the wife for her support shall thereupon terminate."

The agreement then provided that payments for the support of the wife should terminate if she should remarry before December 31, 1953, and that after her remarriage or December 31, 1953, whichever occurred earlier, the husband should pay her $100 per month for the support of each of the two minor children of the parties. It also provided that if the husband's United States disability pension should be reduced, the support payments should be reduced $3.33 for each $10 reduction in the pension. In no event, however, was the wife to receive less than $200 per month.

The seventh, eighth, and ninth paragraphs provided for a detailed division of the community property, including the payment of $8,000 cash to the wife, and adjusted rights with respect to insurance policies and a retirement fund.

The tenth paragraph provided: "Husband agrees to pay Blanche & Fueller, attorneys for the wife, as their attorneys' fees, the sum of three hundred dollars ($300) of which amount one hundred fifty dollars ($150) shall be payable upon the execution of this agreement by the parties hereto and the remaining one hundred fifty dollars ($150) of which shall be payable on or before ninety (90) days from date hereof. In consideration of the agreement of the husband to pay the aforesaid fees, the wife hereby agrees that in any action for divorce or separate maintenance between the parties hereto, whether the same be now pending or hereafter commenced, she will not make application for or seek to require the payment of any attorneys' fees whatsoever by the husband and that she will likewise pay such costs of suit involved in any such action herself and shall not call upon the husband to pay any part thereof.

"The wife further agrees that she will not, in any such action, apply for or seek from the husband any payment of alimony or support money for the children of the parties except in accordance with the provisions of this agreement."

[1] In this case, as in Dexter v. Dexter, Cal.Sup., 265 P.2d 873, it is clear that the provisions for the support and maintenance of plaintiff are an integral and inseverable part of the property settlement agreement of the parties. The parties stated that they desired to effect a final settlement that would "obtain at all times between" them and expressly provided that the agreement was made in consideration of "the premises, and of the covenants, agreements, releases, waivers, and transfers herein made and herein agreed to be made." Thus plaintiff's express promise not to seek alimony other than as provided in the agreement, cannot now be abrogated without changing the property settlement agreement of the parties.

[2, 3] Plaintiff contends, however, that since the payments were labeled alimony, were to cease on her remarriage, and were subject to modification in the event of a reduction of defendant's pension, there is evidence to support the trial court's implied finding that they were solely alimony subject to modification. In the absence of conflicting extrinsic evidence, the interpretation placed upon the agreement by the trial court is not binding on this court on appeal. In re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825; Lane v. Lane, 117 Cal.App.2d 247, 251, 255 P.2d 110; see also, Gosnell v. Webb, 60 Cal.App.2d 1, 4, 139 P.2d 985; Miranda v. Miranda, 81 Cal.App.2d 61, 69, 183 P.2d 61. The labels adopted by the parties are not conclusive, since the agreement must be considered as a whole. Tuttle v. Tuttle, 38 Cal.2d 419, 422, 240 P.2d 587; Puckett v. Puckett, 21 Cal.2d 833, 842, 136 P.2d 1; Rich v. Rich, 44 Cal.App.2d 526, 530, 112 P.2d 780. Moreover, as pointed out in the Dexter case, to the extent the monthly payments are designed to discharge the obligation of support and maintenance, they will ordinarily have some of the indicia of alimony. Similarly, the fact that the payments might be reduced under certain specified circumstances does not indicate that they were alimony. Not only may the parties include such provisions in agreements that are admittedly solely property settlements, Hogarty v. Hogarty, 188 Cal. 625, 628, 206 P. 79, but the provision in this case lends support to the conclusion that at least part of the payments constituted a division of property as such. Thus in no event were the payments to fall below $200 per month, and they were to cease on a fixed date without reference to plaintiff's needs or defendant's ability to pay after that time.

[4] The award of attorney fees was contrary to plaintiff's waiver of all fees other than the $300 provided for in the agreement. Since plaintiff has never attacked the agreement, and since its validity has been adjudicated in the divorce action, the trial court erred in awarding fees in violation of its terms. Patton v. Patton, 32 Cal.2d 520, 523-525, 196 P.2d 909; Viera v. Viera, 107 Cal.App.2d 181, 183-184, 236 P.2d 632.

The order is reversed.

GIBSON, C. J., and SHENK, EDMONDS, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice (concurring and dissenting).

I concur in the judgment reversing the order, but I disagree with some of the reasoning leading thereto.

In this case the parties had agreed that certain payments were to be made to the plaintiff; the portion of this agreement referring to said payments was incorporated in the decree of divorce. Upon application for modification, plaintiff wife was granted an increase in the monthly payments as well as additional attorneys' fees. Plaintiff contended that there was evidence to sustain the trial court's implied finding that the payments were intended solely as alimony subject to modification. This court, in the majority opinion, says: "In the absence of conflicting extrinsic evidence, the interpretation placed upon the agreement by the trial court is not binding on this court on appeal." In effect, the majority is saying that there was insufficient evidence to support the trial court's implied finding that the payments were alimony and not a part of a property settlement agreement. This result flows naturally from its determination that the payments were part of a property settlement agreement.

This case, as well as the Dexter (Dexter v. Dexter, Cal.Sup., 265 P.2d 873) and Flynn (Flynn v. Flynn, Cal.Sup., 265 P.2d 865) cases, has run the full judicial gamut provided for in this state. This unnecessary and costly procedure could be avoided in the future *if* the rule were settled that where parties have agreed upon a division of their property, or for support and maintenance for one of them, and that agreement is found by the court in the divorce action to be fair and equitable, and approved by it, their agreement is considered as the sum of their rights and liabilities and is not subject to modification in the absence of a provision in the agreement to that effect. This is as it should be and would provide the necessary measure of stability in such cases. I have, in my dissents in the Flynn and Dexter cases, set forth the reasons for such a rule and the necessity for it in that parties, and their attorneys, should be able to rely upon the proposition that property and support rights arising out of the termination of a marital relationship once settled by agreement should remain settled and courts should not be called upon to decide whether the payments provided for are alimony or a part of a property settlement. As I said in my dissent in the Dexter case, when the parties have settled their property and support rights and liabilities by agreement which has been approved by the trial court as fair and equitable, the question as to the character of any payments to be made should be forever closed to inquiry. Whether or not the provisions of the agreement are incorporated in the decrees of divorce should only affect the remedy to be pursued in the event of a failure to comply therewith.

Because the parties hereto agreed for specific payments to be made and received and because plaintiff waived all rights to any other attorneys' fees than those set forth in the agreement, I would reverse the order appealed from.

42 Cal.2d 180

WALLACE et al.
v.
CITY OF FRESNO et al.

S. F. 18884.

Supreme Court of California.
In Bank.
Jan. 29, 1954.

Mandamus proceeding by retired member of police department and his wife to compel city to pay pension to retired member for life and upon his death to his wife for life. The Superior Court, Fresno County, Milo Popovich, J., rendered judgment denying relief as to retired member and directing pension board to either deny wife a pension or grant her a pension for life, and retired member and wife appealed. The Supreme Court, Gibson, C. J., held that where at time municipal pension plan was amended to disallow pensions to eligible employees convicted of felony after retirement the retired member had obtained substantial right to pension by service, and amendment in effect operated as condition subsequent to terminate pension which such member had fully earned, amendment was unreasonable and inoperative as to such member and his wife.

Reversed.

Edmonds, J., dissented.

Prior opinion, 256 P.2d 1001.

1. Constitutional Law 🔑102(2)
Municipal Corporations 🔑187(2), 200(2)

A public employee who serves under ordinance pension provisions authorizing pension after 25 years' service in police and fire departments or at specified age acquires a vested contractual right to the substantial pension, and such right arises before the happening of the contingency making the pension payable and cannot be constitutionally abolished by subsequent changes in the law.

2. Officers 🔑94

Public pension system is subject to the implied qualification that the governing body may make reasonable modifications and changes before the pension becomes payable, and that until that time employee does not have right to any fixed or definite benefits but only to a substantial or reasonable pension.

3. Municipal Corporations ⚷220(9)

When a city originally sets up its pension system it has a rather wide latitude in prescribing terms and conditions for retirement, and may adopt restrictions that would be considered unreasonable impairments of the contract if subsequently imposed upon employees who have served under the pension plan.

4. Officers ⚷94

Pension payments are deferred compensation to which a pensioner becomes entitled upon performing all services required under employment contract, and retirement because of age ordinarily shows that pensioner has done everything necessary to entitle him to payment of pension.

5. Municipal Corporations ⚷187(11)

Where at time municipal pension plan was amended to disallow pension to eligible employees convicted of felony after retirement, pensioner, who was convicted of felony after retirement from police department had obtained substantial right to pension by service, and amendment in effect operated as condition subsequent to terminate pension which he had fully earned, amendment was unreasonable and inoperative as to that pensioner.

6. Municipal Corporations ⚷220(9)

Contingent loss which might result from inability to obtain emergency service from pensioner in case of his conviction for felony does not warrant city's adopting an amendment imposing upon one who has already earned some pension rights the drastic penalty of loss of all rights in case of felony conviction after retirement.

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Lawrence W. Young, Fresno, for appellants.

C. M. Ozias, City Atty., Fresno, for respondents.

GIBSON, Chief Justice.

R. T. Wallace was a member of the police department of the city of Fresno from 1921 until July 30, 1949, when he retired at the age of 55 with the rank of chief of police. He was paid a pension of $150 a month until June 1952, when the pension board of the city, upon being informed that he had recently been convicted of preparing a fraudulent federal income tax return, a felony, ordered that the pension be discontinued as to him but that it be paid to his wife during his imprisonment and then terminated forever. Wallace and his wife brought this proceeding in mandamus to compel the city to pay a pension to him during his life and upon his death to his wife for her life. The judgment denied relief as to Wallace but directed the pension board to modify its order by either denying Mrs. Wallace a pension or granting her a pension for life. The Wallaces have appealed from the judgment.

When Wallace entered the police department the city charter authorized the establishment by ordinance of a pension system for members of the police and fire departments who are disabled or become superannuated in the service of the city. In 1923 an ordinance was enacted which provided that after 25 years' service any member who reached the age of 50 years should be entitled to retirement on a pension and that no removal of a member from the department after 25 years' service should operate to deprive him of pension benefits except when ordered for habitual drunkenness, notorious insubordination, or conviction of a felony or crime involving moral turpitude.[1] It was further provided that if a member retired on a pension and died leaving a widow, the pension should be payable to her during her lifetime or until she should remarry.

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[1] Section 2 of the 1923 ordinance provided: "After twenty-five years service any member who has reached the age of fifty years shall as a matter of right be entitled on his application to retirement on a pension equal to fifty (50) per cent of the annual salary of the rank or position held by such member one year prior to such retirement plus an additional one and two thirds (1⅔) of such salary for each year over twenty years and under thirty years, in the aggregate, served by such member before retirement; provided that no removal of any member from the department after such twenty-five years service shall operate to

Substantially the same provisions were contained in a new ordinance, enacted in 1927, which added a section reading: "Whenever any person who shall receive any pension from the pension fund as provided herein, * * * shall be convicted of a felony or crime involving moral turpitude, become dissipated or become nonresident of this state except by permission of the board, then said board may, after notice to the pensioner, order that the pension allowance of said person shall immediately cease and terminate; and the pension board in its discretion may order the pension or allowance to be paid to the dependents of said pensioner * * *." The 1927 ordinance also increased the retirement age to 55 years and specified that if there was a subsequent change in salary for the rank held by a retired member the pension should be calculated upon the basis of the salary as changed but should not exceed the sum of $150 per month. It was further provided that in case of a great public emergency any retired person might be assigned to perform duties by the chief of his department. An amendment adopted in May 1938 required that each member of the fire and police departments, commencing on July 15, 1938, pay into the pension fund four percent (later increased to four and one-half percent) of each month's salary. In 1946 a new ordinance was enacted which superseded the 1927 ordinance but contained provisions practically identical with those set forth above.

[1-3] A public employee who serves under pension provisions similar to those contained in the 1923 ordinance acquires a vested contractual right to a substantial pension. This right arises before the happening of the contingency which makes the pension payable, and it cannot be constitutionally abolished by subsequent changes in the law.[2] Kern v. City of Long Beach, 29 Cal.2d 848, 852 et seq., 179 P.2d 799. In discussing the nature of an employee's rights we recognized in the Kern case that a public pension system is subject to the implied qualification that the governing body may make reasonable modifications and changes before the pension becomes payable and that until that time the employee does not have a right to any fixed or definite benefits but only to a substantial or reasonable pension. 29 Cal.2d at page 855, 179 P.2d 799. To the same effect see Packer v. Board of Retirement, 35 Cal.2d 212, 214, 218–219, 217 P.2d 660. It is, of course, true that when a city originally sets up its pension system it has a rather wide latitude in prescribing the terms and conditions for retirement, and it may adopt restrictions that would be considered unreasonable impairments of the contract if subsequently imposed upon employees who have served under the pension plan. As we have seen, however, the felony conviction provision was not part of the original pension ordinance.

The 1927 and 1946 ordinances, by their terms, clearly purport to apply to a person in Wallace's position, and we must, therefore, determine whether the changes made come within the bounds of a reasonable modification or whether their effect is to impair his vested contractual rights. A number of decisions applying the principles announced in the Kern case have upheld, as reasonable, amendments which were enacted after the employees involved had earned some pension rights but before their pensions became payable. Packer v. Board of Retirement, 35 Cal.2d 212, 218–219, 217 P.2d 660; Allstot v. City of Long Beach, 104 Cal.App.2d 441, 443–444, 231 P.2d 498; Allen v. City of Long Beach, 101 Cal.App.2d 15, 17–21, 224 P.2d 792; Palaske v. City of Long Beach, 93 Cal.App.2d 120, 130 et seq., 208 P.2d 764;

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deprive him of the benefits of this section except when such removal be for habitual drunkenness, notorious insubordination, or conviction of a felony or crime involving moral turpitude and then only in the event the commission in its discretion order that such removal operate to deprive such member of the benefit of the provisions hereof."

[2] For the rule with respect to the right of a city to change pension rights after retirement of an employee, see Terry v. City of Berkeley, 41 Cal.2d ——, 263 P.2d 833.

Brooks v. Pension Board of City of Alameda, 30 Cal.App.2d 118, 123, 85 P.2d 956 (decided prior to Kern case). In the Packer case the modification eliminated a benefit for an employee's widow but made other changes which were advantageous to the employee. The Allstot, Allen and Palaske cases involved an amendment depriving an employee of the right to earn an increase in the amount of his pension payments by remaining in employment after reaching the retirement age. In the Brooks case the amount of the pension was reduced from two-thirds to one-half of the employee's salary. Another decision which upheld an amendment is Brophy v. Employees Retirement System, 71 Cal.App.2d 455, 457–459, 162 P.2d 939, where the modification permitted substantial reductions in pension payments if the pensioner obtained other gainful employment, but that decision is not helpful since it preceded the Kern case and was made without any discussion as to whether the change was reasonable.

[4] No case in this state has passed upon the specific question of the reasonableness of an amendment, made before an employee is eligible to retire, which provides for termination of pension rights if he is convicted of a felony after retirement. In order to determine this question we must look to the general principles set forth in the Kern and Packer cases where it was pointed out that a city may make reasonable modifications of pensions, prior to retirement, for the purpose of keeping the pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system and carry out its beneficent policy. 29 Cal.2d at pages 854–855, 179 P.2d 799; 35 Cal.2d at page 214, 217 P.2d 660. We must also keep in mind the facts that pension payments are deferred compensation to which a pensioner becomes entitled upon performing all services required under the contract and that his retirement because of age ordinarily shows that he has done everything necessary to entitle him to payment of the pension. See Terry v. City of Berkeley, 41 Cal.2d ——, 263 P.2d 833; Kern v. City of Long Beach, 29 Cal.2d 848, 851 et seq., 179 P.2d 799.

[5] Application of these principles in the present case leads to the conclusion that the amendment does not constitute a reasonable modification as to Wallace. The termination of all pension rights upon conviction of a felony after retirement does not appear to have any material relation to the theory of the pension system or to its successful operation. Rather, the change was designed to benefit the city and, as stated in the city's brief, to meet the objections of taxpayers who would be opposed to contributing funds for the maintenance of a pensioner who had been convicted of a felony. At the time of the amendment, Wallace had obtained substantial rights by reason of his services, and the amendment in effect operated as a condition subsequent to terminate a pension which he had fully earned. A city has no more right to adopt an amendment which does not come within the purposes of the rule permitting modifications than a private insurance carrier would have to change an annuity policy by making a unilateral amendment under which the insured's interest might be terminated upon his conviction of a felony.

[6] The city seeks to justify the provision relating to felony conviction by pointing out that under the 1927 and 1946 ordinances a pensioner such as Wallace may be assigned to work in case of a "great public emergency." The argument appears to be that conviction of a felony would make a pensioner unfit or unavailable for service in the event of an emergency and that, accordingly, it was reasonable for the city to provide for termination of pension payments upon conviction after retirement. There is only a remote possibility, however, that a pensioner will be called upon for such service. A "great public emergency" would occur only infrequently; in addition, the city does not require that pensioners remain at all times available for service or that they refrain from leaving the city, and a pensioner might well be absent from the city at the time of such an emergency. The contingent loss which might result from inability to obtain serv-

ice from a pensioner in case of his conviction of a felony cannot warrant the city in adopting an amendment imposing upon one who has already earned some pension rights the drastic penalty of loss of all such rights in case of a felony conviction after retirement. Our conclusion in this respect is strengthened by the fact that the contingent benefit which the city might receive from emergency service performed by retired employees would not have any direct relation to the functioning of the pension system, and, as we have seen, the primary purpose of modifications should be to safeguard the pension system and carry out its beneficent purposes. Considered from the standpoint of the employees the emergency requirement, adopted at the same time as the felony provision, is merely another detriment, and it would seem obvious that the city should not be permitted to urge one detriment to offset another.

The judgment is reversed.

SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting).

Under the 1923 ordinance, an employee who is convicted of a felony can be removed from the department and his pension rights terminated. The ordinance under which the present proceeding was instituted, enacted more than 20 years before Wallace retired, merely extended the time of an employee's required good behavior to include the period after his retirement. I find no basis for the conclusion that this change was an unreasonable one.

In my opinion, the test of permissible amendment of a pension system stated by the Chief Justice is entirely too narrow. Certainly the flexibility of a pension system to meet changing conditions and the safeguarding of its proper purposes are important considerations, but I would not rule out the many other considerations of public policy which may well enter into such a determination. I believe that fundamental principles of good government permit the public to establish minimum standards as to the character of the recipients of public funds. Those standards should include the right to insist upon honesty of public officers both in office and after retirement from governmental service.

I would affirm the judgment.

42 Cal.2d 91

In re Guardianship of SMITH et al.

HOWES v. COHEN.

L. A. 22209.

Supreme Court of California.
In Bank.

Jan. 13, 1954.

Proceeding in the matter of the estate and guardianship of minor children. From an order of the Superior Court, Los Angeles County, Arnold Praeger, J., appointing daughter of children's deceased mother guardian of the persons of the minors, their natural father appealed. The Supreme Court, Carter, J., held that order appointing daughter of children's deceased mother guardian in preference to their natural father, who was also found to be a fit and proper person and requested that he be appointed guardian, should be reversed, thus setting at large all issues of fact for redetermination by trial court.

Order reversed.

Prior opinion 255 P.2d 761.

Schauer and Edmonds, JJ., and Gibson, C. J., dissented.

Guardian and Ward 🔑13(8)

Order appointing older daughter of deceased mother of illegitimate children, six and eight years of age, respectively, guardian of the persons of such children in preference to their natural father, who had requested that he be appointed guardian and was also found to be a fit and proper person, should be reversed, thus setting at large all issues of fact for redetermination by trial court, in view of preference generally accorded parent in awarding custody of minor children and greater likelihood that children would be legitimated, if placed in custody of natural father. Civ.Code, §§ 196, 196a, 200, 230; Code Civ.Proc. § 53.

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Hahn, Ross & Saunders and Saul Ross, Los Angeles, for appellant.

Oswald G. Ingold, Berkeley, Clore Warne, Los Angeles, and Maxwell E. Greenberg, Beverly Hills, as amici curiae on behalf of appellant.

Juaneita M. Veron, Huntington Park, for respondent.

CARTER, Justice.

Frieda Howes petitioned to be appointed the guardian of the persons of Leland Smith, a minor of eight, and Sharon Smith, a minor of six, brother and sister. She alleged that she is the sister of the minors; their mother is dead; their father is Harry Cohen and all reside in Los Angeles, California; that the minors are now under her care and she has supplied and cared for them since the death of their mother; their "natural" father, Cohen, has "remarried" and has a family of the second marriage; that the only relatives of the minors are their father, petitioner, and a brother, Paul Smith, who lives with petitioner; that they have no estate. Cohen filed objections to the appointment and requested that he be appointed guardian stating that he is the "natural" father of the minors, they being the illegitimate children of Cohen and Marguerite Smith, deceased, their mother.

The court found all of the allegations of both Frieda and Cohen are true; that both Frieda and Cohen are "fit and proper" persons to be the guardians of the minors and have their custody and control; and that it is "to the best interest and welfare" of the minors that Frieda be appointed guardian. It was so ordered and Cohen appeals. He asserts that being the father of the children, although they are illegitimate, he has preference in the selection of their guardian, he being a fit and proper person.

It is settled in this state that in either guardianship proceedings or custody proceedings in a divorce action, the parents of a legitimate child have preference over a non-parent and the custody shall not be given to a non-parent unless the parent is found unfit. "Where a parent applying for custody is in a position to take the child and is not shown to be unfit, the court may not award custody to strangers merely because it feels that they may be more fit or that they may be more able to provide financial, educational, social, or other benefits. * * * [Citing cases.] '(T)he discretionary power of a trial court necessarily is limited by those provisions of the codes wherein the express policy of the legislature regarding general questions of custody are set forth, Civ.Code, §§ 138, 197; Prob.Code, §§ 1407–1408 and by the judicial interpretation of those code provisions in relation to the specific questions presented by the instant case.' Robertson v. Robertson, 72 Cal.App.2d 129, 132, 164 P.2d 52, 54. Section 1407 of the Probate Code provides that as between persons equally entitled in other respects to the guardianship of a minor preference is to be given first to a parent. This section has been construed to be substantially the same as former section 246(3) of the Civil Code and section 1751 of the Code of Civil Procedure which provided, in substance, that a parent if competent is entitled to custody in preference to any other person. Section 138 of the Civil Code provides that as between parents adversely claiming the custody, neither parent is entitled to it as of right, but other things being equal, if the child is of tender years it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father. The code sections contemplate that the care of a minor child be awarded to a parent, if a fit and proper person, as against a stranger." Stewart v. Stewart, 41 Cal.2d 447, 260 P.2d 44, 47.

Here the parent, Cohen, the father, was found fit rather than unfit and the mother is dead. The only difference in this case is that the minors were not the legitimate issue of Cohen, but that is not significant.

When the mother and father of an illegitimate child are both alive and he has not been legitimated, the mother is entitled to his custody, services and earnings to the exclusion of the father. Civ.Code, § 200; In re Gille, 65 Cal.App. 617, 224 P. 784; Strong v. Owens, 91 Cal.App.2d 336, 205 P.2d 48; Pierce v. Jeffries, 103 W. Va. 410, 137 S.E. 651, 51 A.L.R. 1507. Both the mother and the father are responsible for his support. Civ.Code, §§ 196a, 196; Schumm, by Whymer v. Berg, 37 Cal.2d 174, 231 P.2d 39, 21 A.L.R.2d 1051; Reed v. Hayward, 23 Cal.2d 336, 144 P.2d 561. On the death of the mother the natural father is entitled to the custody of an illegitimate child if he is a fit person. See Commonwealth ex rel. Harper v. Fuller, 142 Pa.Super. 98, 15 A.2d 518; Hayes v. Strauss, 151 Va. 136, 144 S.E. 432; Aycock v. Hampton, 84 Miss. 204, 36 So. 245, 65 L.R.A. 689; Moritz v. Garnhart, 7 Watts, Pa., 302, 32 Am.Dec. 762; People ex rel. Meredith v. Meredith, 272 App.Div. 79, 69 N.Y.S.2d 462, affirmed 297 N.Y. 692, 77 N.E.2d 8. It has been held repeatedly that, while the best interests of an illegitimate child is the important factor, the parents of such a child have a superior claim as against the world to his custody if they are fit and proper. Armstrong v. Price, Mo.App., 292 S.W. 447, mother; Jensen v. Earley, 63 Utah 604, 228 P. 217, mother; In re Gille, supra, 65 Cal.App. 617, 224 P. 784, mother; Ex parte Wallace, 26 N.M. 181, 190 P. 1020, father; Garrett v. Mahaley, 199 Ala. 606, 75 So. 10, father; Lewis v. Crowell, 210 Ala. 199, 97 So. 691, father; People ex rel. Meredith v. Meredith, supra, 272 App.Div. 79, 69 N.Y.S.2d 462, affirmed, 297 N.Y. 692, 77 N.E.2d 8; State v. Nestaval, 72 Minn. 415, 75 N.W. 725; Jackson v. Luckie, 205 Ga. 100, 52 S.E.2d 588; Ex parte Schwartzkopf, 149 Neb. 460, 31 N.W.2d 294; Ex parte Malley, 131 N.J.Eq. 404, 25 A.2d 630; French v. Catholic Community League, 69 Ohio App., 442, 44 N.E.2d 113; Com. ex rel. Human v. Hyman, 164 Pa.Super. 64, 63 A.2d 447; Templeton v. Walker, Tex.Civ.App., 179 S.W. 2d 811; Henderson v. Henderson, 187 Va. 121, 46 S.E.2d 10; Petition of Dickholtz, 341 Ill.App. 400, 94 N.E.2d 89; 7 Am.Jur., Bastards, §§ 61–66; 10 C.J.S., Bastards, § 17; Pierce v. Jeffries, 103 W.Va. 410, 137 S.E. 651, 51 A.L.R. 1507.

There is an additional factor in the instant case. As far as appears the minors have not been legitimated. By awarding their custody to the father they are more likely to be legitimated because "the father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth." Civ. Code, § 230. Unless the father has the right to custody it is not probable that he will receive the minors into his home and thus legitimate them.

This being a judgment roll appeal and the ground of reversal being that the order appealed from is not supported by the findings, the question is presented as to whether there should be a general reversal or a reversal with direction to the trial court to enter an order appointing appellant guardian of the persons of the minors here involved. Section 53 of the Code of Civil Procedure provides in part: "The Supreme Court, and the District Courts of Appeal, may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had." A proper construction of the foregoing provision would seem to be that in a case such as this, this Court may, in its discretion, order a general reversal which means that the case is set at large and the issues of fact must be retried, or may direct the trial court to enter an order appointing appellant guardian of the minors in the place of respondent in accordance with the views herein expressed. In view of our conclusion that the trial court may desire to give further consideration to the factual matters presented, we deem it appropriate to order a general reversal of the order, thus setting at large all of the issues of fact for a redetermination by the trial court.

The order is reversed.

SHENK and SPENCE, JJ., concur.

TRAYNOR, Justice.

I concur in the judgment.

The objection to the rule that custody must be awarded to the parent unless he is unfit carries the harsh implication that the interests of the child are subordinated to those of the parent when the trial court has found that the best interests of the child would be served by giving his custody to another. The heart of the problem, however, is how the best interests of the child are to be served. Is the trial court more sensitive than the parent to what the child's best interests are, better qualified to determine how they are to be served? It would seem inherent in the very concept of a fit parent that such a parent would be at least as responsive as the trial court, and very probably more so, to the best interests of the child. The rule requiring that custody be awarded to such a parent in preference to a stranger does not operate to subordinate the interests of the child to those of the parent; it merely serves to define the area of the parent's responsibility for the welfare of the child. The court's statutory duty to be "guided by what appears to be for the best interests of the child in respect to its temporal and mental and moral welfare", Probate Code, § 1406, encompasses the view that the child's welfare is part of the responsibility of a fit parent.

One gains perspective by recalling that families are ordinarily allowed to function without outside interference though their wisdom in the upbringing of children may vary as widely as the physical heritage or economic advantages they give their children. Unless the upbringing of the child is so defective as to call for action by the juvenile court, it is unlikely that an outsider will challenge the parental custody or seek by legal process to prove that the child's welfare would best be served elsewhere. It is generally understood that the stability of established family units would be jeopardized by outside interference.

It is only when the family is dissolved by death, divorce or separation that conflicting claims to custody are likely to arise. If the parents are divorced and no third parties are involved, the court of necessity arbitrates whatever conflicting claims the parents may have to the custody of the children. If one parent dies, however, or upon divorce is unable or unfit to have custody of a child, outsiders may enter the picture and attack the competence of the other parent to have custody or contend that the child would be better off with them. The problem may also arise if the parent awarded custody at the time of divorce dies or for other reasons is no longer able to care for the child, or if one or both parents have through necessity been unable for a time to care for the child themselves, but thereafter seek to regain custody from outsiders whose assistance they had solicited in the interim.

Ordinarily in any of these circumstances the determination of what course will best serve the interests of the child will involve the consideration of numerous imponderables. All things being equal, it is clear that the parent should have custody. All things are ordinarily not equal, however. The outsider may be able to offer the child greater material advantages. In the case of the death of the parent having custody after divorce, the child may be on more intimate terms with relatives or a new spouse of the deceased parent than with the other parent who has not had custody. If the child has not been in the custody of either parent he may have been successfully integrated into the home of the person who has been caring for him. The parent seeking custody may have remarried so that if custody is awarded to him, the child will be faced with the problem of adjusting to a stepparent. On the other hand, the importance of preserving the relationship between a natural parent and his child cannot be gainsaid. Even in a case where the foster parent treats the child as his own, the child may still suffer from the lack of a natural parent in the eyes of his playmates, or natural children or other relatives of his foster parent may discriminate against him. If he gets into trouble, members of his foster family may be tempted to point out that he is not really one of them. Moreover, even if the child is required to make some sacrifice to be with his natural parent or adjust to a new environment, it does not necessarily follow that his welfare will be correspondingly impaired. It may not be to the best interest of the child to have every advantage. He may derive benefits by subordinating his immediate interests to the development of a new family relationship with his own parent, by giving as well as receiving. Thus, although a change in custody from an outsider to a parent may involve the disruption of a satisfactory status quo, it may lead to a more desirable relationship in the long run.

The facts of the present case aptly illustrate the problem. The two children lived with their mother and half sister until their mother's death. At that time they were eight and six years of age. Their home was disrupted by their mother's death, and both their half sister and their father now seek their custody. The trial court has found that both are fit and proper persons. It may be assumed that the children wish to stay with their sister and that their lives will be less disrupted at this time if they are allowed to remain with the relative they know best. On the other hand, unless custody is given to their father they will remain to all intents and purposes orphans. If their friends inquire about their father they will either have to fabricate a story or admit their illegitimacy. If their sister marries, her husband might be unwilling to have them in his home. If the children are awarded to their father, they will become legitimate. Civil Code, § 230. They will be placed in a normal home environment with one natural parent and will suffer social embarrassment only to the extent that their past may become known to their friends. In all likelihood the care and support they will receive from their father will be greater if they move into his home than if they remain essentially strangers to him.

There are thus many considerations that support the conclusion that their best interests would be served by awarding custody to their father. There are also considerations that support the contrary conclusion of the trial court.

Psychology is not an exact science. If expert testimony were introduced in cases such as this in all probability it would be in conflict. The ordinary judge as well as the ordinary parent lacks the omniscience accurately to evaluate all of the various considerations that may enter into a custody problem. "The essence of custody is the companionship of the child and the right to make decisions regarding his care and control, education, health, and religion." Lerner v. Superior Court, 38 Cal.2d 676, 681, 242 P.2d 321, 323. If a parent is fit he will be vitally concerned with the best interests of his child. By leaving to him the responsibility as to how those interests will be best served the court simply recognizes that "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. Pierce v. Society of Sisters [etc.], supra [268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070]. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645.

Cases may arise in which the child's interests would be seriously prejudiced by awarding custody to his parent. In such cases, however, the parent's insistence on his right to custody despite the harm that would clearly result to his child will itself be evidence of his unfitness. In re Bensfield, 102 Cal.App. 445, 449, 283 P. 112; In re Guardianship of Casad, 106 Cal.App.2d 134, 152, 234 P.2d 647.

In the present case the appeal is upon the judgment roll alone, and for the purposes of this decision we must accept the finding of the trial court that the father is a fit and proper person to be appointed guardian of the children. It bears emphasis, however, that the father of an illegitimate child comes before the court in at best a questionable light. Although past indiscretions do not necessarily demonstrate present unfitness, Prouty v. Prouty, 16 Cal.2d 190, 193–194, 105 P.2d 295; In re Green, 192 Cal. 714, 721, 221 P. 903; see also, Clarke v. Clarke, 35 Cal.2d 259, 261–262, 217 P.2d 401, such a father should be required to explain why he has not legitimated his child. A father who has the power to do so but does not, demonstrates his unfitness by his willingness to inflict upon his child the status of illegitimacy. Such a father must not be allowed to bargain with the court by offering to exercise his power to legitimate in exchange for custody. On the other hand, a desire to secure custody may be the outgrowth of a moral rehabilitation reflected in an effort to undo a past wrong by legitimating the child.

A father may legitimate his child by marrying the mother, Civil Code, § 215, or "by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child". Civil Code, § 230. On the record before us we must assume that the father did not legitimate his children because he was unable to do so. At the present time the father is married. To legitimate the children now he must have the consent of his wife to receive the children into his family. Civil Code, § 230. There is no express finding that his wife is willing to receive the children into the family. On retrial the father must establish that the children will be legitimated as a minimum prerequisite to establishing his fitness for appointment as guardian.

SCHAUER, Justice.

I dissent.

This is a judgment roll appeal. The facts are not in dispute. The trial court found "That both petitioner Frieda Howes and counter petitioner Harry Cohen are fit and proper persons to be the guardian of the minors herein, and to have their * * * custody * * *. That it is to the best interest and welfare of said minor children that Frieda Howes be appointed guardian of their persons * * *." The court also found that the mother of said children is deceased and that "Petitioner [adult sister of the minors] has supported and cared for said minors since the death of the mother" and that appellant is the natural father of the children and "is remarried and has a family of the second marriage." Letters of guardianship were ordered issued to Frieda Howes.

Appellant's sole ground for reversal is that on the findings, he, as the children's natural father who is not found "unfit," is as a matter of law entitled to judgment denying the petition of the children's sister and ordering the issuance of letters of guardianship to him. He argues, incidentally, that the finding "That it is to the best interest and welfare of said minor children that Frieda Howes be appointed guardian" is immaterial, and must be disregarded. The majority opinion sustains appellant's position in its entirety except that, even though this is a judgment roll appeal, it states that a re-examination of the evidence shall be had.

Appellant does not aver that he desires custody and control of the children. He did not initiate proceedings seeking to be appointed guardian of these children and he does not allege that he ever has had them in his custody, or heretofore sought their custody, or that he ever has supported them. He appears only in response to the petition of Frieda and has contented himself with filing a document entitled *"Objections to Appointment of Guardian and Counter-Petition for Appointment of Guardian"* wherein he merely "objects to the appointment of said Frieda Howes as the Guardian of said children and desires that *if it is deemed by the Court necessary* that a Guardian be appointed, that he be appointed Guardian of said children." (Italics added.) It is also noted that in Frieda's petition for appointment as guardian the word "illegitimate" does not appear; the name of the mother does not appear; the fact of non-marriage is not alleged; the pertinent and sufficient averments in respect to the mother are the simple words "Mother deceased." How different are appellant's sensibilities! In his objections to Frieda's appointment he bluntly avers "That said minor children are the illegitimate children of petitioner and their mother, Marguerite Smith, now deceased."

How eloquently it thus appears on the face of the judgment roll that even though appellant has not been adjudicated "unfit," and has rather been decreed legally "fit," whatever that may mean, he continues now to be as indifferent to the welfare of the children as, from the fact that they were born out of wedlock and that he does not claim to have ever had their custody,[1] it could be inferred he has been from the beginning. Could it be that the real ground for appellant's objections to having the children's adult sister appointed their guardian is a fear that in the interests of these minors she might seek to compel this man to contribute suitably to their support?

And there is still further affirmative evidence in this record, mere judgment roll though it be, of appellant's lack of concern for these children. Appellant asserts in his brief (and respondent concurs in this statement) that the hearing on the guardianship matter "was extremely brief and was based principally upon the report of the Probation Officer and upon an interview in Chambers between the trial judge and the two minor children." The substance of the interview is not shown in the record and the preference expressed by the children does not specifically appear, but appellant urges that such preference *"is immaterial."* (Italics added.) Can we doubt what that preference is?

Appellant argues further that "it is still the law of this State that a parent has a superior right to the custody of his minor children, provided only he is fit and proper to have such custody and *regardless of whether or not it would be better for such children* to be with a stranger." (Italics added.) Therefore, concludes appellant, the trial court "in awarding the guardianship of the children * * * to a stranger [their sister or half-sister who was caring for and supporting them] against the wishes of the father who was a fit and proper person to have their custody, abused its discretion." It seems to me that on this record it is this court which abuses its discretion in reversing the order of the trial court.

Let us look further at this record. Nowhere therein nor in his briefs does appellant come forth with a clear and unequivocal declaration that he is willing to support his children, that he desires their personal custody, that he loves them and that he wants to best serve their welfare, and on that account wants to be their guardian; likewise, he does not even state[2] that he wishes to receive them into his family and otherwise treat them as if they were legitimate, either in order that they may thereby become legitimated as provided by the Civil Code (§ 230), or in order to see to it that their best interest and welfare are subserved in other respects as well. Rather, the whole tenor of appellant's pleadings, briefs, and arguments indicates that he is stepping carefully around an assertion that he now wishes to assume full responsibility for the children, instead suggests that his chief interest is that no one else be placed in a position to assert rights of the children as against him, and that any authority he may have over the children not be lost, as would result from the appointment of another as their guardian (Civil Code, § 204, subd. 1). The entire record tends to confirm the conclusional finding of the trial court that the best interest and welfare of the children lie with their sister, respondent herein, rather than with appellant; nevertheless, the majority of this court, even on this judgment roll appeal, impliedly question the sufficiency of the evidence to support such finding, and argue that certain elements of assumed evidence and implications of some of the findings tend to support a contrary finding that the interests of the children would be better served by placing them in the custody of the father.

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[1] So far as the record on appeal shows appellant does not claim to have supported the children or even to have made any contribution toward their support. However, on the oral argument (at the first hearing) before us, one of the justices, going outside the record, asked counsel for appellant "Did he ever support the children?" and counsel replied "Yes." The inquiring justice also asked counsel for the respondent the question "The father did support these children?" and counsel responded "The father contributed somewhat to their support, yes." There was no stipulation that the record should be augmented by adding all or any part of the quoted questions and unsworn answers, or that any of such "evidence" was before the trial court.

[2] Subsequent to the filing of this court's opinion when this cause was first before it, and while respondent's petition for rehearing was pending, counsel for appellant addressed a letter to the court in which it is stated, among other things, that "It is very clear to appellant that the judgment of the trial court was reversed and that as a result thereof, no further hearing is necessary * * *.

"Counsel for appellant is able to give this Court positive assurance that immediately upon receipt of these children into the home of appellant, these children will be legitimatized * * *.

"Requiring legitimation as a pre-requisite to awarding guardianship is to put the cart before the horse * * *."

It should be obvious that the letter from counsel was not before the trial court, is not in the record, is not signed by or binding on appellant, and cannot properly affect the disposition of a judgment roll appeal.

This case appears to me to again illustrate the poignant undesirability, which I pointed out in my dissents in Roche v. Roche (1944), 25 Cal.2d 141, 144–149, 152 P.2d 999; Stewart v. Stewart (1953), 41 Cal.2d 447, 260 P.2d 44; and In re Guardianship of Kentera (1953), 41 Cal.2d 639, 262 P.2d 317 of requiring the trial court to find a parent to be "unfit" before it can confide the custody of a child to another person, even when the child's best interests are found to be with others. Who can say what "fit" or "unfit" may mean to different judges? If the term be cheapened to mean less fit by comparison—and there are those who argue that such interpretation should be given to it—then the finding that the best interests of the children require that they be placed with one person rather than with another is in effect a finding that, by comparison, the latter is unfit. But why should these children, already bearing the burden of having illegitimate parents (which, as noted hereinabove, their father in this record has unnecessarily alleged and has evidenced no concern about removing) be further burdened with a finding that their natural father is "unfit" to be their guardian? The statute does not require it. The children are both less than ten years of age and it may well be that at some future time changed circumstances and changed attitudes of the father, and perhaps the wishes of the children themselves, will indicate that it would thereafter serve their best interest and welfare to be with the father.

As declared in the dissent in the Roche case, it is my view that we should have confidence in trial judges and in the processes of the law which enable them to view and hear at first hand the children, the parents and other claimants, and that their discretion in the premises should not be so rigidly limited as is done by the rule followed by the majority here. To require a trial court to find a parent "unfit" in order that it may accord the children their right to have their best interest and welfare promoted appears to me to be harsh, legalistic, unfair to both the children and the parent, and in contravention of the legislative intent.

Regardless of differences of opinion as to the desirability of the rule as applied in the Roche case it is quite unnecessary to apply it here. For this holding today there is neither statute nor precedent requiring or supporting it. The holdings of In re Campbell's Estate (1900), 130 Cal. 380, 62 P. 613, and In re Mathews' Estate (1917), 174 Cal. 679, 164 P. 8 (see also In re Estate of Wise (1918), 179 Cal. 423, 426, 177 P. 277; In re Green (1923), 192 Cal. 714, 721, 221 P. 903) that a parent of a minor child under fourteen years of age, if found by the court to be "competent to discharge the duties of guardianship" was entitled to be appointed guardian in preference to a non-parent, regardless of the best interest of the child, are both based upon the specific language of the first sentence of former section 1751 of the Code of Civil Procedure. That sentence was, however, repealed in 1931, and not reenacted, although the other provisions of the section were reenacted as sections 1406 and 1410 of the Probate Code. It thus appears that the Legislature, in recognition of what seems to me to be the protest expressed by this court in In re Mathews' Estate, supra, and In re Estate of Wise, supra, against statutes construed to require that the property right of a parent in a child be considered superior to the best interest and welfare of the child, wisely decided to, and did, remove such requirement from the law of this state.

In the Mathews case, decided in 1917, the court pointed out (p. 683 of 174 Cal.,

p. 9 of 164 P.), that "It is argued with great force that the trend of modern decisions is to regard as of primary importance the welfare of the minor himself. This is most true. The decisions to this effect are made either under the permission of the law, which contains no such restriction as that found [in 1917] in our section 1751, or else are given under the command of the law which, in effect, declares that over and above all else the controlling consideration shall be the welfare of the child. If we were thus at liberty to act, it might well be that the custody of this child, under the findings of the court, would be given to [the non-parent with whom the child had been living for some ten years] * * *."

It is therefore my view that the courts of this state are no longer required by statute to arbitrarily disregard the welfare of the child whenever a legally "fit" parent is making claim, and need no longer adhere to the view expressed in In re Campbell's Estate (1900), supra, 130 Cal. 380, 382, 62 P. 613, that the right of the parent in the child is similar to that of the owner of property in his chattel and must "be regarded as coming within the reason, if not within the strict letter, of the constitutional provisions for the protection of property * * *." To place this property right conception of a parent's claim to children over and above the welfare of the children seems to me to be a throwback of generations if not of centuries. The mandate of our Legislature as expressed in section 1406 of the Probate Code is that "In appointing a general guardian of a minor, the court is to be guided by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare; and if the child is of sufficient age to form an intelligent preference, the court may consider that preference in determining the question * * *." These provisions, when construed with the provision of section 1407 of the same code, that "Of persons equally entitled *in other respects* to the guardianship of a minor, preference is to be given as follows: (1) To a parent; * * *" (italics added), appear to me to require that the first concern of the court should be directed toward determining "what appears to be for the best interest of the child in respect to its temporal *and* mental *and* moral welfare" (italics added) as specified by section 1406, and that only when the sum of all of these aspects of the child's welfare will be subserved equally well by having the parent as guardian will the parent's right be held as a matter of law superior.

I am further of the view that such a philosophy, rather than tending toward the weakening of family relationships and the assumption of arbitrary state control over children, will work towards the contrary result. Where, as here, although the parent is found legally "fit," it does not appear that as between parent and child there ever has been a family relationship, and where the parent's concern for his children's welfare and his wish to serve their best interests are unestablished and appear to be highly questionable, how can it be considered that any family relationship that might be established with him would be more desirable than that heretofore and presently enjoyed by the children with their sister, respondent herein who, it seems, has cared for them as a labor of love? Is it not more likely that they will grow to mature, responsible, adulthood, to take a useful place in society, when living in the home in which the trial court found their best interest resides, rather than being compelled to leave that home for such abode, if any, as the father may be inclined to designate? Although I believe there is no question but that in the vast majority of cases the best interest of the child will lie with the natural parent and that trial judges surely can be depended on to so find, it nevertheless seems to me that this case points up and again emphasizes the necessity, the justice, and the rightness, of permitting trial judges the exercise of a wise discretion in deciding problems of custody and guardianship of children. There are many things in this record which, in the interests of the children, seem to cry aloud for support of the trial court's order, yet none of those things suggests that the trial judge should have found the father to be "unfit" to have custody of children. Indeed it would have been a cruel and unnecessary act for the trial court to have found the father "unfit" to have custody of children, for there is another finding in the record. It is that this "Natural father is remarried and has a family of the second marriage." To this second family appellant well may be not only a legitimate husband and father but in truth a "natural" and a kindly, considerate one. Yet however fit he is in a legalistic sense, he may be the last one who, for the interests of the children, should be appointed their guardian.

The findings establish that the children have no estate. Such findings also establish, directly or impliedly, that the appellant is the one person who is primarily liable for the support of the children and against whom the guardian should assert rights on behalf of the children. But this court holds that as a matter of law, since appellant is not legally "unfit," the welfare of the children cannot even be considered, let alone given effect.

Although I have not discussed the question of illegitimacy as bearing upon any right of the father (except as it may be relevant before the trial court in determining what is for their best interest), it may be noted that while under the provisions of section 1403 of the Probate Code the consent of both parents, if living and capable of consent, is required for the appointment by will or deed of a guardian of a child, nevertheless the mother alone may make such appointment if the child is illegitimate. Also, section 1405 of the same code provides that the court may appoint a guardian "when no guardian has been appointed * * * by will or by deed * * *." These sections would appear to me to cast further doubt upon the absolute legal right here sought to be asserted by appellant-father. (See In re Britt (1917), 176 Cal. 177, 167 P. 863; In re Imperatrice's Guardianship (1920), 182 Cal. 355, 358, 188 P. 48.)

As already indicated there are some assumptions in the majority opinion, and some in the concurring opinion, which appear to be inconsistent with the trial court's findings, and to be indulged to the end of supporting a reversal rather than an affirmance. The majority and concurring opinions speak of a new trial. But this is a mere judgment roll appeal, and the reversal must be based on the findings or it is necessarily in defiance of the strict direction of section 4½ of article VI of the Constitution. Thus, as pointed out by counsel for appellant, there is no occasion for a new trial. On the majority holding appellant is, as a matter of law, entitled to guardianship papers, yet both the majority and concurring opinions suggest a new trial.

The majority say "There is an additional factor in the instant case. As far as appears the minors have not been legitimated. By awarding their custody to the father they are more likely to be legitimated * * *. Unless the father has the right to custody it is not probable that he will receive the minors into his home and thus legitimate them." This speculation as to the existence or non-existence of facts and as to possible future events, and as to the effect thereof on the weight or sufficiency of the evidence supporting the finding that it is to the best interest of the children that letters of guardianship issue to, and that they remain in the custody of, the respondent adult sister who has supported and cared for them since the death of their mother several years ago, has no legitimate place in an opinion disposing of a judgment roll appeal.

It cannot lawfully be assumed that on a new trial there can be any evidence which would justify not awarding the children's guardianship to the father, because, on evidence which cannot be doubted, he has already been found to be fit and that finding, as a matter of law, it is held, entitles him to a reversal of the judgment. If on this record he is entitled to a reversal, *a fortiori* he is entitled to letters of guardianship without further hearing. This has to be true, because otherwise the majority would be reversing a judgment without a showing of prejudice as required by section 4½ of article VI of the California Constitution and by section 475 of the Code of Civil Procedure. The burden is on appellant to show prejudice, i.e., a miscarriage of justice. On this judgment roll appeal he cannot possibly show prejudice entitling him to a reversal unless on that record (upon the findings) he is entitled to judgment in his favor, which means the issuance of letters of guardianship on the going down of the remittitur. Therefore, this court, if it upholds the law, must sustain the award of letters of guardianship to appellant upon the going down of the remittitur without further hearing in the trial court. But evidencing at last some slight weakening in its self-made rule of thumb for award of custody it suggests that there should be a new trial.

Also demanding mention, to avoid possible confusion, is the concurring opinion's statement (not concurred in by the majority) that "On retrial the father must establish that the children will be legitimated as a minimum prerequisite to establishing his fitness for appointment as guardian." This statement has no legitimate place in the opinion. As already mentioned repeatedly this is a judgment roll appeal. The evidence is not before us; it is conclusively presumed to be sufficient to support all findings and the findings squarely determine that the appellant is a fit person to be appointed guardian of the children here concerned. But if there is to be a new trial it is to be hoped that the quoted statement will not be accepted by the trial court. To accept it might well work a manifest injustice to the appellant father, and to his wife, and occasion unnecessary suffering both to these children and to the presently legitimate children of appellant and his wife. It may be, or it may not be, to the best interests of the children involved here that they be taken into the home and family of appellant. There might develop a quite natural resentment on the part of the legitimate children of the established family to what they could consider to be an intrusion. Their remarks to neighborhood children could lead to cruelties and griefs which only the sensitive can fully understand and which only the callous would willfully inflict. There can be far more sinister influences on the life of a child than the legal status of illegitimacy. If the appellant here has all the virtues which the concurring opinion assumes for him, then his good faith determination that the welfare of these children will best be served by not taking them into his household should be respected just as much as his possible determination to the contrary. In any event it is to me unthinkable that a trial court should find the appellant father here, if he is a good husband and father to his present family, to be "unfit" to have the custody of the children whose welfare is here at stake.

The extraordinary concept of "fitness" disclosed in the concurring opinion does not appear to, at least at this time, have the concurrence of any other justice of this court and is not, I think, likely to commend itself to many trial judges whose duty it is to deal face to face with live children and flesh and blood parents and custodians. Judges who handle such cases have, in my observation of their work, exhibited a high respect for the law, a conscientious fidelity to duty, and great wisdom and patience in seeking to determine the course that will best serve the interests of the children. Such judges, I think, are regretful that we arbitrarily deny to them the right to consider the welfare of the children as opposed to a custody claim of a parent unless the parent be found "unfit." The trial judge, when he is confronted with facts which indicate that for a while the interests of a child imperatively demand placement with a person other than a parent, ordinarily uses that means to bridge the present emergency, and he looks to the future and possible restoration of the child to the custody of a parent (or parents) at a later date. The law, as enacted by the Legislature, contemplates such procedure and every custody order is subject to modification during the child's minority. A judge so engaged realizes that few domestic relations concepts could be more cruel in application and regrettable in result than a willingness to lightly —but necessarily publicly and indelibly— brand a parent as "unfit." Such branding would almost certainly mean that the parent could never hope to regain either the custody or respect or affection of his child; no more could the child hope to re-join his parent. Such a branding could add immeasurably to the burdens and handicaps of the children affected. And it would do all this without any necessity therefor, simply to satisfy a court-made rule which is adhered to in direct derogation of the legislative policy.

It should further be pointed out that the concurring opinion, after at least suggesting lip service to the view that it would be harsh to place the rights of a "fit" parent above the best interests of the child, then goes on to assert that "The heart of the problem, however, is how the best interests of the child are to be served. Is the trial court more sensitive than the parent to what the child's best interests are, better qualified to determine how they are to be served? It would seem inherent in the very concept of a fit parent that such a parent would be at least as responsive as the trial court, and very probably more so, to the best interests of the child." Such an assertion completely ignores the obvious fact that it is in controversies in which the parent's responsiveness to the best interests of the child has been called into question, that trial courts are called upon to determine where such interests lie, and that in such controversies our Constitution and the Legislature have entrusted to trial courts exercising a proper discretion, rather than to either parents or appellate courts, the determination of the issue. I do not share at all the indicated deprecatory view of the wisdom of trial judges and I would leave with them, appreciatively, the full scope of discretion given them by the Legislature in the handling of the very difficult and delicate problems which daily confront them in domestic relations court.

I would affirm the order appealed from.

EDMONDS, Justice (dissenting).

In a proceeding to appoint a guardian for a minor child, the court must be guided "by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare". Prob.Code, § 1406. The code provisions relating to the custody of a legitimate minor child, as construed in Roche v. Roche, 25 Cal.2d 141, 152 P.2d 999, Stewart v. Stewart, 41 Cal.2d —, 260 P.2d 44, and In re Guardianship of Kentera, 41 Cal.2d —, 262 P.2d 317, are a legislative determination that the child's interest will be best served if the right of the natural parent to his custody is made paramount to that of a stranger. In this connection, section 197 of the Civil Code specifically provides that "[i]f either the father or mother [of a legitimate unmarried minor child] be dead or unable or refuse to take the custody or has abandoned his or her family, the other is entitled to its custody, services and earnings."

There is no similar provision in regard to an illegitimate child. Section 200 of the Civil Code, which concerns the custody of such a child, gives that right to the mother without mention of the father's status upon her death. In short, there is no legislative determination that, when the mother is dead, the interest of the child will be better served by a custodial right in the father superior to that of any other person.

The conclusion reached in the majority and concurring opinions is based upon the rule which governs judicial determination of the custody of legitimate children. But there is far less reason to suppose that the generally undesired child of an illicit relationship will enjoy the same paternal love and affection as that of a legitimate one.

Great concern is expressed by my associates in regard to the probability of legitimating the child. According to Justice CARTER, the child more likely will be legitimated if the father is given a paramount right to his custody. Justice TRAYNOR takes the position that a willingness to legitimate the child is a minimum prerequisite to a showing of the father's fitness.

The probability of legitimation is a consideration which cannot be too strongly emphasized. But in my opinion, there is no reasonable basis for concluding that a father will be more moved to do what is right if he is given a paramount right to custody. To permit the trial judge to ascertain first that the child will be legitimated before awarding custody to the father and, in the absence of such action, to award custody to another qualified person would more nearly achieve that objective. Otherwise the trial judge must award custody to the father without assurance that the child will be legitimated, or, according to the alternative suggestion, may declare the father unfit if legitimation is not accomplished, despite the fact that the only hinderance may be the failure of his wife to consent.

The trial court found that the best interests of the children will be served by giving their custody to Frieda Howes. The appeal being on the judgment roll, it must be presumed that the evidence supports that determination. If, upon a future application it should be shown that the childrens' interests would be better served because of a change in conditions of which legitimation of the children may be one, a different order may be made. But, upon the present record I would affirm the order of the trial court.

GIBSON, C. J., concurs.

* * *

PEOPLE v. CARMEN.*

Cr. 5286.

Supreme Court of California.
In Bank.
Feb. 1, 1954.
Rehearing Granted Feb. 24, 1954.

Defendant, an Indian, was convicted of first degree murder. The Superior Court, Madera County, Stanley Murray, J., entered judgment, and case came before Supreme Court on automatic appeal. The Supreme Court, Carter, J., held that the state court was without jurisdiction to try defendant for murder of another Indian on Indian allotment comprised of lands held in trust by United States government for a 25 year period, in view of statutes vesting exclusive jurisdiction in such cases in United States in its courts.

Judgment reversed.

1. Indians 🔑38(2)

State court was without jurisdiction to try Indian for murder of another Indian on Indian allotment comprised of land held in trust for United States government for a 25 year period, in view of statutes vesting exclusive jurisdiction in such cases in United States and its courts. 18 U.S.C.A. §§ 1151–1153, 3242; Executive Order No. 9500, U.S.Code Cong. Service 1944, p. 1539.

2. Indians 🔑5

Citizenship is not incompatible with continued guardianship, and so may be conferred without completely emancipating Indians, or placing them beyond reach of congressional regulations adopted for their protection.

3. Indians 🔑38(2)

Principle of exclusive federal jurisdiction over crimes involving Indians on Indian reservations is not based on a cession of such jurisdiction by states to federal government, but is based on the constitutional authority of the United States to deal with Indians.

4. Criminal Law 🔑104, 105

The matter of jurisdiction in a criminal proceeding is never presumed; it must always be proved and is never waived as a defense, and question of jurisdiction can be raised at any stage of the proceeding.

5. Indians 🔑38(2)

Under statutes conferring exclusive jurisdiction on United States over crimes involving Indians on Indian allotments, that the Indian allotments must have once been a part of an Indian reservation is not a prerequisite to vesting of such exclusive jurisdiction. 18 U.S.C.A. §§ 1151, 1153.

6. Indians 🔑38(2)

Fact that Congress, in 1953, enacted law giving to California jurisdiction over crimes by Indians in Indian country within the state, had no effect upon federal jurisdiction of such a crime committed in 1950. 18 U.S.C.A. §§ 1151–1153, 1162, 3242.

Mason A. Bailey, Madera, and Leonard J. Bloom, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Winslow Christian, Wallace G. Colthurst and Arlo E. Smith, Deputy Attys. Gen., Andrew J. Eyman, Sp. Deputy Atty. Gen., and George R.

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* Subsequent opinion 273 P.2d 521.

McClenahan, Deputy Dist. Atty., San Diego, for respondent.

CARTER, Justice.

Defendant, Rayna Tom Carmen, pleaded not guilty and not guilty by reason of insanity to a charge of murder. One jury found him guilty of first degree murder, and another jury found him sane. The death penalty was imposed. The case is here on automatic appeal. Pen.Code, § 1239(b).

Defendant was previously tried on the same charge and found guilty of having murdered one Wilbur Dan McSwain on April 22, 1950; he was also charged in a second count with, and found guilty of, assault with intent to commit the murder of Alvin McSwain. After an appeal to this court, the murder conviction was reversed because of the failure, on the part of the trial court, to give an instruction on manslaughter, and because erroneous instructions on first degree murder were given. The judgment of conviction on the second count was affirmed. People v. Carmen, 36 Cal.2d 768, 228 P.2d 281.

On this appeal, additional evidence in the form of a stipulation was produced for the purpose of determining whether or not the state courts had jurisdiction to try defendant for the crime of murder. By stipulation it was shown that the deceased, Wilbur Dan McSwain, was an Indian; that the defendant, Rayna Tom Carmen, is an Indian, and that the crime was committed on the Maggie Jim Allotment which was comprised of lands held in trust by the United States Government for a twenty-five year period, Federal Register, November, 14, 1944, 9 F.R. 1369, Executive Order No. 9500, U.S.Code Cong.Service 1944, p. 1539.

On behalf of defendant, it is contended that the state court was without jurisdiction over him in that exclusive jurisdiction in such cases is vested in the United States and its courts by reason of sections 1151, 1152, 1153 and 3242 of the United States Code Annotated, as amended May 24, 1949. U.S.C.A., Title 18.

Section 1151 provides as follows: "Except as otherwise provided in sections 1154 and 1156 of this title [those sections have reference to sales of liquor to Indians and the definition of the term "Indian country" as it relates to the liquor laws], the term 'Indian country,' as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) *all Indian allotments, the Indian titles to which have not been extinguished,* including rights-of-way running through the same." Emphasis added; June 25, 1948, c. 645, 62 Stat. 757, amended May 24, 1949, c. 139, § 25, 63 Stat. 94.

Section 1152 provides: "Laws governing. Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

"This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." June 25, 1948, c. 645, 62 Stat. 757.

Section 1153 provides in pertinent part: "Offenses committed within Indian country. Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." (The second paragraph of this section relates to rape; the third paragraph to burglary. Both provide that the crimes shall be defined as provided by the laws of the state in which they were committed. Burglary is to be punished in accordance with the laws of the state in which it is committed.) June 25, 1948, c. 645, 62 Stat. 758, amended May 24, 1949, c. 139, § 26, 63 Stat. 94.

Section 3242 provides that "All Indians committing any of the following offenses, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny on and within the Indian country, shall be tried in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." June 25, 1948, c. 645, 62 Stat. 827, amended May 24, 1949, c. 139, § 51, 63 Stat. 96.

[1] We have concluded that defendant's position must be sustained. The sections define "Indian country" as including an Indian allotment, the Indian title to which has not been extinguished and as being within the exclusive jurisdiction of the United States and that crimes committed by Indians against other Indians shall be punished under the general laws of the United States.

[2] The People argue that defendant was a citizen of the United States and of this state and for that reason, our courts have jurisdiction. That contention was answered adversely to the People in United States v. Nice, 241 U.S. 591, at page 598, 36 S.Ct. 696, at page 698, 60 L.Ed. 1192, wherein it was said: "Citizenship is not incompatible with * * * continued guardianship, and so may be conferred without completely emancipating the Indians, or placing them beyond the reach of congressional regulations adopted for their protection." In Hallowell v. United States, 221 U.S. 317, 324, 31 S.Ct. 587, 589, 55 L.Ed. 750, the defendant was an Omaha Indian residing in Nebraska. He was a citizen of the United States and of the state in which he resided. He contended at the trial that the state court had jurisdiction. The Supreme Court held that the federal courts had jurisdiction and said: "* * * [T]he United States had not parted with the title to the lands, but still held them in trust for the Indians. In that situation its power to make rules and regulations respecting such territory was ample."

[3, 4] It is contended by the People that this state had jurisdiction in that it had never ceded jurisdiction over the land on which the crime occurred. In United States v. McGowan, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410, it was held that the principle of exclusive federal jurisdiction over crimes involving Indians on Indian reservations is not based on a cession of such jurisdiction by the states to the federal government but is based on the constitutional authority of the United States to deal with the Indians. It is argued by the People that whether the defendant was a ward of the United States, as held in United States v. Kagama, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228, was a question of fact which should have been raised at one of defendant's two trials, and that the burden was on defendant to prove such wardship, or jurisdiction, as a defense. In United States v. Rogers, D.C., 23 F. 658, it was held that the matter of jurisdiction in a criminal proceeding is never presumed; that it must always be proved and is never waived as a defense. It was further held there that the question of jurisdiction can be raised at any stage of the proceeding. See, also, United States v. Anderson, D.C., 60 F.Supp. 649, 650, holding that if the court is without jurisdiction of the subject matter, its proceeding is a nullity.) "Even the consent of the accused can not confer jurisdiction, and it is an issue that can be made at any stage of the proceedings, * * *." In Costa v. Banta (a civil case), 98 Cal.App.2d 181, 182, 219 P.2d 478, 479, it was held that "Although the jurisdiction of that court was not questioned during the trial, it is well established that questions of jurisdiction are never waived and may be raised for the first time on appeal." In State v. Pepion, 1951, 125 Mont. 13, 230 P.2d 961, the defendant, an Indian, committed larceny within the limits of an Indian reservation. The court held that he was subject to applicable federal laws and was under the exclusive jurisdiction of the United States

courts. It was there held that the state district court was without jurisdiction and that its purported judgment was a nullity.

[5] The People contend that section 1153 extended the definition of "Indian country" to cover Indian allotments for the first time in 1948 and that in order to vest exclusive jurisdiction in the United States (section 1151) such Indian allottees must have had an "unextinguished Indian title" to the land. By this, it is argued, is meant that the Indians holding under such an allotment must have had an "uninterrupted use and occupancy or to [sic] land which comprises a statutorily recognized Indian reservation." The crime occurred in 1950, and a complete answer to this argument is that the sections under consideration do not so provide. Nothing is to be found therein providing that Indian allotments must have once been part of an Indian reservation. The People contend that the sections were amended to cover Indian allotments after the decision in United States v. Pelican, 232 U.S. 442, 449, 34 S.Ct. 396, 399, 58 L.Ed. 676, wherein it was held that land once part of an Indian reservation did not lose its character as Indian Country by reason of a subsequent allotment to Indians. It was there held: "But, meanwhile, the lands remained Indian lands, set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings, the government retaining control." It would appear that the Pelican decision adds nothing to the People's argument and serves merely to establish that the statute was amended so as to cover, specifically, Indian allotments. Tooisgah v. United States, 10 Cir., 186 F.2d 93, 99, relied upon by the People is not in point here. That case involved the murder of an Indian by an Indian in 1942. At that time section 1151 did not include Indian allotments within the definition of Indian country. The court there said: "But, judging federal jurisdiction here under the words of the statute when the offense was committed, we are now constrained to hold that when the reservation was dissolved and tribal government broken up, the allotted lands lost their character as lands 'within any Indian reservation'." The court there noted that it was not alleged that either Indian involved occupied the status of an allottee of lands the title to which was held in trust by the United States and that federal jurisdiction was not invoked or sought to be sustained under the provisions of the General Allotment Act.

[6] It is next contended that the United States cannot claim exclusive jurisdiction over crimes committed by Indians in Indian country and that the case of United States v. Kagama, supra, 118 U.S. 375, 6 S.Ct. 1109, with its wardship theory, is obsolete. From this it is argued that because Indians are now citizens of the United States and of the state in which they reside, U.S.C.A., Tit. 8, § 1401 [formerly Tit. 8, §§ 601, 604]; Anderson v. Mathews, 174 Cal. 537, 163 P. 902; Piper v. Big Pine School Dist., 193 Cal. 664, 226 P. 926, they should be subject to the laws of the state in which they reside. It is said, with merit, that Congress itself has recognized the change in the condition of the California Indian in that it has expressly stated that California has jurisdiction over crimes by Indians in Indian country within the state. Public Law 280 was passed by the First Session of the 83rd Congress, Aug. 15, 1953, 18 U.S.C.A. § 1162, giving to California jurisdiction in such situations. The fact remains, however, that at the time the crime in question was committed Congress had not seen fit to so act.

The last contention made by the People is that this state has concurrent jurisdiction with the United States. Since the statutes in question provide that the United States has exclusive jurisdiction in such a situation, the contention is obviously without merit.

Inasmuch as the Superior Court was without jurisdiction to try defendant for the crime with which he was charged, the judgment of conviction is a nullity and must therefore be reversed with directions to the trial court to dismiss the information against the defendant.

Judgment reversed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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42 Cal.2d 158

PRESCOTT
v.
RALPH'S GROCERY CO.

L. A. 22826.

Supreme Court of California.
In Bank.
Jan. 29, 1954.
Rehearing Denied Feb. 24, 1954.

Action for damages sustained when plaintiff fell on sidewalk near entrance to defendant's store. The Superior Court, Los Angeles County, Otto J. Emme, J., entered judgment on verdict for defendant and plaintiff appealed. The Supreme Court, Gibson, C. J., held that assumption of risk instructions were prejudicially erroneous.

Judgment reversed.

Edmonds, J., dissented.

Prior opinion, 256 P.2d 77.

1. Stipulations 🔑14(12)

Stipulation that plaintiff, on appeal, would present the point whether trial court erred in refusing to give requested instructions did not foreclose plaintiff from presenting other objections, where stipulation was prepared by defendant copying the wording from plaintiff's proposed settlement statement, and such wording was not intended as waiver of any points.

2. Negligence 🔑65, 105

Contributory negligence arises from lack of due care, while assumption of risk will negative defendant's liability regardless of fact that plaintiff may have acted with due care.

3. Negligence 🔑105

Defense of assumption of risk is available where there has been a voluntary acceptance of risk and where such acceptance, whether express or implied, has been made with knowledge and appreciation of the risk.

4. Negligence 🔑105

Plaintiff may be found to have assumed risk if facts are such that he must have had knowledge of the hazard, but where it merely appears that he should or could have discovered danger by exercise of ordinary care, the defense is contributory negligence and not assumption of risk.

5. Appeal and Error 🔑1064(1)

Negligence 🔑138(1)

In action for damages for injuries sustained when plaintiff fell on sidewalk near entrance to defendant's store, instructions permitting jury to find that plaintiff assumed risk without finding that plaintiff had actual knowledge of the danger were erroneous and the error was prejudicial.

6. Negligence 🔑138(1)

In action for damages sustained when plaintiff fell on sidewalk near entrance to defendant's store, plaintiff's requested instruction that party cannot assume risk of danger which arises from negligent act of another did not state law and was properly refused.

7. Negligence 🔑141(1)

In action for damages for injuries sustained when plaintiff fell on sidewalk near entrance to defendant's store, plaintiff's requested instruction that plaintiff could be found contributorily negligent only if she were found to have been aware of danger into which she was proceeding did not state law and was properly refused. Civ.Code, § 1714.

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Kenny & Morris and Eleanor V. Jackson, Los Angeles, for appellant.

Moss, Lyon & Dunn, Richard B. Coyle and Henry F. Walker, Los Angeles, for respondent.

GIBSON, Chief Justice.

Plaintiff brought this action to recover damages for injuries sustained when she fell on the sidewalk near an entrance to defendant's grocery store. The jury returned a verdict for defendant, and plaintiff has appealed claiming that the judgment should be reversed because the court assertedly erred in instructing the jury.

Plaintiff testified that she parked her car at the rear of defendant's store and walked to the entrance, using the sidewalk adjacent to the building. After making a purchase, she left the store and noticed that there was "a lot of water" on the sidewalk and that there was no dry area between the building and the curb through which she could walk. She had not noticed any water when she entered the store. Upon "very carefully" taking three or four steps on the wet sidewalk, plaintiff slipped on something and fell. She did not see any foreign substance in the water, but it looked dirty. Her dress was soiled, and, after it dried, there were "little flakes of something" on it.

An employee of defendant testified that vegetables were unloaded at a receiving door near where plaintiff fell and that, occasionally, he had seen vegetable matter on the sidewalk. On the day of the accident he found some refuse there which he placed in a garbage container. He then washed the walk with two buckets of hot water and swept it "completely clear of water." According to his testimony nothing was left on the walk except some dampness. About fifteen or twenty minutes later someone reported to him that a woman had fallen on the walk. After the accident, some parts of the walk were damp and other parts appeared to be dry.

[1] A preliminary question is presented as to the matters which plaintiff is entitled to raise on this appeal. She asserts that the trial court erred in giving certain instructions and in refusing to give others. Defendant claims that, by reason of a stipulation, plaintiff is limited to the asserted error in *refusing* to give requested instructions. Plaintiff originally elected to use a settled statement on appeal which asserted that "the point to be raised by plaintiff on appeal is the contention that the trial court erred in refusing to give plaintiff's requested instructions Nos. 1 to 6 as hereinabove set forth." Thereafter defendant agreed to advance the cost of preparing clerk's and reporter's transcripts if plaintiff would proceed by that method, and the parties stipulated in writing to use the transcripts as the record on appeal. The stipulation, which incorporates the quoted language set forth above, does not state that the recited contention is the only point to be raised, and plaintiff asserts that the language was used therein merely because defendant, who prepared the stipulation, copied the wording from plaintiff's proposed settled statement. While such a provision is appropriate as part of a settled statement, it does not appear to have been intended as a waiver of any points which plaintiff desired to make on the present record, and in the absence of a clear showing of such intent, plaintiff should not be precluded from raising any points she may have.

[2-5] Plaintiff contends that the trial court erred in giving instructions * to the

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* The challenged instructions read as follows:

"Defendant's Instruction No. 23. There is a legal principle commonly referred to by the term 'assumption of risk,' which now will be explained to you:

"One is said to assume a risk when she freely, voluntarily and knowingly manifests her assent to dangerous conduct or to the creation or maintenance of a dangerous condition, and voluntarily exposes herself to that danger, or when she knows, or in the exercise of ordinary care would know, that a danger exists in either the conduct or condition of another, or in the condition, use of operation of property, and voluntarily places herself, or remains, within the area of danger.

"One who thus assumed a risk is not entitled to recover for damage caused her without intention and which resulted from the dangerous condition or conduct to which she thus exposed herself.

"Defendant's Instruction No. 24. It should be noted that to bar recovery, assumption of risk must be voluntary. To be voluntary, these two factors must be present: First, the person in question must have actual knowledge of the danger, or the conditions must be such that she would have such knowledge if she exercised ordinary care. Second, she must have freedom of choice. This freedom of choice must come from circumstances that provide her a reasonable opportunity, without violating any legal or moral duty, to safely refuse to expose herself to the danger in question."

effect that "One is said to assume a risk when she freely * * * and voluntarily exposes herself to [a] danger, or when she knows, *or in the exercise of ordinary care would know,* that a danger exists," and that to bar recovery on this ground "the person in question must have actual knowledge of the danger, *or the conditions must be such that she would have such knowledge if she exercised ordinary care.*" (Italics added.) The defenses of assumption of risk and contributory negligence are based on different theories. Contributory negligence arises from a lack of due care. The defense of assumption of risk, on the other hand, will negative liability regardless of the fact that plaintiff may have acted with due care. (See Prosser on Torts [1941], p. 377.) It is available when there has been a voluntary acceptance of a risk and such acceptance, whether express or implied, has been made with knowledge and appreciation of the risk. (See Rest., Torts, § 893.) Where the facts are such that the plaintiff must have had knowledge of the hazard, the situation is equivalent to actual knowledge, and there may be an assumption of the risk, but where it merely appears that he should or could have discovered the danger by the exercise of ordinary care, the defense is contributory negligence and not assumption of risk. Hayes v. Richfield Oil Corp., 38 Cal.2d 375, 385, 240 P.2d 580; see Prosser on Torts [1941], p. 386. In the present case, the instructions are erroneous since they permitted the jury to find that plaintiff had assumed the risk without finding that she had actual knowledge of the danger. Hayes v. Richfield Oil Corp., 38 Cal.2d 375, 384–385, 240 P.2d 580; Plotts v. Albert, 120 Cal.App.2d 105, 260 P.2d 621.

[6] We cannot agree, however, that the court erred in refusing any of the instructions requested by plaintiff. In the first of these instructions the court was asked to tell the jury that "You are instructed as to the doctrine of assumption of risk that the law is, that while a person assumes the perils which are naturally incident to the position he has taken, *he does not assume dangers which come only from the negligent act of another.*" (Italics added.) As we have seen, the elements of the defense of assumption of risk are a person's knowledge and appreciation of the danger involved and his voluntary acceptance of the risk. It follows that a person, if he is fully informed, may assume a risk even though the dangerous condition is caused by the negligence of others. See Lunsford v. Standard Oil Co., 84 Cal.App.2d 459, 466–468, 191 P.2d 82; Warnke v. Griffith Co., 133 Cal.App. 481, 494, 24 P.2d 583; Prosser on Torts (1941), p. 385; 35 Am.Jur. 725–727; 28 L.R.A.,N.S., 1215–1244. Indeed, the cases in which this defense is applied usually involve dangerous conditions created by the negligence of another. The requested instruction was erroneous, and the trial court was not under a duty to revise it to state the law accurately. Tossman v. Newman, 37 Cal.2d 522, 525, 233 P.2d 1. The cases of Hedding v. Pearson, 76 Cal.App.2d 481, 173 P.2d 382, Bee v. Tungstar Corp., 65 Cal.App.2d 729, 151 P.2d 537, Muskin v. Gerun, 46 Cal.App.2d 404, 116 P.2d 105 and Jones v. Hedges, 123 Cal.App. 742, 12 P.2d 111, are disapproved insofar as they contain language inconsistent with the view herein expressed.

[7] The court also properly refused an instruction requested by plaintiff as follows: "Plaintiff was not negligent as a matter of law merely because she continued to walk on the sidewalk after knowing that some danger existed. *She can only be charged with negligence if you find as a fact that before she proceeded further she was aware of the amount of danger actually present.*" (Italics added.) The italicized portion of the instruction states the law incorrectly, since plaintiff could have been charged with negligence not only if she was aware of the danger present and did not take proper precautions to avoid it, but also if, in the exercise of ordinary care, she should have been aware of that danger and failed to take such precautions. Civ. Code, § 1714; Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 50 P.2d 801; see Rest., Torts, §§ 463, 464, 466. With respect to the other requested instructions which were refused, it is sufficient to note that the matter contained therein was substantially covered in instructions given by the court.

We have concluded that, under the circumstances of this case, the erroneous instructions given on assumption of risk resulted in a miscarriage of justice.

The judgment is reversed.

CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting).

The only evidence as to the cause of Mrs. Prescott's injury tended to show the presence of water upon the sidewalk at the time of her fall, a condition which she admittedly observed before proceeding. Although the challenged instructions were incorrect in stating that she assumed the risk of injury if "in the exercise of ordinary care" she should have perceived the dangerous condition, her testimony that she was aware of the condition of the sidewalk refutes any claim of prejudice from them. For that reason, in my opinion, no miscarriage of justice could have resulted.

I would affirm the judgment.

Rehearing denied; EDMONDS, J., dissenting.

42 Cal.2d 149

VALLINDRAS

v.

MASSACHUSETTS BONDING & INSURANCE CO. et al.

S. F. 18869.

Supreme Court of California.
In Bank.

Jan. 22, 1954.

Rehearing Denied Feb. 17, 1954.

False imprisonment action against sheriff and his surety. The Superior Court, San Francisco County, Edward Molkenbuhr, J., sustained defendants' general demurrers, and plaintiff appealed from the resultant judgment. The Supreme Court held that order directing sheriff to imprison plaintiff until he should purge himself of contempt by payment of "——" was regular on its face and was, so far as civil liability of sheriff for false imprisonment was concerned, sufficient authority for him to imprison plaintiff, where it bore on its face the signature of a judge of a court of competent jurisdiction, notwithstanding fact that it did not specify amount which plaintiff was required to pay to purge himself of contempt.

Affirmed.

Shenk and Carter, JJ., dissented.

Prior opinion, 255 P.2d 457.

1. False Imprisonment 🔑20(1)

Complaint alleging that sheriff had unlawfully imprisoned plaintiff under order of Superior Court adjudging plaintiff guilty of contempt for wilful failure to pay attorney's fees and support money to his wife in pending divorce action and that order was void upon its face failed to state cause of action for false imprisonment.

2. Pleading 🔑8(9)

Within complaint alleging that sheriff "did unlawfully imprison plaintiff" under order of Superior Court adjudging plaintiff guilty of contempt for wilful failure to pay attorney's fees and support money to his wife in pending divorce action and that contempt order was "void upon its face", the quoted phrases were conclusions of law and added nothing to the substantive averments of the complaint.

3. False Imprisonment 🔑7(5)

The fact that it is held that a man is entitled to be released on habeas corpus does not mean that his custodian must answer in damages for previous detention.

4. False Imprisonment 🔑7(5)

Habeas Corpus 🔑90

Generally, right to release from custody is determined by rules of criminal law, and right to recover damages for false imprisonment depends on rules of civil law.

5. False Imprisonment 🔑39

Fact that contempt order under which imprisoned plaintiff had been held void in plaintiff's habeas corpus proceeding did not establish as matter of law that his arrest and detention were unlawful thereby making sheriff liable for false imprisonment. Code Civ.Proc. § 1219.

6. Contempt ⚷40

All contempt proceedings are criminal in nature and those procedural rights and safeguards which are appropriate to criminal contempt proceedings are also accorded contemnor in civil contempt proceedings. Code Civ.Proc. § 1219.

7. Sheriffs and Constables ⚷95

A sheriff is a ministerial or executive, not a judicial, officer, and it is his duty to execute orders of court unless they are patently irregular and void. Code Civ.Proc. §§ 262.1, 1219; Civ.Code, § 43.5(a).

8. Sheriffs and Constables ⚷98(5)

Unless there is a clear absence of jurisdiction on part of court or magistrate issuing process, it is sufficient authority for sheriff to act if upon its face it appears to be valid in judgment of ordinarily intelligent and informed layman. Code Civ.Proc. §§ 1219, 262.1; Civ.Code, § 43.5(a).

9. Sheriffs and Constables ⚷98(5)

All that is required to make process fair on its face so as to protect sheriff from civil liability for action taken thereunder is that it must proceed from court having jurisdiction of subject matter and that it contain nothing which ought reasonably to apprise officer that it was issued without authority, and it is not necessary that the process under which sheriff acts should show jurisdiction of person to afford sheriff protection and justification for his acts in executing it. Code Civ.Proc. §§ 1219, 262.1; Civ.Code, § 43.5(a).

10. Sheriffs and Constables ⚷98(2)

A judgment may be void as to the parties thereto and valid so as to protect ministerial officers from civil liability for action taken pursuant thereto when court issuing it had jurisdiction of the subject matter and nothing appears on face of process to advise ministerial officers that court had no jurisdiction of the person. Code Civ. Proc. §§ 1219, 262.1; Civ.Code, § 43.5(a).

11. Contempt ⚷67

Habeas Corpus ⚷22(2)

When contempt proceedings, criminal in their nature, are reviewed by habeas corpus or certiorari and the limited jurisdiction of the court to punish for contempt is brought into question, presumptions indulged in support of ordinary judgments do not apply and judgment is strictly construed in favor of accused.

12. False Imprisonment ⚷7(5)

A sheriff, who receives order directing him to imprison person for contempt, is obliged to use reasonable diligence to perform duties of his office in a lawful manner, but is not bound at his peril to anticipate that court higher than one which made the order will not uphold its validity. Code Civ.Proc. §§ 1219, 262.1; Civ.Code, § 43.5(a).

13. False Imprisonment ⚷7(3)

Order directing sheriff to imprison plaintiff until he should purge himself of contempt by payment of "———" was regular on its face and was, so far as civil liability of sheriff for false imprisonment was concerned, sufficient authority for him to imprison plaintiff, where it bore on its face the signature of judge of court of competent jurisdiction, notwithstanding fact that it did not specify amount which plaintiff was required to pay to purge himself of contempt. Code Civ.Proc. §§ 1219, 262.1; Civ.Code, § 43.5(a).

◆

Allan L. Sapiro, Warren Sapiro and Arthur N. Ziegler, San Francisco, for appellant.

Raymond D. Williamson, San Francisco, for respondent.

Dinkelspiel & Dinkelspiel and Robert Drewes, San Francisco, amici curiae on behalf of respondents.

PER CURIAM.

[1] Plaintiff appeals from a judgment for defendants after general demurrers to his amended complaint were sustained without leave to amend. The complaint attempts to state a cause of action for damages for false imprisonment against Sheriff Daniel C. Murphy and his surety. It alleges that the defendant sheriff "did unlawfully imprison plaintiff in the County Jail." It specifies that in April, 1950, the sheriff imprisoned plaintiff under an order of the superior court adjudging him guilty of contempt for wilful failure to pay attorney's

fees and support money to his wife in a pending divorce action; a copy of the order is attached to the complaint and made a part thereof. The complaint further avers that the contempt order was "void upon its face"; that on application to this court plaintiff was discharged from such imprisonment by writ of habeas corpus, In re Vallindras, 1950, 35 Cal.2d 594, 220 P.2d 1; and that as a result of his imprisonment he sustained certain damages. The complaint does not negative any of the facts upon which the order of commitment was based. We have concluded that the facts alleged in the amended complaint do not, and it appears therefrom that plaintiff cannot, state a cause of action for false imprisonment.

[2] The allegations that the order of commitment was "void upon its face" and that the sheriff "did unlawfully imprison plaintiff" are conclusions of law and add nothing to the substantive averments of the complaint. Foerst v. Hobro, 1932, 125 Cal. App. 476, 478, 13 P.2d 1055; Barrier v. Alexander, 1950, 100 Cal.App.2d 497, 500, 224 P.2d 436.

It is plaintiff's theory that our holding in the habeas corpus proceeding, In re Vallindras, 1950, supra, 35 Cal.2d 594, 596, 220 P.2d 1, 2, that he was entitled to be released because "regardless of the court's failure to file [with the clerk] these judgments [the orders adjudicating contempt] and other deficiencies in the procedure leading to the imprisonment of Vallindras, the order of April 10th does not meet the law's requirements", establishes as a matter of law that his arrest and detention were unlawful not only as being vulnerable to the attack on habeas corpus but also as establishing civil liability of the sheriff in this damage action. But this theory is not tenable.

[3, 4] From time immemorial our law has recognized differences between criminal proceedings and civil proceedings. The fact that a man is held to be entitled to release on habeas corpus does not mean that his custodian must answer in damages for the previous detention. Generally speaking, the right to release from custody is determined by the rules of criminal law while the right to recover damages for false imprisonment depends on the rules of civil law. By the light of the civil law, therefore, we must examine the factual allegations of the complaint to ascertain whether the sheriff was justified in imprisoning plaintiff pursuant to the order of the superior court and prior to the ruling of this court.

The order in question clearly directed the officer to imprison plaintiff, and it bore on its face the signature of a judge of a court of competent jurisdiction. The order, according to the copy thereof attached to the complaint, recited that on April 10, 1950, the date of the hearing and the order, Vallindras and his counsel were present in court, that he had been theretofore adjudged guilty of contempt "and ordered to pay the sum of $250.00 by this date," and "said sum not being paid, and the said plaintiff [Vallindras] having admitted that he was in default of the orders of said Court * * * and the Court further finding that plaintiff had and has the ability to pay the said sum as aforesaid and to purge himself of said contempt by complying with said orders, * * * and this Court having on the 10th day of April, 1950, by its order then duly entered, adjudged and decreed" Vallindras to be guilty of contempt for his "wilful refusal and failure to comply with the said order of this Court, he having the ability and means to comply therewith," the court "did order that * * Vallindras, be punished for his said contempt by imprisonment in the County Jail * * * until such time as he shall comply with the decree and order of this Court to pay to the said defendant the sum of ———— as aforesaid." The adjudicating and committing portion of the order follows, in this language: "Now, Therefore, * * * the Sheriff of the City and County of San Francisco is hereby ordered to take said defendant [plaintiff] into custody * * * to be imprisoned in the County Jail * * * until the sum of ———— shall have been paid, or until he be otherwise discharged according to law, and until further order of this Court in the premises." By examination of the substance of the entire order, including the recitals as above set forth, it is apparent that the act required of Vallindras, the performance of which would end the term of his imprisonment, was intended to be the payment of the sum of $250 which was mentioned in the recitals. That sum, however, was omitted from the portion of the order following the "Now, Therefore," which purports to state the specific adjudication, the term of commitment, and the act required to be performed.

[5, 6] In the habeas corpus proceeding, applying the strict standards which protect those charged with contempt of court,[1] we examined the order of April 10 in its entirety and, after carefully mentioning its recitals, held that the committing portion of the order did "not meet the law's requirements"[2] in that it did not specify the "amount which Vallindras must pay to purge him from contempt and secure his release." But it does not necessarily follow from this holding, based as it is upon the standards of criminal law[3] and contempt commitments, that the sheriff is liable in civil damages for having obeyed the order of the superior court until this court ordered otherwise. The order does specifically direct the sheriff to imprison Vallindras until the further order of the court; it specifies, "Now, Therefore, * * the Sheriff * * * is hereby ordered to take said defendant [plaintiff] into custody * * * to be imprisoned in the County Jail"; and it was issued by a court of competent jurisdiction. The only inadequacy or uncertainty relates to the specification of the act by which the prisoner could purge himself of contempt and become entitled to his release.

Section 262.1 of the Code of Civil Procedure (formerly section 4168 of the Political Code) provides, "A sheriff or other ministerial officer is justified in the execution of, and shall execute, all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued." And section 43.5(a) of the Civil Code provides, "There shall be no liability on the part of and no cause of action shall arise against any peace officer who makes an arrest pursuant to a warrant of arrest regular upon its face if such peace officer in making the arrest acts without malice and in the reasonable belief that the person arrested is the one referred to in the warrant."

[7, 8] The validity of a judgment of commitment, where the question is a close one, as is true here, is ultimately for the courts, not the sheriff, to decide. A sheriff is a ministerial or executive, not a judicial, officer, Merrill v. Gorham, 1856, 6 Cal. 41, 42; People ex rel. Attorney-General v. Squires, 1859, 14 Cal. 12, 16; First Nat. Bank of Marysville v. McCoy, 1931, 112 Cal.App. 665, 670, 671, 297 P. 571; Sparks v. Buckner, 1936, 14 Cal.App.2d 213, 220, 57 P.2d 1395. It is his duty to execute the orders of the court unless they are patently irregular and void. In determining whether process and orders are "regular on their face" so far as the liability of such an officer is concerned, the following statement from Aetna Ins. Co. v. Blumenthal, 1943, 129 Conn. 545, 553, 29 A.2d 751, 754, is pertinent: "When we speak of process 'valid on its face,' in considering whether it is sufficient to protect an officer, we do not mean that its validity is to be determined upon the basis of scrutiny by a trained legal mind; nor is it to be judged in the light of facts outside its provisions which the officer may know. [Citations.] Unless there is a clear absence of jurisdiction on the part of the court or magistrate issuing the process, it is sufficient if upon its face it ap-

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[1] In California all contempt proceedings are said to be criminal in nature and those procedural rights and safeguards which are appropriate to criminal contempt proceedings are also accorded the contemnor in civil contempt proceedings. Culver City v. Superior Court, In and For Los Angeles County, 1952, 38 Cal. 2d 535, 541, 241 P.2d 258.

[2] Section 1219 of the Code of Civil Procedure provides that "When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he have performed it, and in that case *the act must be specified in the warrant of commitment.*" (Italics added.)

[3] Cf. In re Basuino, 1943, 22 Cal.2d 247, 250-252, 138 P.2d 297, not a contempt commitment.

pears to be valid in the judgment of an ordinarily intelligent and informed layman. To hold otherwise would mean that an officer must often act at his peril or delay until he has had an opportunity to search out legal niceties of procedure and, as said in Anderson v. Dewey [(1917), 91 Conn. 510, 514, 100 A. 99, 101], 'A result subjecting him to constant danger of liability would be an intolerable hardship to him, and inevitably detract from the prompt and efficient performance of his public duty.' "

[9] As was pointed out in Robinette v. Price, 1943, 214 Minn. 521, 8 N.W.2d 800, 805, 806, "All that is required to make process fair on its face is that it must proceed from a court having jurisdiction of the subject matter and that it contain nothing which ought reasonably to apprise the officer that it was issued without authority. [Citations.] * * *

"It is not necessary that the process under which a sheriff acts should show jurisdiction of the person to afford him protection and justification for his acts in executing it. [Citations.] * * *" See also Brinkman v. Drolesbaugh, 1918, 97 Ohio St. 171, 119 N.E. 451, 453, L.R.A.1918F, 1132.

Plaintiff insists that it cannot now be said that there was a close question as to the regularity of the contempt order because the habeas corpus decision established that that order was altogether void. He lays stress upon In re Wells, 1946, 29 Cal.2d 200, 202, 173 P.2d 811, 812, where a petitioner was released upon habeas corpus because the judgment of contempt under which he was held was described as "void in its entirety" for its complete failure to specify the act or acts which he was required to do in order to purge himself of contempt. The order there in its recitals or otherwise, unlike the order here, did not suggest or make ascertainable what act was required of the petitioner. It recited that petitioner had been "found guilty of contempt for removing the money from the bank, in violation of the restraining order and for refusing to answer questions concerning the whereabouts of certain funds withdrawn from the bank," and order that petitioner be imprisoned "until he purges himself of said contempt." The identity of "the bank," the requirements of "the restraining order," the amount of "the money," and the nature of the "questions" were not disclosed, nor was it stated what the petitioner should do to purge himself of contempt. Manifestly petitioner there, even by the most careful scrutiny, could not ascertain inferentially or otherwise from the contempt commitment itself, in what his contempt consisted. The Wells case, therefore, although relevant to the issue on habeas corpus (the effect of noncompliance with section 1219 of the Code of Civil Procedure) is not authority for plaintiff's civil claims.

[10–13] As already indicated, it is proper to recognize one standard for obtaining relief from imprisonment for contempt by the use of habeas corpus or certiorari and another standard for obtaining damages from the ministerial officer in a civil suit. It may be said that the situation is similar to that in Levy v. Melody, 1906, 50 Misc. 509, 99 N.Y.S. 153, 155, where the court said, "A judgment may be void as to the parties and valid to protect ministerial officers, when the court issuing it had jurisdiction of the subject-matter, and nothing appears on the face of the process to apprise the officer that the court had not jurisdiction also of the person. [Citations.]" Or it may be said that on the one hand when contempt proceedings, criminal in their nature, are reviewed by habeas corpus or certiorari and the limited jurisdiction of the court to punish for contempt is brought into question, the presumptions indulged in support of ordinary judgments do not apply and the judgment is strictly construed in favor of the accused, Raiden v. Superior Court for Los Angeles County, 1949, 34 Cal.2d 83, 86; In re Wells, 1946, supra, 29 Cal.2d 200, 201, 173 P.2d 811, whereas, as previously indicated, a sheriff, when he receives an order directing him to imprison a person for contempt, while obliged to use reasonable diligence to perform the duties of his office in a lawful manner, is not bound at his peril to anticipate that a court higher than the one which made the order will not uphold its validity. We hold that the order here, for purposes of civil liability, was regular on its face.

Further legal questions, involving the survivability of this action, have been briefed because of the facts that after the appeal herein was taken Sheriff Murphy died and his administrator was substituted as a defendant. Because of our conclusion that no cause of action is or can be stated, it is unnecessary to consider these further problems.

For the reasons above stated the judgment is affirmed.

SHENK, Justice.

I dissent.

I am unable to concur in the light of the following undisputed facts: In 1950 this plaintiff was in the county jail under the identical order of commitment here involved. He applied to this court for release on habeas corpus on the ground that the order was void in that it failed to comply with section 1219 of the Code of Civil Procedure. This court held in accordance with his contention, namely, that the order was not regular on its face, was therefore void, and we ordered his release. In re Vallindras, 35 Cal.2d 594, 220 P.2d 1. Thereafter, he brought this action for damages for false imprisonment again alleging that the same order was and is void, basing his cause of action on the determination of this court to that effect. This court now holds that this order is regular on its face for the purposes of an action for damages for false imprisonment.

In an almost identical situation, Mr. Justice Schauer stated for this court in In re Wells, 1946, 29 Cal.2d 200, 173 P.2d 811, 812, that an order which failed to comply with the requirements of section 1219 of the Code of Civil Procedure is "void in its entirety." This court in the former Vallindras case on habeas corpus relied on the determination in the Wells case.

Section 262.1 of the Code of Civil Procedure provides: "A sheriff or other ministerial officer is justified in the execution of, and shall execute, all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued." Civil Code section 43.5(a) provides: "There shall be no liability on the part of and no cause of action shall arise against any peace officer who makes an arrest pursuant to a warrant of arrest regular upon its face * * *." These sections protect a sheriff or peace officer only when the warrant or order under which he is acting is "regular upon its face".

Section 1219 of the Code of Civil Procedure is addressed not only to the courts but to those executing conditional warrants of commitment under it as ordered by the courts. The sheriff is chargeable with knowledge of what constitutes a valid order. Rogers v. Marshal, 1 Wall. 644, 650–51, 17 L.Ed. 714; People v. O'Brien, 96 Cal. 171, 176, 31 P. 45; Rhodes v. Sargent, 17 Cal.App. 54, 57–58, 118 P. 727; Storey's Equity Jurisprudence (14th ed.) § 173. The order under which Vallindras was imprisoned was void by final determination of this court and the sheriff is not protected in acting under it.

CARTER, J., concurs.

Rehearing denied; SHENK and CARTER, JJ., dissenting.

42 Cal.2d 187

WERNER
v.
STATE BAR OF CALIFORNIA.

L. A. 22699.

Supreme Court of California.
In Bank.

Feb. 1, 1954.

Rehearing Denied Feb. 24, 1954.

Proceeding brought for review of action of Board of Governors in approving report of Special Administrative Committee of State Bar regarding reinstatement of petitioner. The Supreme Court held that the showing made justified reinstatement.

Petition granted.

Edmonds and Spence, JJ., dissented.

1. Attorney and Client ⚷61

Burden is upon applicant for reinstatement to prove his rehabilitation since his disbarment, as well as his present moral qualifications and his present ability and learning in law. Rules of Procedure of State Bar, rule 43(d).

2. Attorney and Client ⚷61

Evidence of reinstatement applicant's occupation of positions of fiduciary nature may be of probative value where it exists, but evidence that applicant has occupied positions of trust is not a requirement for reinstatement. Rules of Procedure of State Bar, rule 43(d).

3. Attorney and Client ⚷61

Supreme Court has plenary power to reinstate where it is shown that applicant possesses requisite learning and moral character and has an acceptable appreciation of duties and responsibilities of an attorney at law.

4. Attorney and Client ⚷61

On showing made, in proceeding brought for review of action of Board of Governors in approving report of Special Administrative Committee of State Bar recommending that petition for reinstatement be denied, Supreme Court would exercise its plenary power to reinstate petitioner. Rules of Procedure of State Bar, rule 43(d).

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T. B. Cosgrove, Los Angeles, for petitioner.

Leonard S. Lyon, Jr., and Jerold E. Weil, Los Angeles, for respondent.

PER CURIAM.

The petitioner, Erwin P. Werner, was disbarred from the practice of the law in 1944. In 1951 he petitioned for reinstatement. A Special Administrative Committee of the State Bar recommended that the petition be denied upon findings that the petitioner has failed sufficiently to establish his rehabilitation. The matter is now before this court for a review of the action of the Board of Governors in approving the report of the committee and in declining to recommend that the petitioner be reinstated.

The petitioner is sixty-one years of age. He was admitted to the bar in 1916. In 1937 by indictment he was co-charged with Helen Werner, his wife, now deceased, in count one of soliciting the offer of a bribe in violation of Section 653(f) of the Penal Code and in the second count of attempted grand theft. The petitioner was acquitted on the charge stated in count 1 and he and his wife were convicted on the second count. He appealed from the judgment. She did not appeal and the judgment as to her became final. This court, in 1940, reversed the judgment against the petitioner on the ground that the evidence was insufficient to support the conviction. People v. Werner, 16 Cal. 2d 216, 105 P.2d 927. Notwithstanding the reversal he was disbarred in supplemental proceedings based on the record in the criminal case including the record on the first count.

In the disbarment proceedings the petitioner objected to the consideration of the transcript of the criminal record. Admittedly the charges brought against him could not have been proved without that transcript in evidence. It was first considered by the committee pursuant to a stipulation entered into between the petitioner and the committee following the judgment of conviction in the trial court and pending the appeal by the petitioner therefrom. At first it was sought to disbar him on the basis of the conviction alone. Upon reversal of the judgment the order to show cause was amended to charge acts claimed to involve moral turpitude as shown by the record in the criminal case. The petitioner contended that the stipulation no longer was effective because the committee had stated a new cause of action against him, and that the stipulation was entered into only for purposes of proceedings under the original charge. The committee agreed with the petitioner and recommended that the proceedings be dismissed, but the Board of Governors ordered the committee to receive the transcript into evidence. Following those instructions and on consideration of the evidence contained in that transcript the committee recommended disbarment but the petitioner and also the committee continued to insist that the transcript was improperly in evidence. This court finally determined that it was admissible and that issue is not now open to question.

[1] The burden upon one applying for reinstatement requires that he prove his rehabilitation since his disbarment. If rehabilitation be proved, the present moral qualifications of the applicant generally follow as a matter of course. It is also required that the applicant prove his present ability and learning in the law. It is conceded that the petitioner is qualified in this latter requirement, and the question of the petitioner's rehabilitation from the standpoint of his moral qualifications is the only one for consideration. He contends that he has shown rehabilitation sufficient to entitle him to reinstatement by undisputed, pertinent facts. They will be related.

After his disbarment the petitioner was employed for several years by the Union Pacific Railroad, first as a yard clerk and later as a brakeman. While so employed he acted with credit as chairman of the grievance committee for the local labor union. Beginning in 1949 he was employed for approximately a year as a research clerk and appraiser for a member of the bar.

The petitioner has taken an active part in community affairs. On behalf and at the request of property owners in his community he successfully engaged in local planning commission matters. In 1950 he applied for and was accepted as a Red Cross Blood Bank driver and has worked diligently and well for the Red Cross since that time, donating far in excess of the number of hours required of him. He is an active member of a church in his community and regularly assists as an usher during its services.

He has endeavored to maintain an understanding of current world affairs by attending classes at a local university. He has held the law and its tribunals in high respect, and has kept himself well informed of developments in the field of the law.

Numerous members of the bench and bar and many lay witnesses testified on behalf of the petitioner. The testimony of each was to the effect that the petitioner is a man of good moral character who could be trusted with duties requiring honesty, integrity and fidelity. Among them were an attorney who had been a deputy in the office of the District Attorney at the time of the criminal proceedings against the petitioner, a superior court judge who had presided at the criminal trial in which the petitioner was involved, a justice of the District Court of Appeal that affirmed the judgment of conviction, and a justice of the District Court of Appeal who sat *pro tem.* as a member of this court when the judgment of conviction was reversed. These men knew the petitioner throughout his professional career and were familiar with the events leading to and since his disbarment. The attorney who had represented the petitioner in litigation both before and after his disbarment testified that the petitioner was a man of good moral character; that they had been engaged in commercial enterprises, and that he knew of no position of trust which the petitioner could not properly hold. The testimony of many others were of similar nature.

Following his disbarment the petitioner was excluded from membership in numerous fraternal organizations requiring good moral character as a prerequisite to membership. After an investigation of the petitioner's rehabilitation and qualifications for reinstatement in those lodges, he was restored to full membership. The investigation was conducted by a judge of the superior court, acting solely in his capacity as a member of the lodges concerned. He unhesitatingly recommended reinstatement in those organizations.

It also appears that an investigation of the petitioner's rehabilitation was conducted by the Southern California Women Lawyers at the request of the State Bar in connection with the present proceedings. The report recites such an investigation and recommends reinstatement.

The recommendation against reinstatement is based on four grounds, each of which will be considered separately. The first arose out of the petitioner's testimony before the Special Administrative Committee in regard to certain disciplinary matters involving the petitioner prior to the one resulting in his disbarment. They dated back as far as 1925. In each the petitioner was absolved from any conduct which would justify discipline and the charges were dismissed. The committee questioned him at length concerning these matters for the stated purpose of "testing the petitioner's present recollection of such accusations and his attitude towards them." See Beeks v. State Bar, 35 Cal.2d 268, 277, 217 P.2d 409. The petitioner could not answer some of the questions asked of him because he could not remember the details of events which took place so many years before. In some instances his memory was refreshed by excerpts from documents in the possession of the committee and he conformed his answers accordingly. The committee's report suggests that if the petitioner is entitled to practice law he certainly would not have forgotten the details of previous charges against him even though they had been dismissed, and that he was evasive in some instances and was uncooperative with the committee in disclosing them.

The record does not support the conclusion that the petitioner was evasive in answering questions. It is true that he stated that he did not remember some of the details of a criminal charge made against him and his wife some sixteen years before (1936) and of which he was acquitted, but in substance he correctly answered the questions asked of him. Admittedly the examination had no relevancy except to test the petitioner's memory and his answers were adequate in that respect. With reference to the criminal charge the following exchange is typical of the examination:

> "Q. And you still don't remember what the crime was that you were charged with conspiring to commit? A. Yes, I just stated what it was.
>
> "Q. No, you haven't. A. It was conspiracy to violate a certain section of the Penal Code which makes it a violation to solicit a person to commit a crime. I am sure that is pretty close to the definition in the code.
>
> "Q. Well, then, you are unwilling or unable, I take it, to state the crime that you were charged with conspiring to commit? A. I am not unwilling. I may be unable to. That is as close as I can come to it. I can give you all the facts. They are very vivid in my mind. I would be very happy to tell yon anything about it. I am not trying to avoid anything, but as far as defining the thing, I have a hesitancy in doing it further than I have when the indictment is right at hand. If it is that sort of particularity that you want to find, I would be glad to read it to you and discuss it in detail."

There was other examination on the same subject, none of which shows an unwillingness to cooperate.

The second ground asserted to show a lack of good moral character consists of the petitioner's conduct in relation to oil well interests owned by him and associates. The petitioner with one W. J. Frick and others entered into a joint venture or partnership to drill a well located in Puente from its then depth of 2,000 feet to 4,200 feet in an endeavor to strike oil. The venture was unsuccessful. About the same time the parties became interested in a drilling operation in Moab, Utah. Frick testified that he did not keep abreast of developments, and relied upon the petitioner for information; that in December, 1950, he became disinterested in the Moab venture and suggested to the petitioner an exchange of his (Frick's) Moab interest for the petitioner's Puente interest. Such an exchange was carried out at that time. In January, 1951, there appeared a report in a local newspaper that the Moab well had come in with an estimated flow of from 2,000 to 5,000 barrels daily. Shortly thereafter Frick met with the petitioner, and according to Frisk's testimony he accused the petitioner of such knowledge of the reported favorable conditions at the Moab well as placed a duty upon the petitioner to reveal his information to Frick at the time the latter suggested the exchange of interests.

The petitioner denies that he had information that there were favorable indications at the Moab well. Following the report but without knowledge that the well was mistakenly reported to have come in, he discussed the transaction with the Fricks and because of their dissatisfaction with the exchange he retransferred to Mrs. Frick one-seventh of their interest without cost to her. In fact the report about the Moab well was unfounded and it never produced oil in commercial quantities.

The evidence is insufficient to support a finding that the petitioner exercised bad faith in the oil transactions. There is no proof that he had knowledge favorable to Frick which should have been revealed to him. The exchange of interests was made at Frick's suggestion and to accommodate him, and at a time when it appeared from a newspaper report that the property might be valuable. Frick himself testified that "I have found my dealings with Mr. Werner satisfactory in every respect, with the one exception * * * [failure to tell him of the rumor which was unfounded that the well had come in]. Other than that, I have found him honorable and ethical in everything he has done."

The committee seems to have attached much significance to the fact that the Puente and Moab ventures were not mentioned in the petition for reinstatement under the provisions of Rule 43(d) of the Rules of Procedure of the State Bar. That rule provides for a disclosure of the "nature of petitioner's occupation in detail during said period, with names and addresses of all partners, associates in business, and employers, if any, and dates and duration of all such relations and employments". The report of the committee states that the petitioner intentionally omitted to disclose the oil ventures in his petition because they might be deemed unfavorable to him as not only involving the transactions with the Fricks but also that they would disclose that one of those associated in the Moab venture, a man by the name of Mason, had been convicted of a violation of the Corporate Securities Act, Corporations Code, § 25000 et seq. It also appeared that at about the time the Moab well was reported to have come in a retail merchants' credit association had prepared a credit report on the petitioner which showed that the petitioner owned a substantial interest in a producing well. This information was, of course, an exaggeration. However, there is no proof that the petitioner knew that Mason had been convicted of violating the Corporate Securities Act or that he was responsible for the credit report.

In regard to the omission of information concerning the oil ventures from his petition for reinstatement, the petitioner contends that the ventures were in the nature of investments which Rule 43(d) does not require him to disclose. He stated: "Even though a partnership was involved in the thing * * * I was merely an investor, and it just didn't occur to me is all." He relies on Farmers Automobile Inter-Insurance Exchange v. Calkins, 39 Cal.App.2d 390, 394, 103 P.2d 230, 232, to the effect that data concerning one's "occupation" does not include "an isolated or semi-occasional and temporary adventure in another line of endeavor." While the petitioner undertook to inspect the oil properties, he took no part in actual drilling operations or planning in connection therewith as an occupation. We find nothing in charge number two that would reflect on the petitioner's asserted good moral character.

[2] The third ground urged as evidence of the lack of rehabilitation is the failure of the petitioner to show that he had filled positions of a fiduciary nature or those involving the handling of money, and that he had not violated such trust or absconded with money that might have been entrusted to his care. This contention is without merit. While evidence of the nature referred to often is of probative value where it exists, Jonesi v. State Bar, 29 Cal.2d 181, 173 P.2d 793; Preston v. State Bar, 28 Cal.2d 643, 171 P.2d 435, evidence that the petitioner has occupied positions of trust is not a requirement of reinstatement. See In re Gaffney, 28 Cal. 2d 761, 171 P.2d 873.

It is contended finally that the petitioner made unwarranted denials in verified pleadings in certain civil actions brought against him after his disbarment. Between December, 1946, and April, 1947, certain improvements were made on the premises occupied by the petitioner and his wife. According to the undisputed evidence they were contracted for by the wife who took sole charge and supervision of the improvements.[1]

The improvements were completed on April 4, 1947. Mrs. Werner passed away on the 12th of the following month. On August 20, 1947, two mechanics' lien suits were filed in the Municipal Court, one claiming a lien for $789.87 for labor and the other claiming a lien for $344.92 on account of materials furnished. The complaints were in the usual form and were verified. Paragraph V of one complaint and Paragraph VI of the other contained the allegations that the petitioner had contracted for the materials and labor in the sums stated. The petitioner in his answers specifically denied, in accordance with the facts, that he had contracted for the expenditures, and the questions of the amounts were also put in issue.

Paragraph X in one complaint and Paragraph XI in the other each contained the allegation that the claim of lien had been filed of record, giving the book and page of recordation in the office of the County Recorder. The denials as to these two paragraphs, in the same form as the denials of other paragraphs of the complaints, 12 in number in one case and 13 in the other, were as follows: "Denies each and every allegation contained in Paragraph [X in one, and XI in the other] of plaintiff's complaint." The answers were verified in the usual form by the petitioner as the defendant in each case. It is only the denials as to Paragraphs X and XI that are subjected to criticism.

The committee charged that by verifying the denials of the allegations of the filing and recordation of the claims of lien the petitioner "recklessly trifled with the oath of verification." The charge is based on the rule of pleading that a denial of the alleged existence of a public record is insufficient, and the argument is advanced that such a denial is proof of a lack of good moral character.

In answer to this criticism the petitioner contends that his conduct was justified because of the situation in which the litigation had placed him, namely: that the contracts under which the liens arose were oral and indefinite; that they were all made by his wife; that he was not personally aware of what obligations she had incurred or what work or materials had been expended; that he did not have time to make a thorough investigation of the claims including the matters of public record before he was required to answer, and that it did not appear that the notices prerequisite to the right to a lien had been given. Code of Civ.Proc. § 1184. After he filed his answers he made the necessary investigations. He paid the claims in full before the cases were brought to trial, and the actions were dismissed.

The petitioner concedes, as he must, that the form of the denials of the existence of public records is subject to criticism. But he urges that extenuating circumstances were such as to relieve him of a charge of moral dereliction. The record shows that it was unnecessary for him to make the criticized denials for purposes of delay because other denials not subject to criticism were sufficient to put the plaintiffs to proof of their claims. The petitioner gained no advantage by making the denials in the form criticized and the plaintiffs were not prejudiced by them. An admission of or a failure to deny the allegations of recordation would not have affected the result. This may have been the preferable course since the means of acquiring knowledge of recordation were at hand and the petitioner had not examined the records. It is the availability of knowledge and a failure to obtain it in preparation for the pleading that is the basis of the rule the violation of which is criticized. The denials were admittedly improper and cannot be excused by a practice too generally indulged in. However, it is contended that the infractions were more in the field of pleading than in morals. A search of the authorities fails to reveal a case where a person making such a verification has been charged with a violation of law or, if he was an attorney that he was charged with unprofessional conduct or subjected to disciplinary proceedings. If such a denial, verified in the usual form, is contrary to good morals and therefore an act of moral turpitude within the definition of that term, see Lantz v. State Bar, 212 Cal. 213, 218, 298 P. 497; Matter of Coffey, 123 Cal. 522, 524, 56 P. 448, it is feared that in the history of the legal profession in this state many a practitioner whose moral character was not otherwise questioned could have been subjected to disciplinary proceedings. In any event, such a course of action is properly criticized and condemned as not within the required standards of pleading and practice. As applied to the circumstances of this proceeding it may not justly be said that a lack of good moral character has been shown by the form of the pleading and its verification. In other words the record does not justify the conclusion that the petitioner in making the denials in the form indicated and in verifying his answers is, because thereof, lacking in good moral character.

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[1] It should be noted that much of the petitioner's troubles arose from the conduct and activities of his wife. The petitioner does not charge this nor intimate that it is so, but the record in the criminal case which formed the basis of the evidence on which he was disbarred plainly indicates its truth.

[3, 4] The petitioner has stated a sufficient case in support of his claim of rehabilitation. He is admittedly qualified as to his knowledge of the law. He has the recommendation of persons best in position to judge his moral character. It has been stated that such a showing "should weigh heavily in the scale of justice." Preston v. State Bar, supra, 28 Cal.2d 643, 650–651, 171 P.2d 435. In addition there is other evidence beyond substantial dispute that since his disbarment he has conducted himself in his employment and within his community in a manner entitling him to a declaration of rehabilitation.

This court has plenary power to reinstate where it is shown that the applicant possesses the requisite learning and moral character and has an acceptable appreciation of the duties and responsibilities of an attorney at law. This, we conclude, is such a case.

The petition is granted. It is ordered that the petitioner be reinstated upon the roll of attorneys at law in this state upon payment of the fees and taking the oath required by law.

GIBSON, C. J., did not participate.

CARTER, Justice.

I concur in the judgment that petitioner be reinstated as a member of the Bar of this State, but I cannot refrain from pointing out that the decision of the majority here is definitely out of line with the recent decisions of this court in Feinstein v. State Bar, 1952, 39 Cal.2d 541, 248 P.2d 3, and Roth v. State Bar, 1953, 40 Cal.2d 307, 253 P.2d 969, in both of which cases I dissented. In fact, the showing in both the Feinstein and Roth cases in favor of rehabilitation was much stronger than the showing made by the petitioner here and there was no showing whatsoever in either of those cases against rehabilitation. In the Feinstein case the petitioner had been disbarred for over ten years and in the Roth case for over eight years, while in the case at bar only seven years had elapsed between the disbarment and the application for reinstatement. Neither the Feinstein nor Roth case is cited in the majority opinion and the rule announced in those cases with respect to the showing required in support of a petition for reinstatement is not even mentioned.

I take the same position here that I took in the Feinstein and Roth cases that where the uncontradicted evidence shows that petitioner has, since his disbarment, lived a useful and honorable life, kept gainfully employed and has gained, and held, the respect and confidence of the people with whom he has associated and dealt for many years, he has met the burden cast upon him to establish his rehabilitation. I believe such a showing was made in this case as well as in the Feinstein and Roth cases.

The standard of moral character required of those who are permitted to practice law in this state should be the highest possible. A license to practice law places the holder in a position where he may impose upon the ignorance or credulity of his clients to their detriment if he is so minded, and it is the responsibility of the State Bar and of this court to protect the interests of the public by eliminating, from the profession, those who have shown by their conduct that they are lacking in the moral character requirement. The problem of reinstatement of a disbarred lawyer is always a difficult one. It has been correctly stated that the principal issue is rehabilitation, see Andreani v. State Bar, 14 Cal.2d 736, 97 P.2d 456. This issue is one of fact and must be established by evidence. Where the evidence is uncontradicted, as it was in the Feinstein and Roth cases, and shows exemplary conduct extending over a period of from eight to ten years without even a suggestion of wrongdoing, it would seem that rehabilitation had been established. If it was not established in those cases, it certainly was not established here. There should be some measure of uniformity in cases such as these if the precept of "Equal justice under law" is to have any vitality whatsoever. The concept of rehabilitation is now so firmly embedded in our law that none but the sternest martinet would refuse to apply it in cases where it has been established by the uncontradicted evidence.

The members of this court are not psychiatrists nor are they clairvoyant. Unless our decisions are based on evidence and rules of law uniformly applied, they are nothing more than arbitrary determinations which change from time to time according to the whim or caprice of the individual members of the court and we thus have a government of men and not of law.

While as heretofore stated, the showing made by petitioner in favor of his rehabilitation is not as strong as that made in either the Feinstein or Roth cases, I believe it is sufficient to warrant his reinstatement, and I therefore concur in the conclusion reached by the majority.

EDMONDS, Justice (dissenting).

It long has been the rule in this state that "the burden of proof is upon the one who seeks * * * restoration to the ranks of the legal profession, and, before the court may grant the petition for reinstatement, it must be satisfied and fully convinced by positive evidence that the effort he has made toward rehabilitation of his character has been successful. (Citations.) It is only reasonable that the person seeking reinstatement, after disbarment, should be required to present stronger proof of his present honesty and integrity than one seeking admission for the first time whose character has never been in question. In other words, in an application for reinstatement, although treated by the court as a proceeding for admission, the proof presented must be sufficient to overcome the court's former adverse judgment of applicant's character." Kepler v. State Bar, 216 Cal. 52, 55, 13 P.2d 509, 510. This established principle has been consistently followed. Wettlin v. State Bar, 24 Cal.2d 862, 868-869, 151 P.2d 255; McArthur v. State Bar, 28 Cal.2d 779, 788, 172 P.2d 55; Maggart v. State Bar, 29 Cal.2d 439, 444, 175 P.2d 505; Beeks v. State Bar, 35 Cal.2d 268, 275–276, 217 P.2d 409; and was reaffirmed by recent decisions. Feinstein v. State Bar, 39 Cal.2d 541, 546, 248 P.2d 3; Roth v. State Bar, 40 Cal.2d 307, 313, 253 P.2d 969.

The controlling criterion is whether the petitioner has produced convincing evidence of his rehabilitation, and to determine that question this court must weigh and evalute the evidence. Essentially the determination is to be made by the application of a few general principles to the particular facts of the case.

In my opinion, the evidence presented by Werner does not meet the burden of proof required of him. The Board of Governors followed the recommendation of the Special Administrative Committee. That committee heard the witnesses and the petitioner; this court must depend upon the printed record. The determinations of the Board of Governors and its administrative committee should be accorded the greatest deference, Roth v. State Bar, supra, 40 Cal. 2d at page 315, 253 P.2d 969; In re Lacey, 11 Cal.2d 699, 701, 81 P.2d 935; Beeks v. State Bar, supra, 35 Cal.2d at page 277, 217 P.2d 409, and I do not find in the record such convincing evidence of rehabilitation as to justify a conclusion different from the recommendation made to this court.

For these reasons, I would deny the application.

SPENCE, J., concurs.

Rehearing denied; EDMONDS and SPENCE, JJ., dissenting.

122 Cal.App.2d 822

In re HIRSH'S ESTATE.

SARNO v. HIRSH.

Civ. 19826.

District Court of Appeal, Second District, Division 1, California.

Jan. 26, 1954.

Hearing Denied March 25, 1954.

Widow and her co-executrix filed petition for instructions to determine which property of the estate should be chargeable for payment of family allowance. The Superior Court, Los Angeles County, John Gee Clark, J., ordered that separate property of decedent and all community property in estate, including that of widow, should be charged pro rata with family allowance on a proportionate basis, and the widow appealed. The District Court of Appeal, Drapeau, J., held that separate property of decedent and community property was chargeable with family allowance on proportionate basis.

Affirmed.

1. Executors and Administrators 🔑181

Where estate of decedent was composed of both separate and community property, all the community property and decedent's separate property were chargeable pro rata with family allowance. Probate Code, §§ 202, 300.

2. Husband and Wife 🔑268(2)

During the lifetime of a husband the community property is liable for all his debts. Probate Code, §§ 202, 300.

3. Husband and Wife 🔑273(4), 276(1)

All the community property passing from the control of the husband by his death or otherwise is subjected to administration, to his debts and to certain other charges. Probate Code, §§ 202, 300.

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Altagen & Rubin, Los Angeles, for appellant.

Bachrack & Wilson, Los Angeles, Ralph Wilson, Los Angeles, of counsel, for respondent.

DRAPEAU, Justice.

The petition for instructions of Bessie Hirsh and Jeanette Sarno, as co-executrices of the last will of Max Hirsh, recites that Bessie Hirsh is the surviving spouse of decedent; that the estate consists of community property of decedent and Bessie Hirsh and also separate property of decedent. Under the terms of the will all of decedent's property was devised and bequeathed to his three children: Jeanette Sarno, Al Hardy and Hy Hirsh; and Bessie Hirsh is not entitled to receive, and does not claim any interest belonging to decedent, except her one-half of the community property.

It is further recited that Bessie Hirsh received $4,500 in family allowance during course of administration and that the estate is in a position to be closed. That a dispute exists between the co-executrices as to which property of the estate shall be chargeable for payment of the family allowance.

It was contended by Bessie Hirsh, the surviving wife, that decedent's half of the community property and his separate property should *alone* be chargeable with family allowance.

Jeanette Sarno maintained that *all* of the community property and decedent's separate property were chargeable pro rata with family allowance.

[1] The trial court found in accord with the latter contention and ordered that the separate property of decedent and all of the community property in the estate, including that of Bessie Hirsh, were chargeable pro rata with family allowance on a proportionate basis. Bessie Hirsh appeals.

Appellant urges that "the family allowance is chargeable to the one-half interest of deceased's community property first and then to his separate property to the exclusion of the surviving wife's one-half interest in the community property."

In this connection it is argued that "in 1927, Civil Code, Section 161a, gave the wife a *'present, existing and equal interest'* in the community. It certainly must be assumed that the Legislature, when it enacted Probate Code Sections 202 and 300, in 1931, had in mind the nature of the wife's interest in the community, and consequently provided that *only the husband's property* was chargeable with a *family allowance.* This is the clear effect of the statutory provisions mentioned. (Emphasis added.)"

Section 202, Probate Code, reads: "Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to his debts and to administration and disposal under the provisions of Division III of this code; * * *."

Section 300, of the same code, provides: "When a person dies, the title to his property, real and personal, passes to the person to whom it is devised or bequeathed by his last will, or, in the absence of such disposition, to the persons who succeed to his estate as provided in Division II of this code; but all of his property shall be subject to the possession of the executor or administrator and to the control of the superior court for the purposes of administration, sale or other disposition under the provisions of Division III of this code, and shall be chargeable with the expenses of administering his estate, and the payment of his debts and the allowance to the family, except as otherwise provided in this code."

In support of her contention, appellant relies upon the Estate of King, 19 Cal.2d 354, 121 P.2d 716. Respondent cites Estate of Haselbud, 26 Cal.App.2d 375, 79 P.2d 443, in support of her stand.

Neither case passes directly upon the point here at issue.

The King case holds that family allowance is properly charged against the assets of the estate, whether such assets are community or separate property, as against the contention that it must be paid from the community property.

The Haselbud case holds that expenses of family allowance and other debts should be borne ratably by the community and separate property of decedent, rather than that the separate property of decedent should first be resorted to.

In Estate of Cutting, 174 Cal. 104, 108, 161 P. 1137, 1138, it was said: "Of course, a family allowance * * * is an expense of administration."

With this in mind, we believe the language used by the Supreme Court in Estate of Coffee, 19 Cal.2d 248, 249, 120 P.2d 661, is applicable. In that case the court reversed an order fixing inheritance taxes which had the effect of allowing the widow of decedent to take one-half of their community property without deduction for debts, expenses of administration or inheritance taxes.

[2, 3] It was there stated, 19 Cal.2d at page 252, 120 P.2d at page 664: "For many years, the rule in this state has been that during the lifetime of a husband, the community property is liable for his debts. Grolemund v. Cafferata, 17 Cal.2d 679, 111 P.2d 641; Spreckels v. Spreckels, 116 Cal. 339, 48 P. 228, 36 L.R.A. 497, 58 Am.St.Rep. 170. And section 202 of the Probate Code, said the United States District Court in a recent case, 'subjects all community property passing from the control of the husband, by his death or otherwise, to administration, to his debts, and to certain other charges. This is a provision more or less typical of the law in all community property states and should be construed as correlative to the principle that during the husband's life the community property is subject to his debts. Both are apparently corollaries to his right of management and control.' Sampson v. Welch, D.C., 23 F.Supp. 271, 281.

"It is clear, therefore, that the portion of the community property which belongs to the wife is the one-half which remains after the payment of the husband's debts and the expenses of administration apportioned between the community and separate property in accordance with the value thereof, and this is true even when the husband's share of the community, together with his separate property, is ample to pay those debts and expenses."

In a specially concurring opinion filed in the same case, it was said, 19 Cal.2d at page 253, 120 P.2d at page 665: "In my opinion, the debts of the deceased, expenses and charges of administration, etc., should be first deducted from the gross value of the property subject to administration, *including all of the community and separate property.*" (Emphasis added.)

For the reasons stated, the order appealed from is affirmed.

WHITE, P. J., and DORAN, J., concur.

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122 Cal.App.2d 914

KIMBER v. JONES et al.

Civ. 19967.

District Court of Appeal, Second District, Division 2, California.

Jan. 29, 1954.

Action on a note by alleged assignee of the note. The Superior Court, Los Angeles County, Ellsworth Meyer, J., entered summary judgment for plaintiff, and defendants appealed. The District Court of Appeal, Fox, J., held that since plaintiff's affidavits in support of motion for summary judgment failed to show that the assignment of the note had been made to him and that he was still the owner and holder thereof, he failed to sustain his burden of showing facts sufficient to entitle him to summary judgment.

Reversed.

1. Judgment 🔑185

The validity of summary judgment is to be determined by sufficiency of affidavits considered upon hearing of motion for summary judgment without resort to the pleadings. Code Civ.Proc. § 437c.

2. Bills and Notes 🔑489(6)

Proof of assignment of note is essential to recovery on note by alleged assignee thereof where fact of assignment is put in issue by pleadings.

3. Judgment 🔑185

In summary judgment proceeding, which is a drastic procedure to be used sparingly and with circumspection in order to fully preserve rights of litigants, affidavits of moving party must be strictly construed. Code Civ.Proc. § 437c.

4. Judgment 🔑185

If plaintiff is to prevail upon his motion for summary judgment, it is necessary that his affidavits in support of such motion furnish factual support covering every element required to establish his cause of action. Code Civ.Proc. § 437c.

5. Judgment 🔑185

In suit on note by alleged assignee of note, wherein assignee moved for summary judgment, where his affidavits in support of such motion failed to show that the assignment of the note had been made to him and that he was still the owner and holder thereof, he failed to sustain his burden of showing facts sufficient to entitle him to such judgment. Code Civ.Proc. § 437c.

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Laurence Phillips and Robert P. Schifferman, Los Angeles, for appellant.

Daniels, Elson & Mathews, and William A Sherwin, Los Angeles, for respondent.

FOX, Justice.

Defendant appeals from a summary judgment in an action on a promissory note.

On November 25, 1952, plaintiff, Don C. Kimber, filed a complaint alleging that he was the assignee and lawful holder of a promissory note executed by defendant Nelson E. Jones in the sum of $12,214.81, running in favor of Lee P. Hill, plaintiff's assignor. A copy of this note, dated June 15, 1952, and maturing in 90 days, was attached to the complaint. It is alleged that payment has been made on the note in the amount of $6,714.18, leaving an unpaid balance of $5,500. Plaintiff prayed judgment in this amount and for attorney's fees as provided by the note in event of suit.

The answer denied that there was any balance unpaid on the note, and also denied, for want of information and belief, that plaintiff was the assignee and lawful holder of the note. As an affirmative defense, defendant set up a partial failure of consideration. Defendant alleged thereunder that by virtue of fraudulent misrepresentations as to the quality of certain lumber belonging to Lee P. Hill, made by Robert Creelman, Hill's agent, namely that it was Number One common and better, defendant was induced to purchase said lumber, in part payment of which transaction he had executed the promissory note running to Hill. He alleged that Hill and Creelman knew that "approximately one-half thereof was of a grade poorer and less valuable than Number One common grade or better."

Thereafter plaintiff moved for summary judgment on the ground that defendant's defense of failure of consideration was without merit and spurious. In support thereof, he filed three affidavits executed by Robert Creelman, Lee P. Hill and James Ramsdell, Hill's attorney, together with documents which were appended to each affidavit. Creelman's affidavit was essentially to the effect that he represented that the 140,000 feet of lumber which was delivered by Hill to Jones would be "Grade 2 common, and better." Concomitant with this transaction, Creelman states he made certain business arrangements with defendant, pursuant to which he became employed by defendant Jones as sales manager of the latter's company. There is attached a certificate of inspection issued at the shipping point covering 25,000 feet of the lumber, which Creelman avers was delivered to defendant, and asserts that similar certificates for the balance of the lumber were also issued and delivered to defendant. The attached inspection certificate indicates that some of the lumber was classified a Number Two common, and a part was number One common. The affidavit also states that an inspection at destination was made by one E. L. Primm, confirming the shipment to be grade 2 and better, and copies of Primm's reports were sent to Jones, who also personally inspected at least one carload. Creelman asserts that defendant informed him that if Hill failed to extend the time due for payment on the promissory note and initiated legal action to collect on it, he would "stall" the case for over a year, put up an attachment bond, and appeal from any judgment rendered on the note.

The affidavits of Hill and Ramsdell attach as exhibits a total of 12 letters exchanged between Jones and themselves over the period May to November, 1952. For reasons which will subsequently appear, it is unnecessary to elaborate in full detail the contents of this correspondence, which defendant does not deny passed between the persons designated. It is sufficient to indicate that during the six months following the sale of the lumber, at no time in his letters does defendant suggest there was any misrepresentation, though on one occasion he wrote that the lumber was of "very low grade." His letters offer excuses for nonpayment of the note, ask for an extension of time for payment, and contain an offer to renew the original note by the execution of two new ones. Upon receiving notification of Hill's unwillingness either to extend the time of payment or to agree to a compromise suggested by defendant, and of Hill's intention to take legal action if full payment were not made, defendant wrote on November 10, 1952, that he would invite a suit though "we appreciate the fact that we have no material defense to an action and all we can hope to do is to delay Hill's receipt of payment for a year or so."

Hill's affidavit also contains as an exhibit a photostatic copy of the promissory note, and it is averred that he is the assignor of the note which is the foundation of this suit. He asserts he had no part in the negotiations between Jones and Creelman for the sale of lumber which was effectuated in connection with a deal whereby Creelman went to work for defendant's company.

In opposition to the motion made by plaintiff, affidavits were filed by L. B. Krohn, Jack Cline, and defendant. The Krohn affidavit is to the effect that Krohn was present during conversations between Creelman and Jones relating to the purchase of the lumber in question, during which time affiant heard the repeated statements made by Creelman to Jones to the effect that the said lumber was number One common lumber, and that the discussions of the price to be paid by Jones to Hill were based on a Number One common or better quality. Cline avers in his affidavit that as defendant's employee, he handled the lumber in question, which was stored on the premises of the Fern Trucking Company; that of 140,000 board-feet of lumber approximately 30,000 board-feet remains unsold; that from his observation approximately 40 percent of the total of said lumber is below the grade of Number One common; that the best prices obtainable for said lumber have been far below the current price in the Los Angeles market for Number One common and better, "and that the remaining 30,000 board-feet thereof can be sold only at prices far below the current market price for Number One common and better and below the price paid therefor by Nelson E. Jones to Lee P. Hill."

Defendant Jones' affidavit states that during his negotiations with Creelman, as Hill's agent, for the purchase of 140,000 board-feet of lumber owned by Hill, he never received any certificate of inspection showing the grade of said lumber; that he relied entirely upon statements made by Creelman that the lumber was of the grade of Number One common and better, which induced him to purchase said lumber at a price above the current Los Angeles market price for Number One common and better lumber of this type; that he did not examine said lumber before entering into the transaction because it was packaged in such a manner as to be too time-consuming and laborious to do so and because of the custom to rely on the seller's statement respecting grade of lumber; that it was his belief that the note executed to Hill was endorsed to a "holder for value before maturity", thus explaining his belief expressed in his correspondence that he would have no defense to the action; that the lumber he purchased from Hill was not Number One common and better, and a large portion thereof was not even Number Two common or better; that the sales thereof to his customers as Number One common and better have resulted either in rejection of the lumber or a demand for adjustment in price; that there remains on hand approximately 30,000 board-feet of said lumber which is not Number One common and better, but is lumber which is almost impossible to sell at any price.

[1] Of the several grounds urged by defendant in support of his contention that the trial court erred in granting the motion for summary judgment, we believe his argument that the plaintiff's affidavits were insufficient as a basis for the judgment is well taken. Section 437c,[1] Code of Civil Procedure, in referring to the contents of affidavits, provides that the "*affidavit* or *affidavits* in support of the motion must contain facts sufficient to entitle plaintiff * * * to a judgment in the action, and the facts stated therein shall be within the personal knowledge of the affiant * * *." It is thus evident that the validity of a judgment entered pursuant to section 437c "is to be determined by the sufficiency of the affidavits considered upon the hearing of the motion." McComsey v. Leaf, 36 Cal.App. 132, 133, 97 P.2d 242, 243. In

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[1] Section 437c reads in part as follows: "In superior courts * * * when an answer is filed in an action * * * to recover an unliquidated debt or demand for a sum of money only arising on a contract express or implied in fact or in law * * * if it is claimed that there is no defense to the action or that the action has no merit, on motion of either party * * * supported by affidavit of any person or persons having knowledge of the facts, the answer may be stricken out or the complaint may be dismissed and judgment may be entered, in the discretion of the court unless the other party, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact."

Coyne v. Krempels, 36 Cal.2d 257, 261, 223 P.2d 244, 246, the court stated: "Summary judgment for plaintiff is proper only if the affidavits in support of his motion state facts that, if proved would be sufficient to sustain judgment in his favor * * *." In the Coyne case, supra, 36 Cal.2d at pages 262–263, 223 P.2d 244, the court further emphasized that a failure to file affidavits containing the requisite facts cannot be remedied by resort to the pleadings, at least when such facts are within the issues framed therein.

[2] It is clear that plaintiff's affidavits and exhibits contain no showing that plaintiff is the lawful owner and holder of the note. By defendant's denial of this allegation of the complaint it became an issue in the case, and plaintiff was required to establish that he was the holder of the note on the motion for summary judgment in order to entitle him to a judgment. Hill's affidavit merely states, without identification of the assignee, that he was the assignor of the note referred to in the complaint. But plaintiff alone was the only person who could competently testify that he still held the note and was the owner thereof at the time the motion for summary judgment was made and heard by the court. However, plaintiff filed no affidavit whatever and nowhere does it appear in the affidavits submitted that he was actually the owner or holder of the note. This crucial, factual deficiency in the plaintiff's affidavits precluded the entry of judgment in his favor, since, under the pleadings herein, it was a fundamental part of plaintiff's case to establish his right to sue on the note as the holder thereof. "There can be no question but that proof of the assignment is essential to a recovery by the alleged assignee where the fact of assignment is put in issue by the pleadings." Messick v. Houx Bros. Inc., 105 Cal.App. 637, 643, 288 P. 434, 437. In Brown v. Curtis, 128 Cal. 193, 194, 60 P. 773, one Brown sued upon a claim of which he was the assignee. In reversing judgment in Brown's favor, the court stated: "It was incumbent upon Brown to establish his right to sue, and this necessitated proof of the assignment by which alone he had any such right. It was as necessary for Brown to prove this fact as it was to prove the indebtedness." 128 Cal. at page 196, 288 P. at page 437. In Sterling Adjustment Co. v. Laher Auto Spring Co., 116 Cal.App. 100, 2 P.2d 408, an assignee recovered a judgment in an action in which the fact of assignment was in issue. The record failed to disclose evidence to support a finding that the alleged assignment had been made. In reversing the judgment the court stated, 116 Cal.App. at page 101, 2 P.2d at page 408: "Respondent argues that 'the finding as to the assignment is a technicality not involving a substantial right of appellant.' We do not believe that it may be so considered, for where an action is brought by an alleged assignee, the allegation of the complaint relating to the assignment must be proved as formally as any other material allegation [citations]."

[3] It must be borne in mind that in a summary judgment proceeding, which is a drastic procedure to be used sparingly and with circumspection in order to fully preserve the rights of litigants, the affidavits of the moving party must be strictly construed. United States Fidelity & Guaranty Co. v. Sullivan, 93 Cal.App.2d 559, 561, 209 P.2d 429; Travelers Indemnity Co. v. McIntosh, 112 Cal.App.2d 177, 182, 245 P.2d 1065.

[4, 5] If plaintiff is to prevail it is necessary that his affidavits furnish factual support covering every element required to establish his cause of action. Hardy v. Hardy, 23 Cal.2d 244, 245, 143 P.2d 701; Coyne v. Krempels, supra, 36 Cal.2d at page 261, 223 P.2d 244. Where, as here, plaintiff's affidavits failed to show that the assignment of the note was made to him and that he is still the owner and holder thereof, he failed to sustain his burden of showing facts sufficient to entitle him to judgment.

The judgment is reversed.

MOORE, P. J., and McCOMB, J., concur.

OLIVER v. CAMPBELL.*

Civ. 19610.

District Court of Appeal, Second District, Division 3, California.

Jan. 21, 1954.

Hearing Granted March 17, 1954.

Action by attorney for reasonable value of legal services rendered to client. The Superior Court, Los Angeles County, Arthur B. Coates, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that whether contract between plaintiff and his client, which called for a fixed fee, had been rescinded, so as to permit plaintiff to sue in quantum meruit, was question of fact, and that judgment would be reversed for a finding thereon.

Judgment reversed.

1. Attorney and Client 🔑144

If contract between attorney and client was not rescinded, abandoned, or superseded by a new contract, it remained in effect and the contracting parties were bound thereby, and any action by attorney for recovery of compensation would of necessity be founded upon the contract, but if the contract was rescinded, neither party would be bound thereby, and attorney would be entitled to receive reasonable value of services.

2. Contracts 🔑253

An agreement of rescission, like any other agreement, requires mutual consent, which may be express or implied.

3. Attorney and Client 🔑158

In action to recover reasonable value of services rendered by attorney to client, attorney's right to sue in quantum meruit could be established only by a finding that the contract between attorney and client, calling for fixed fee, had been rescinded.

4. Attorney and Client 🔑167(2)

In action by attorney to recover reasonable value of services rendered to client, whether contract between attorney and client, which called for fixed fee, had been rescinded, so as to permit attorney to sue in quantum meruit, was question of fact.

5. Contracts 🔑313(2)

Not every breach of a contract by one party that amounts to a repudiation or offer to rescind gives to other party a right to treat contract as rescinded.

6. Contracts 🔑313(2)

Where one party to an executory contract refuses to treat it as subsisting or binding upon him, there is, in legal effect, a prevention of performance by other party, but a mere declaration of an intention not to be bound will not of itself amount to a breach, so as to create an effectual renunciation of contract.

7. Contracts 🔑253

One party cannot by any act or declaration destroy the binding force and efficacy of the contract.

8. Contracts 🔑313(2)

To justify adverse party in treating renunciation of contract as a breach, refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal and absolute.

9. Attorney and Client 🔑142

The mere discharge of an attorney under employment for a fixed fee is not, in all cases, such a breach of the contract of employment as to justify the attorney in treating it as rescinded.

10. Attorney and Client 🔑167(4)

In all cases where an attorney, employed for a fixed fee, has been discharged without cause, and it is questionable whether the dismissal and the conduct of the parties amounted to a rescission of the contract, a finding on that issue will determine whether contract price or value of the services is proper measure of client's liability.

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Wm. H. Neblett, Los Angeles, for appellant.

Clyde C. Shoemaker, Byron O. Smith, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff, an attorney at law, brought this action against the special administratrix of the estate of Dr. Roy Campbell, deceased, upon a common count alleging an indebtedness of Roy Campbell in the sum of $10,000, as the reasonable value of legal services rendered to him by plaintiff. It was alleged that $450 had been paid on account; that thereafter Roy Campbell died; a claim for $9,550 was presented to defendant, administratrix with general powers, and that the claim was rejected. A copy of the claim was attached to the complaint claiming $10,000, less credits, for "work, labor and services." In a court trial judgment was for the defendant and plaintiff appeals.

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* Subsequent opinion 273 P.2d 15.

The answer of the defendant denied the indebtedness and alleged that the services of plaintiff, and of another attorney, Ralph D. Paonessa, were rendered jointly pursuant to a written agreement for an agreed compensation of $750. It was admitted that only $450 had been paid on account.

The court found that Roy Campbell employed plaintiff and Ralph D. Paonessa to represent him in an action for separate maintenance instituted by his wife, Iva Lee Campbell, in which he filed a cross complaint for divorce, "* * * for a total fee of $750.00 plus Court Costs and other incidentals in the sum of $100.00 making a total sum of $850.00. Said fees of $750.00 to be paid after trial." It was found that pursuant to said contract plaintiff and Paonessa became attorneys for Roy Campbell; that Iva Lee Campbell amended her complaint to sue for divorce; the trial proceeded and consumed 29 trial days, during which Campbell was represented by plaintiff and Paonessa; the court's decision was announced December 6, 1950, directing an interlocutory decree in favor of the plaintiff therein; findings and judgment were prepared; Dr. Campbell became dissatisfied with his attorneys over proposed amendments to the findings and on January 25, 1951, substituted himself, in proper person, with the consent of his attorneys, "* * * and thereby the representation of said Roy Campbell in said action by said John Oliver and Ralph D. Paonessa was terminated." It was also found that the services of the attorneys were "* * under and pursuant to said written contract dated December 16, 1949, and for an agreed compensation and total fee of seven hundred fifty dollars ($750.00). That the reasonable value of all the aforesaid work, labor and services is the sum of five thousand dollars ($5,000.00), performed by the plaintiff John Oliver." It was further found that the action was not founded upon the written contract nor was the claim based thereon. The court concluded that the written contract covered all the work, labor and services rendered and performed. It was also concluded that the amendment of the complaint which converted the action into one for divorce did not alter the primary issues in the action, and "* * * that said contract of December 16, 1949, between said Roy Campbell and said John Oliver and Ralph D. Paonessa remained in full force and effect. That there was no breach of said contract by reason of said amendment whereby said action became an action for divorce instead of an action for separate maintenance."

It is not questioned on the appeal that the services were rendered under and pursuant to the terms of the written agreement, the sole contention being that the discharge of the attorneys was a breach of the contract of employment which released them therefrom and entitled them to recover the value of their services, unlimited by the written agreement.

[1] The primary question for the trial court was whether the contract of employment had been rescinded. If the contract was not rescinded, abandoned, or superseded by a new contract, it remained in effect and the contracting parties were bound thereby. Any action for the recovery of compensation would of necessity be founded upon the contract. Lavenson v. Wise, 131 Cal. 369, 375, 63 P. 622.

Upon the other hand, if the contract was rescinded neither party would be bound thereby and the attorneys would be entitled to receive the reasonable value of their services. Lessing v. Gibbons, 6 Cal.App.2d 598, 607, 45 P.2d 258; Brown v. Crown Gold Milling Co., 150 Cal. 376, 384, 89 P. 86; Hart v. Buckley, 164 Cal. 160, 128 P. 29; Welch v. Gunn, 101 Cal.App. 359, 281 P. 704; Laiblin v. San Joaquin Agr.

Corp., 60 Cal.App. 516, 213 P. 529; Davidson v. Laughlin, 138 Cal. 320, 71 P. 345, 5 L.R.A.,N.S., 579; Adams v. Burbank, 103 Cal. 646, 37 P. 640; Cox v. McLaughlin, 76 Cal. 60, 18 P. 100; Gray v. Bekins, 186 Cal. 389, 199 P. 767.

The only evidence as to the circumstances in which the substitution was made was given by plaintiff. Testifying at the trial he was asked whether he had any conversation with Dr. Campbell about compensation at the time of the substitution. He testified that Dr. Campbell requested him to propose a finding which would declare his wife's attorney to have been guilty of improperly influencing witnesses at the trial, that he refused to do so, and that Dr. Campbell stated that he could be discharged; that the substitution was agreed to and signed, and that he told Dr. Campbell that he expected to be paid the "reasonable value;" that Dr. Campbell asked: "What do you think the reasonable value of your services are?" and that he replied: "I expect to be paid as much as Mr. Shoemaker" (stated in the brief of appellant to be $9,000), and that Dr. Campbell said: "I am not going to pay you a cent more."[1] Mr. Oliver did not converse with Dr. Campbell again, nor during the latter's lifetime did he make any demand upon him for the payment of money.

The court found that Dr. Campbell was substituted in propria persona "* * * and thereby the representation of said Roy Campbell in said action by said John Oliver and Ralph D. Paonessa was terminated." Plaintiff says this finding establishes as a matter of law that the contract between Dr. Campbell and his attorneys was rescinded; "It does not matter whether the rescission of the contract is pinned to the *discharge* of his attorneys by Doctor Campbell or to a substitution of himself in their place, done with the attorneys' *consent.* Rescission follows from either one or both acts." The finding that the representation of Campbell by his attorneys was terminated was not a finding that the contract was cancelled or rescinded.

The conclusion of the trial court that the contract was still in full force and effect was not a finding that there had been no rescission nor does it indicate that the question of rescission had been considered by the court. Apparently it had been contended that the change of the action from one for separate maintenance to one for divorce in some manner abrogated plaintiff's employment contract. The conclusion was related to that contention. The failure of the court to determine, as a fact, whether the contract had been rescinded may be accounted for by the contentions of the parties at the trial. They did not recognize that it was a controlling question of fact upon the decision of which depended defendant's liability, whether upon the contract in *quantum meruit.*

In the first briefs on the appeal, and it is to be presumed at the trial, plaintiff took the position that when he was discharged he was entitled, at his election, to sue for the reasonable value of his services. He assumed that his discharge was a complete repudiation of the contract of employment and he relied entirely upon the statement in Lessing v. Gibbons, 6 Cal.App.2d 598, at page 607, 45 P.2d 258, at page 262, quoted in Neblett v. Getty, 20 Cal.App.2d 65, 70, 66 P.2d 473: "It is well settled that one who is wrongfully discharged and prevented from further performance of his contract may elect as a general rule to treat the contract as rescinded, may sue upon a *quantum meruit* as if the special contract of employment had never been made and may recover the reasonable value of the services performed even though such reasonable value exceeds the contract price." In the Lessing case, and in all the other cases in the first group cited above, it was either admitted or assumed that the defendant at fault had not only failed to perform but had repudiated the contract altogether, and that each defendant's intention to that effect had been manifested, as stated in Atkinson v. District Bond Co., 5 Cal.App.2d 738, at page 743, 43 P.2d 867, at page 870, infra, in a manner that was "distinct, unequivocal, and absolute".

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[1] Mr. Oliver was questioned by defendant's attorney with respect to payments that had been made on account. When he was questioned concerning conversations had with Dr. Campbell at the time of the substitution defendant objected that his testifying would be in violation of section 1880 of the Code of Civil Procedure, subdivision 3. The objection was overruled upon the ground that the questioning of Mr. Oliver concerning the payments on account was a waiver of his disqualification under the section.

The Lessing and Neblett cases upon which plaintiff relies are not in point. In neither case was there an agreement for the payment of a definite amount; therefore the only available basis of recovery was in *quantum meruit.*

Defendant takes the position that "Where an attorney is employed under an express agreement for an agreed compensation and is discharged without cause, the measure of his damages is the compensation named in the contract. Webb v. Trescony, 76 Cal. 621 [18 P. 796]; Elconin v. Yalen, 208 Cal. 546 [282 P. 791]." The cited cases are not in point. They did not involve the question of a claimed rescission. The Webb case was for damages for breach of contract; the plaintiff was entitled to recover what he would have received had he not been prevented from completing his services. In Baldwin v. Bennett, 4 Cal. 392, cited in the Webb case, the contract price for a fixed sum was allowed on the theory that it was the only practicable measure of damage. In Elconin v. Yalen there was no agreement as to the compensation to be paid to the attorney and a recovery in *quantum meruit* was allowed. The statement [208 Cal. 546, 282 P. 792]: "Had there been included in said contract a provision as to plaintiff's compensation, such provision upon his wrongful discharge would have measured the amount of his recovery. Kirk v. Culley, 202 Cal. 501, 261 P. 994; Webb v. Trescony, 76 Cal. 621, 18 P. 796." was unnecessary to the decision and is not supported by the cases cited. We cannot agree with the contention of either of the parties.

[2–4] An agreement of rescission, like any other agreement, requires mutual consent, which may be express or implied. Under the pleadings and the evidence plaintiff's right to sue in *quantum meruit* could be established only by a finding that the contract had been rescinded. That was a question of fact. Tuso v. Green, 194 Cal. 574, 582, 229 P. 327; Treadwell v. Nickel, 194 Cal. 243, 259, 228 P. 25. If the parties intended to rescind it by the discharge of the attorneys, acquiesced in by the latter, Dr. Campbell became obligated to pay the reasonable value of the legal services. If there was no rescission the contract price was the measure of his liability. Lavenson v. Wise, supra, 131 Cal. 369, 63 P. 622. There was no finding that the contract was or was not rescinded.

[5–8] The evidence did not establish, as a matter of law, that the contract was rescinded. It is not every breach of a contract by one party that amounts to a repudiation or offer to rescind which gives to the other party a right to treat the contract as rescinded. We agree with the statement in Atkinson v. District Bond Co., 5 Cal.App.2d 738, at page 743, 43 P.2d 867, at page 869: "Where one party to an executory contract refuses to treat it as subsisting or binding upon him, there is, in legal effect, a prevention of performance by the other party. A mere declaration, however, of a party of an intention not to be bound will not of itself amount to a breach, so as to create an effectual renunciation of the contract; for one party cannot by any act or declaration destroy the binding force and efficacy of the contract. To justify the adverse party in treating the renunciation as a breach, the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute." In accord, Thompson v. Municipal Bond Company, 23 Cal.App.2d 402, 411, 73 P.2d 274; Bozeman v. Curtis, 108 Cal.App. 648, 291 P. 870; Ross v. Tabor, 53 Cal.App. 605, 200 P. 971; 17 C.J.S., Contracts, § 46, p. 389.

[9] In McConnell v. Corona City Water Co., 149 Cal. 60, at page 64, 85 P. 929, at page 930, 8 L.R.A.,N.S., 1171 it was said: "One who has been injured by a breach of contract has an election to pursue any of three remedies. He may treat the contract as rescinded and may recover upon a *quan-*

tum meruit so far as he has performed; or he may keep the contract alive, for the benefit of both parties, being at all times ready and able to perform; or, third, he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing." In Rehart v. Klossner, 48 Cal.App.2d 46, at page 50, 119 P.2d 148, it was said that a communication is not sufficient to establish repudiation by a party to a contract unless it amounts to an absolute and final renunciation and repudiation; a mere expression not to be bound by it is not sufficient. And in Tracy v. MacIntyre, 29 Cal.App.2d 145, 147, 84 P.2d 526, 528, the court said: "While a client may cancel the retainer contract by an arbitrary discharge of his attorney, he must abrogate the contract in its entirety and not in part." The mere discharge of an attorney under employment for a fixed fee is not, in all cases, such a breach of the contract of employment as to justify the attorney in treating it as rescinded. May not the client say, "I am dispensing with your further services, but I will pay you the balance of your fee", without abrogating the contract? May not a party to any contract tender full performance on his part and excuse further performance on the part of the other without subjecting himself to any further or different liability? It cannot be questioned that he has that right. And even though no offer of performance is expressed, if there is a willingness and intention to pay a stipulated sum in fulfillment of the contract, does the mere excusing of further performance on the part of the other party amount to an offer to rescind the contract which is open to acceptance? Reason does not suggest an affirmative answer to the latter question, nor, to our knowledge, has any court so held. The flat statement found in some of the cases that the discharge of an attorney gives him the right to treat the contract of employment as rescinded or abrogated cannot be considered without regard to context, nor is it a correct statement unless the discharge amounts to a clear repudiation or abrogation of the agreement of employment in its entirety. It is true that Dr. Campbell did not offer to pay the balance of the agreed fee but it is also true that his intentions in the matter were to be determined as a fact, and as an inference from the facts in evidence.

The evidence would not require a finding that Dr. Campbell repudiated his contract in its entirety. When Mr. Oliver said he expected to be paid as much as Mr. Shoemaker had received, and Dr. Campbell said he would not pay "a cent more," this might have meant either that he would pay no more than the balance of the agreed fee or no more than he had already paid. It is not for us to say what he meant. Unfortunately, there was no further communication between the doctor and Mr. Oliver after the latter's discharge, and the trial court must determine what was in Dr. Campbell's mind from the circumstances of the case and the scant testimony. And even if it should be determined that Dr. Campbell intended to go no further under his contract the questions would remain whether it was such a breach of contract as would give the attorney the right to treat the contract as rescinded and whether the actions of plaintiff during Dr. Campbell's lifetime and after his death amounted to an election to treat the contract as rescinded.

We may not affirm the judgment for defendant, nor may we direct a judgment for the plaintiff upon the theory that the discharge of the attorneys, accepted by them, effected a rescission of the contract as a matter of law.

The pleadings necessarily created an issue as to the effect of the discharge of the attorneys—whether it amounted to a complete repudiation of the contract by Dr. Campbell, and was treated as such by the attorneys. This was the vital issue. We repeat that if there was no rescission the contract remained in effect, and would have furnished a proper basis for a recovery of the balance of the fee in an action on the contract, or for the measurement of damages in an action for breach of contract. Lavenson v. Wise, supra, 131 Cal. 369, 63 P. 622. If it was rescinded it ceased to exist for any purpose, and the sole remedy of the attorneys would have been in *quantum meruit.*

[10] In all cases where an attorney, employed for a fixed fee, has been discharged without cause, and it is questionable whether the dismissal and the conduct of the parties amounted to a rescission of the contract, a finding on that issue will determine whether the contract price or the value of the services is the proper measure of the client's liability. For the reasons stated, it is necessary that the judgment be reversed.

The judgment is reversed; the parties to pay their own costs of appeal.

PARKER WOOD, Justice.

I concur in the above opinion and judgment. The substitution of Dr. Campbell in place of his attorneys occurred at a time when, insofar as his attorneys were concerned, there was nothing further for them to do in the actual trial of the case. The trial was over and they had lost the decision. According to the testimony of one of the attorneys, the substitution was made in order that Dr. Campbell might request the judge to make a certain finding which the attorneys would not request. About six months after the substitution Dr. Campbell died. The attorneys had never made a demand upon him for payment of any sum as attorneys' fees. One of the attorneys, plaintiff herein, sued the administratrix of the estate for $9,550 for services which the attorneys had agreed to render for $750. That suit is based upon a theory that merely by reason of the substitution (after the actual trial work had been finished) they were free to disregard their written agreement that they would do all the work for $750.

The finding herein that by the substitution the "representation * * * was terminated" could mean only that the obligation of the attorneys to further represent their client was ended. Certainly that finding, which the learned trial judge carefully limited to "representation," did not mean that the client's obligation to pay the full agreed price of $750 was ended. Certainly, in view of that finding and the judgment for the balance of the $750, the trier of the facts was not of the opinion that the mere substitution, at that final stage of the case, abrogated the whole written agreement and made it nonexistent. Certainly the client did not intend, by the substitution, to set aside his written agreement to pay $750, and thereby to subject himself to a lawsuit by his attorneys for approximately thirteen times the amount the attorneys had agreed upon.

The relationship of attorney and client existed during the alleged conversation preceding the substitution. The attorneys owed their client the duty of telling him precisely what they had in mind regarding their fee, and that if the substitution were made they would then disregard their written agreement entirely and would sue him for more than the balance of the agreed price of $750. The interpretation of any uncertain or ambiguous expression in the alleged conversation between the attorneys and the client, regarding the substitution, should be resolved against the attorneys. If anything was said by the attorneys about being paid "a reasonable value," and if Dr. Campbell replied he would not pay "a cent more," his reply should be interpreted to mean that he would not pay a cent more than the agreed price of $750. If, by reason of certain cross-examination of claimant, there was a waiver of the disqualification of the claimant as a witness against the administratrix, the testimony of the claimant should be viewed with caution. The cross-examination of claimant, which allegedly was the basis for the asserted waiver of claimant's disqualification as a witness, was of such a nature that it is doubtful that there was such a waiver. The cross-examination related to uncontroverted matters which were wholly unrelated to any matter pertaining to the substitution. The finding that the "representation * * was terminated" might be regarded as a defective or incomplete finding in that it did not state expressly whether the contract was rescinded. Ordinarily when there is a defective or incomplete finding, a judgment should not be reversed merely by reason of that finding unless it is reasonably probable that on a retrial a finding might be made which would result in a different judgment. See Culjak v. Better Built Homes, Inc., 58 Cal.App.2d 720, 725, 137 P.2d 492. In the present case I think it is not reasonably probable that a finding might be made that the contract was rescinded and is not reasonably probable that there might be a different judgment. However, in the interest of clarifying the matter by obtaining an express finding of fact as to whether there was a rescission, I concur in the reversal.

VALLÉE, Justice.

I am of the opinion that the judgment should be reversed with directions to the superior court to render judgment for plaintiff for $5,000. The court found that the reasonable value of the services performed by plaintiff is $5,000. Plaintiff was the only witness who testified concerning his discharge by Dr. Campbell. The opinion of this court fails to state all of the testimony of plaintiff with respect to his discharge. I set it forth in toto in the margin.[1] I think no reasonable conclusion can be drawn from the evidence other than that the discharge amounted to a clear repudiation and abrogation of the contract in its entirety, in which case plaintiff is entitled to recover the reasonable value of the service performed. The contract plaintiff made with Dr. Campbell did not limit his services to the trial of the case.[2] Under the contract he agreed to represent the Doctor until final judgment, and he told the Doctor that he "thought the case would be reversed on appeal." Manifestly, the evidence will be no different on a retrial. Dr. Campbell is dead. Plaintiff is the only witness who can testify to the conversation. There is nothing in plaintiff's testimony to impugn his integrity. He did all any lawyer of the highest professional standards could have done under the conditions. Defendant waived plaintiff's disqualification under the deadman's statute.[3] Deacon v. Bryans, 212 Cal. 87, 90–93, 298 P. 30. Defendant will be unable to make any showing to the contrary of the testimony of plaintiff. Under these circumstances, the judgment should be reversed with directions as I have indicated. Connor v. Grosso, 41 Cal.2d 229, 259 P.2d 435.

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[1] "Q. Mr. Oliver, did you have any discussion with Dr. Campbell about that contract or as to the writing of that contract sometime after Judge Clark had announced his decision, and about the time that you had received the proposed findings of fact drawn by Mr. Shoemaker for Mrs. Campbell. * * *

"The Witness: I did not.

"By Mr. Neblett: [Attorney for plaintiff]

"Q. Did you have a discussion with Dr. Campbell about that time in your office? A. I did.

"Q. What was said? * * * A. Dr. Campbell came into my office and stated that he was dissatisfied with the announced judgment of the court. In his opinion, Mrs. Campbell should have been allowed nothing by way of alimony. I told Dr. Campbell that after 28 years of married life and with his property and his earning capacity that I thought the least the court would have allowed would have been possibly $250.00 a month.

"He also stated to me at that time that he was dissatisfied with the proposed amendments that I had prepared on the findings of fact and conclusions of law because he thought the findings should state in there that Mr. Shoemaker had suborned and bribed certain witnesses for the plaintiff.

"I told Dr. Campbell that there was no evidence of any such action on the part of Mr. Shoemaker and that I was not going to submit to the court any proposed findings in that regard.

"He stated at that time that if I wouldn't run this case the way he wanted it that he would discharge me, and asked me if I would sign a substitution of attorneys. I told him that I recognized that he had the power to discharge me as his attorney, that I was prepared to carry the case through to a conclusion, and I thought the case would be reversed on appeal.

"He said 'no,' he wanted to act as his own attorney, so he could argue the proposed findings himself; and with that I prepared the substitution of attorneys which is in the file, and Dr. Campbell signed it and I signed it.

"He left the office carrying the files of this case, the divorce case, and also the file of the Municipal Court case with him, and that is the substance of the conversation.

"Q. You turned over to Dr. Campbell at that time all of the files in Campbell against Campbell? A. The two cases.

"Q. And the other case that is, the case in the Municipal Court? A. The entire file.

"Q. You have had nothing to do with the case from that time until now? A. I have not.

"Q. Mr. Oliver, will you look in the file of Campbell against Campbell, Number D370,670, and find the substitution to which you have just referred? A. Here it is.

"Q. This substitution which you have presented to me appears to have been signed by Dr. Campbell, January 25, 1951, and by John Oliver on account of Ralph D. Paonessa and John Oliver on the same day? A. That is correct.

"Q. That is Dr. Campbell's signature? A. That is Dr. Campbell's signature; he signed that in my presence; and that is my signature.

"Q. That reads: 'Defendant and cross complainant hereby substitutes himself Roy Campbell in pro per as his attorney of record in place of Ralph D. Paonessa and John Oliver,' and under that: 'We consent to the above substitution, dated: January 25, 1951.'

"Then on the other page there is another signature by Dr. Campbell above 'substitution accepted.'

"A. That is correct.

"Q. Did you have any conversation at that time with Dr. Campbell about compensation? A. Yes, I told him that I expected to be paid the reasonable value. * * *

"(Continuing) That I expected to be paid a reasonable value for my services. He says: 'What do you think the reasonable value of your services are?' I said, 'I expect to be paid as much as Mr. Shoemaker.' * * *

"Q. When you told Dr. Campbell that you expected to be paid and you expected to be paid approximately, or the same amount that was allowed Mr. Shoemaker what did Dr. Campbell say? A. He said, 'I am not going to pay you a cent more.' "

[2] The contract reads:

"December 16th, 1949

"We, the undersigned do hereby agree to represent Roy Campbell in an action for separate maintenance instituted by his wife, Iva Lee Campbell and on cross complaint for divorce filed by Roy Campbell against his wife, and which has been set for trial for February 20th, 1950, in Department 1 of the Superior Court of the County of Los Angeles State of California for a total fee of $750.00 plus Court Costs and other incidentals in the sum of $100.00 making a total sum of $850.00. Said fees of $750.00 to be paid after trial.

"Ralph D. Paonessa
"John Oliver

"I accept the services of Ralph D. Paonessa and John Oliver as per above agreement.

"RC "

[3] The court fails to state that in questioning plaintiff, in addition to asking him with respect to the payments that had been made on account, defendant's attorney questioned him about his signature and that of Mr. Paonessa on the contract, and thus waived plaintiff's disqualification under section 1880 of the Code of Civil Procedure.

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122 Cal.App.2d 867

PEOPLE v. PARKER.

Cr. 2434.

District Court of Appeal. Third District.
California.
Jan. 27, 1954.

Rehearing Denied Feb. 8, 1954.

Defendant was convicted of separate crimes of aiding escape of prisoner and harboring a felon. The Superior Court, Merced County, Sischo, J., rendered judgment and defendant appealed. The District Court of Appeal, Bedeau, J. pro tem., held that defendant's extrajudicial confession to aiding escape was improperly admitted in absence of other evidence establishing the corpus delicti.

Judgment reversed in part, affirmed in part.

1. Criminal Law 🔑622(1), 1148

When two or more defendants are jointly charged with any public offense the question of right to severence of trial is addressed to discretion of trial court, decision of which will not be overturned except upon clear abuse of discretion. Pen.Code, § 1098.

2. Criminal Law ⚿622(1)

When two or more defendants are jointly charged with any public offense, separate trials are privilege and not matter of right. Pen.Code, § 1098.

3. Criminal Law ⚿622(1)

There is no abuse of discretion in refusing to grant demand for separate trials because damaging testimony admissible against one defendant, but not against the other, may be received in evidence. Pen. Code, § 1098.

4. Criminal Law ⚿622(4)

Where counsel for both defendants had been appointed eleven days before trial and there had been full opportunity for consultation and preparation, refusal to grant demand for separate trials first made immediately preceding trial did not constitute abuse of discretion. Pen.Code, § 1098.

5. Criminal Law ⚿517(4)

To authorize reception of evidence of extrajudicial confession, proof of corpus delicti need not be as clear and convincing as is required to establish guilt.

6. Criminal Law ⚿535(1)

A conviction cannot be had upon defendant's extrajudicial confession without proof aliunde of corpus delicti.

7. Criminal Law ⚿517(4)

Where defendant was charged with crime of aiding escape of prisoner, evidence that prisoner, who was not confined to building housing jail, did escape, was no evidence of crime of aiding escape, and defendant's extrajudicial confession was improperly admitted in absence of other independent evidence of corpus delicti.

8. Escape ⚿10

In prosecution for crime of aiding escape, wherein defendant's extrajudicial confession was improperly admitted in absence of other independent evidence of corpus delicti, conviction was not sustained by the evidence. Pen.Code, § 4534.

9. Criminal Law ⚿517(4)

In prosecution for harboring felon independent evidence justified a finding that defendant, knowing felon had escaped from jail, drove him out of town and left him there to avoid arrest, and corpus delicti was sufficiently established to permit admission of extrajudicial confession.

10. Escape ⚿10

In prosecution for harboring felon, wherein corpus delicti was sufficiently established to permit admission of extrajudicial confession, evidence sustained conviction. Pen.Code, § 32.

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Stephen P. Galvin, Merced, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., for respondent.

BEDEAU, Justice pro tem.

In an information filed by the district attorney of Merced County, appellant John K. Parker and Jesse Jack Wilmoth were jointly charged with two crimes. In count one of the information they were charged with violating section 4534 of the Penal Code, it being alleged that appellant and Wilmoth on or about the 3rd day of August, 1952, "did wilfully, unlawfully and feloniously assist a prisoner, to-wit: Louis David Lyda, who was confined in the Merced County Jail and in the lawful custody of the sheriff of the County of Merced, to escape." The second count charged a violation of section 32 of the Penal Code, it being alleged that appellant and Wilmoth on or about August 3, 1952, "did wilfully, unlawfully and feloniously, and with knowledge that the crime of escape, a felony, was committed by Louis David Lyda, harbor, conceal and aid said Louis David Lyda * * * [to] escape from trial, conviction, and punishment for said felony."

They were jointly tried before a jury, which returned verdicts of guilty against both defendants on each count. A motion for a new trial was made and denied and appellant and Wilmoth were each sentenced to state prison for the term prescribed by law on each count, sentences to run concurrently. It is only the appeal of Parker that is before us at this time for consideration.

The case arises out of the following facts, which are stated in a light most favorable to respondent. Appellant Parker, his wife (sister of Wilmoth) Wilmoth, and one Louis David Lyda had been friends for a long time in Oklahoma, and had traveled from Oklahoma to California in appellant's automobile. On July 21, 1952, they were motoring through the city of Merced with Lyda driving. On that day the three men were arrested. Lyda was charged with a violation of Vehicle Code section 502 (drunk driving), and appellant and Wilmoth were charged with violation of a Merced City ordinance prohibiting the presence of intoxicated persons in and about automobiles. On July 22, 1952, they pleaded guilty in the city court. Lyda was fined $275 in default of which he was to serve 137½ days in the county jail. Appellant and Wilmoth were each fined $25 and in default thereof, were to serve one day in the county jail for every $2 of the fine not paid. Being unable to pay the fines, all three were confined in jail. On August 2, 1952, after appellant and Wilmoth had served approximately eleven days, they raised sufficient money to pay the balance of their fines and were released on that day about 5 to 5:30 p. m. Lyda was still confined in jail; he had 126 more days to serve. By that time he had become a trusty with certain limited privileges. As such trusty he was released from his cell about 6:30 to 7 o'clock each morning and permitted to go in and out of the jail, but the distance he could go was definitely fixed and well known to him. He was required to stay within the curb lines around the jail and the jail side of the court house.

Later, on the same day, appellant and Wilmoth returned to the jail and were seen talking to Lyda and other trusties. The following morning, August 3, appellant and Wilmoth returned about 7:30 and again about 10:15. On each occasion they talked to Lyda. Lyda was seen for the last time about the jail around 11 a. m. Shortly thereafter, around 11:30 a. m., Lyda was wanted to do an errand, but could not be found. A search was made for him in the jail building and in the area to which he was confined as a trusty, but he was not there. A general search was then instituted for appellant, Wilmoth and Lyda. Some time thereafter appellant was found near his automobile at the county hospital where his wife was confined. When interrogated there, he denied any knowledge of the whereabouts of Wilmoth or Lyda. He was taken to the sheriff's office where he was again interrogated. He then told the officers that Lyda and Wilmoth were at the Santa Fe overpass on Highway 140, about a mile or two from Merced. The officers went immediately to that place and found both Wilmoth and Lyda, and both were arrested. Both appellant and Wilmoth made statements thereafter which were admitted in evidence over the objections of defense counsel. Appellant did not take the witness stand, but both Wilmoth and Lyda were called as witnesses by the defendants.

[1-4] As ground for reversal, appellant first contends that the trial court committed error in denying him a separate trial. The clerk's transcript discloses the following: On September 15 appellant and his co-defendant, Wilmoth, appeared in court with their counsel, the public defender, and their arraignment was continued to September 29; on September 29 they appeared with the public defender and were arraigned and the case was set for trial for October 24; on October 20 they appeared again in court at which time the public defender was relieved of his duties and the court appointed S. P. Galvin as counsel for both defendants; on October 21, they appeared with their counsel and the court reset the trial for October 27; on October 27, with the defendants and their counsel present, the court again reset the trial for October 31. On October 31, and just before the commencement of the trial, appellant and Wilmoth, through their counsel, for the first time requested a separate trial, stating as grounds therefor that there would be a conflict in the interest of the two defendants and that it would be disadvantageous to go to trial with but one counsel.

Section 1098, Penal Code, provides in part: "When two or more defendants are jointly charged with any public offense * * * they must be tried jointly, unless the court order separate trials." Under that section a joint trial is contemplated, and a separate trial is a privilege and not a matter of right. People v. Rocco, 209 Cal. 68, 73, 285 P. 704; People v. Baa, 24 Cal.2d 374, 377, 150 P.2d 1. The question of the right to a severance of trial is addressed to the sound discretion of the trial court, with which decision an appellate tribunal will not interfere except upon a clear abuse of discretion. People v. Bundte, 87 Cal.App.2d 735, 197 P.2d 823; People v. Baa, supra; People v. Eudy, 12 Cal.2d 41, 45, 82 P.2d 359; People v. Isby, 30 Cal.2d 879, 897, 186 P.2d 405; People v. Goold, 215 Cal. 763, 12 P.2d 958; People v. Erno, 195 Cal. 272, 277, 232 P. 710; People v. King, 30 Cal.App.2d 185, 85 P.2d 928.

There is no abuse of discretion in refusing to grant a demand for separate trials because damaging testimony admissible against one defendant, but not against the other, may be received in evidence. People v. Thomas, 135 Cal.App. 654, 27 P.2d 765; People v. Isby, supra; People v. Erno, supra; People v. Dowell, 204 Cal. 109, 266 P. 807; People v. King, supra; People v. Perry, 195 Cal. 623, 235 P. 890; People v. Bennett, 93 Cal.App.2d 549, 209 P.2d 417. In People v. Thomas, supra, practically all the reasons advanced in this case for a separate trial were there advanced. The order denying a separate trial was upheld by the appellate court which said [135 Cal. App. 654, 27 P.2d 768]: "We find no error in the trial court's ruling denying appellant's motion for a separate trial. Since the amendment in 1921 of section 1098 of the Penal Code, defendants jointly charged are no longer entitled to separate trials as a matter of right. The granting or refusing of separate trials now rests largely, if not wholly, within the discretion of the trial court, and it is well settled that the ruling of the trial court denying a motion for a separate trial will not be disturbed in the absence of a clear showing of an abuse of discretion."

Appellant relies principally upon People v. Lanigan, 22 Cal.2d 569, 140 P.2d 24, 148 A.L.R. 176, but the factual situation there was entirely different. In that case the defendant was forced to elect on the morning of the trial, either to represent himself, which he stated he was unable to do, or to accept an attorney whom he did not want and with whom he had no opportunity to consult and prepare for trial. In this case counsel for defendants had full opportunity to consult with appellant and to investigate and prepare for trial. No claim is made that appellant's counsel was not prepared or that appellant was not properly represented. On the record presented in this case the trial court did not abuse its discretion in denying appellant's motion for a separate trial.

Appellant's major contention is that the evidence is insufficient to support the verdicts and judgments on both counts. Interwoven with this contention is his claim that the trial court erred in allowing in evidence appellant's admissions and confessions without sufficient proof of the corpus delicti.

[5] To authorize the reception and consideration by the jury of evidence of extrajudicial confessions and admissions of a defendant the prosecution is not required to establish the corpus delicti by proof as clear and convincing as is required to establish the fact of guilt; and rather slight or prima facie proof is sufficient for such purpose. People v. Hudson, 139 Cal.App. 543, 34 P.2d 741; People v. Mehaffey, 32 Cal.2d 535, 545, 197 P.2d 12; People v. Ives, 17 Cal.2d 459, 463, 110 P.2d 408; People v. Bollinger, 196 Cal. 191, 200, 237 P. 25; People v. Selby, 198 Cal. 426, 437, 245 P. 426; People v. McMonigle, 29 Cal.2d 730, 738, 177 P.2d 745. The order of proof is in the discretion of the trial court. People v. Lopez, 93 Cal. App.2d 664, 209 P.2d 439; People v. Crozier, 119 Cal.App.2d 204, 258 P.2d 1029.

[6] But it is still an established and well settled rule that the corpus delicti of a crime must be established independently of the admissions or confessions of a defendant and a conviction cannot be had upon defendant's extrajudicial admissions or confessions without proof *aliunde* of the corpus delicti. People v. Rupp, 41 Cal.2d —, 260 P.2d 1; People v. Kaye, 43 Cal.App.2d 802, 809, 111 P.2d 679; People v. Mehaffey, supra; People v. McMonigle, supra; People v. Corrales, 34 Cal.2d 426, 429, 210 P.2d 843; People v. Cullen, 37 Cal.2d 614, 234 P.2d 1; Hall v. Superior Court, 120 Cal.App.2d —, 262 P.2d 351. The rule is clearly set forth in the Cullen case as follows [37 Cal.2d 614, 234 P.2d 7]: "It is the settled rule, however, that the corpus delicti must be established

independently of admissions of the defendant. Conviction cannot be had on his extra-judicial admissions or confessions without proof *aliunde* of the corpus delicti; but full proof of the body of the crime, sufficient to convince the jury of its conclusive character, is not necessary before the admissions may be received. A prima facie showing * * * is all that is required. * * * The purpose of the rule is to protect the defendant against the possibility of fabricated testimony which might wrongfully establish the crime and the perpetrator."

[7] In the first count appellant was charged with assisting Lyda to escape. There is no evidence in the record, direct or indirect, other than appellant's admission, that appellant or any one assisted or helped Lyda to escape or that assistance or help of any kind was furnished to or used by Lyda. The evidence is clear that Lyda did escape, but proof of that fact does not prove a necessary and essential element of the corpus delicti of the crime with which appellant was charged, tried and convicted, to wit: that Lyda was assisted or aided in his escape. People v. Ramos, 106 Cal.App.2d 709, 235 P.2d 864; 113 Cal.App.2d 631, 248 P.2d 423. Lyda at the time of his escape was a trusty in the county jail. He had certain well defined privileges. One was that during the daytime he could leave the building that housed the jail, but the limits that he could go were definite and well known to him. Lyda was not confined in a cell. He needed no assistance to escape. It was a simple matter for him to escape without aid from any person. All he had to do was to walk unassisted beyond the boundary of his confinement with the intention to escape. The physical control over him was then ended by his flight beyond immediate active pursuit and his escape was complete.

Appellant's statements that were admitted in evidence were made to the authorities. Deputy Sheriff Rowe testified that in a conversation with appellant on August 6, he stated that he and Wilmoth came to the jail about 8 or 9 a. m. on Sunday morning, and again about 12 noon, parked their car between the jail and the new court house and talked to Lyda; that he did not take Lyda with him at that time, but he saw Lyda in town about an hour later on 16th Street, and Lyda got into his automobile; Wilmoth was driving; Lyda wanted to leave town, and they took him to Cal Pac; that he, Parker, left Wilmoth and Lyda at the overpass on the Yosemite highway while he came into Merced; that he did not know that Lyda had escaped from jail until they were at Cal Pac. Another deputy sheriff, Jensen, testified that on October 20, 1952, he was present at a conversation in the district attorney's office and his best recollection was that appellant stated that he and Wilmoth picked up Lyda on the west side of the court house-jail house block and the witness indicated on a map the point that appellant had specified as the place where they picked up Lyda around 11 a. m. Wilmoth also made admissions and statements to the officers, but the trial court limited its reception in evidence as binding only against Wilmoth and not appellant. Neither Lyda nor Wilmoth testified to any fact from which it could be inferred that Lyda was assisted in any way in his escape or that appellant or any other person assisted or helped him. It is apparent that the only evidence to establish the corpus delicti of the crime of assisting a prisoner to escape is the statement made by appellant to Jensen. There is no other evidence *aliunde* of the admission.

[8] It is respondent's position that the surrounding circumstances—the fact that appellant and Wilmoth were related and had come to California from Oklahoma together; that they had visited the jail several times after their release and talked to Lyda; that Parker and Wilmoth had picked Lyda up at the county jail about noon on August 3—justified the jury in drawing the inference that the escape of Lyda was a concerted action on the part of all three men, and that an essential part thereof was Parker's car being at the jail at the time Lyda was ready to leave. The essential fact in respondent's argument is appellant's admission to the witness, Jensen, that he picked Lyda up at the jail about noon on August 3. Eliminating the admission and considering the other circumstances advanced, they amount only to conjecture, speculation and surmise that Lyda was assisted in any way

or that appellant assisted him. There is no proof independent of appellant's admission of this essential element of the corpus delicti. The judgment of conviction on the first count is not sustained by the evidence.

[9, 10] The judgment of conviction on the second count, in which appellant is charged with harboring, concealing and aiding an escaped felon, is amply supported by the record. Lyda testified as to his duties as trusty and the limits of the area in which he was permitted, and of his visits and conversations with appellant and Wilmoth; that he left the county jail of his own accord about 10:45 a. m. and no one was with him; that it was his intention to leave the jail; that he had no conversation at any time with appellant and Wilmoth about his leaving; that he met appellant and Wilmoth in Merced about three blocks from the Merced County Jail; and that they took him in appellant's car to Cal Pac; that he did not tell appellant or Wilmoth he had left the jail without permission until they were at Cal Pac. Wilmoth stated that he and appellant saw Lyda at the jail on August 3 about 7:30 a. m. and talked to him and other trusties; they did not see Lyda again until about noon on that day, when he was about a block and a half across the court house park, or three blocks from the jail; they were in Parker's automobile and he was driving; Lyda got into the car and they took him to Cal Pac; on the way back he and Lyda got out of the automobile at the Santa Fe overpass and stayed there while appellant drove into Merced; that he knew at that time that Lyda still had 126 days to serve. The evidence justified the jury in finding that when appellant and Wilmoth picked Lyda up they knew that he had escaped from the county jail, and that Lyda was taken out of the city of Merced by appellant and Wilmoth and left with Wilmoth at the overpass while appellant went to town to aid Lyda, with the intent that Lyda might avoid and escape from arrest, trial, conviction and punishment for his felony of escape. The corpus delicti was sufficiently established and the admissions of appellant were properly admitted.

Appellant's last contention is that he cannot be found guilty of both counts and by reason thereof the verdicts are inconsistent and void. Our conclusion that the judgment of conviction on the first count is not supported by substantial evidence and must be reversed makes this contention of appellant moot; there is therefore nothing before this court to decide.

This disposes of appellant's contentions. The judgment convicting defendant of the crime charged in count one is reversed, and the judgment of conviction and denial of appellant's motion for a new trial on the second count are affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

122 Cal.App.2d 741

BREAKERS HOLDING CO.
v.
JOSEBRA CO. et al.

No. 15598.

District Court of Appeal, First District, Division 2, California.

Jan. 25, 1954.

Hearing Denied March 25, 1954.

Buyer's action against seller to recover price paid for brandy allegedly returned to seller under rescission agreement, and for damages in fraud for knowing sale of unmerchantable brandy, and for $600 for money had and received. The Superior Court, City and County of San Francisco, Theresa Meikle, J., entered judgment for buyer for purchase price plus interest and incidental costs, and seller appealed. The District Court of Appeal, Kaufman, J., held that evidence sustained findings and verdict for plaintiff.

Judgment affirmed.

1. Sales 🔑120, 391(8)

Rescission and return of purchase price is proper where there has been a breach of warranty.

2. Sales 🔑397

In buyer's action against seller to recover price paid for brandy allegedly returned to seller under rescission agreement, evidence sustained finding that there had been agreed rescission by the parties and that buyer was entitled to return of purchase price.

3. Sales ⚿168(2)

Brandy buyer had duty to inspect brandy to determine its merchantability within reasonable time. Civ.Code, § 1767.

4. Sales ⚿181(13), 397

In buyer's action against seller to recover price paid for brandy allegedly returned to seller under rescission agreement, evidence sustained findings that reasonable time for inspection of brandy to determine its merchantability had not expired when buyer was notified that brandy was quarantined and that upon being advised of quarantine, buyer advised seller that it would not accept brandy and that seller must retake the same. Civ.Code, § 1767.

5. Witnesses ⚿379(7)

In buyer's action against seller to recover price paid for brandy allegedly returned to seller under rescission agreement, cause of action set forth in original complaint asking damages occasioned by alleged wrongful act of seller in connection with export shipment agreement allegedly entered into with buyer involving brandy, which was withdrawn with trial court's permission, did not, as matter of law, impeach buyer's testimony that no such agreement for export had been entered into.

6. Sales ⚿397, 398

In buyer's action against seller to recover price paid for brandy allegedly returned to seller under rescission agreement, trial court's specific finding in regard to discovery of unfitness of brandy and rejection thereof by buyer controlled general finding as to breach of warranty cause of action, and was sustained by evidence.

7. Trial ⚿404(4)

Where in addition to general findings the court makes specific findings as to particular averments of the pleadings, the latter will control in the case of inconsistency.

8. Pleading ⚿427
Sales ⚿404

Where parties to buyer's action against seller to recover price paid for brandy allegedly returned to seller under rescission agreement proceeded throughout trial on rescission issue, both parties were estopped from claiming that no such issue was raised by the pleadings, and buyer was not required to elect between recoupment after rescission and damages. Civ.Code, § 1789.

9. Pleading ⚿380

Evidence is admissible only to establish issues before the court.

10. Sales ⚿398

In buyer's action against seller to recover price paid for brandy allegedly returned to seller under rescission agreement, trial court's finding that there was an agreed rescission supported its judgment in buyer's favor for purchase price and incidental costs and expenses.

◆

Bertrand Lurie, Leonard S. Lurie, San Francisco, for appellant.

Harry Gottesfeld, Joseph A. Brown, Hutchinson & Quattrin, San Francisco, for respondent.

KAUFMAN, Justice.

This is an appeal by Joseph Abrams, an individual, defendant below, from a judgment against him in the amount of $10,876.74 plus interest, arising out of a sale by him to respondent of imported Portuguese brandy. The trial court held that a certain document and transaction of December 11, 1945, constituted an agreed and voluntary rescission by the parties of the purchase orders for the 400 cases of brandy, and the court approved and confirmed said rescission, giving judgment in favor of respondent for the purchase price paid plus certain incidental expenses and interest.

Appellant was a wholesale liquor merchant in San Francisco doing business as Josebra Company. Respondent corporation operated a restaurant and bar, The Breakers, at Mason and O'Farrell Streets in San Francisco. Prior to the transactions here involved, respondent had been a regular customer of appellant, dealing through appellant's salesman Salbert. During the latter part of 1943 when a shortage of domestic distilled spirits appeared imminent, Salbert proposed to respondent the sale of Portuguese brandy which appellant was then importing, stating that it was good brandy, that respondent was lucky to get it, and that he was doing respondent a favor to furnish him with part of the shipment.

Mr. Adams, president of respondent, placed an order with Salbert on August 17, 1943, for 200 cases from a shipment expected to arrive within a few months. Respondent gave him a check for $1,000.00 on the purchase price, and on October 1, 1943 ordered another 200 cases of brandy expected from Portugal at a latter date. Another deposit receipt agreement was executed, appellant receiving a second check for $1,000.00 from respondent on account.

On November 11, 1943, respondent purchased 50 cases of Portuguese brandy which appellant had in stock, and this lot was delivered to respondent's place of business and was paid for. Fifteen cases out of this lot were sold by respondent at a profit. During the trial respondent withdrew the issue as to this lot, hence it is not involved on this appeal.

The first order of 200 cases arrived in San Francisco during December 1943, and was placed in a federal bonded warehouse, under bond No. 2317. Upon payment of the balance due, the storage company issued its receipt to respondent evidencing its title to the 200 cases. The second lot of 200 cases arrived during the month of February 1944, and the same procedure was followed as in the case of the first lot. From the date of arrival until withdrawn in December 1945, the two lots remained in bond in the name of respondent who paid all storage charges to the warehouse company.

In April 1944, the Pure Food and Drug Division of the State of California, suspecting that some bottles of imported Portuguese brandy might contain particles of glass, issued a statewide order to all distributors and sellers of such brandy, requiring them to withhold further sale until inspection could be made to determine the condition of the brandy. The federal authorities issued a similar order, hence the 400 cases sold to respondent were detained by the federal government for examination but were subsequently released, said releases being directed to the Josebra Company, and produced by them at the trial.

Respondent first learned of the quarantine from reports in a San Francisco newspaper. On the same day he was visited by appellant's salesman, Salbert, with whom he discussed the report. Respondent's president, Adams, testified that Salbert assured him that Josebra Company would filter the brandy and put it in a saleable condition before he would have to take it, or before he did take it. Salbert said that they had to pick up the brandy wherever they had delivered it and return it. Adams told Salbert that if it had to be filtered or anything, that he didn't want it. Salbert responded that everything would be taken care of.

On April 26, 1944, appellant sent a form letter to all of its customers advising them to return all Portuguese brandy, and that it would be examined and returned at appellant's expense. Appellant admits that the 400 cases of brandy ordered by respondent, were examined, cleared and released at appellant's sole expense while in the federal bonded warehouse.

On December 11, 1945, the following document was executed by respondent and accepted by appellant. It reads as follows:

"San Francisco, California
"December 11, 1945

"In consideration of our transfer to Josebra Company of ownership of brandy now stored in the San Francisco Warehouse Co. in customs—bond, tax unpaid, the undersigned shall be released of all liability for payment of any balance due for taxes on account of such merchandise, and Josebra Company upon such transfer shall be entitled to sell or dispose of the same to any person or firm whosoever for which purpose we relinquish to Josebra Company all our rights, ownership, title and interest therein.

"Breakers Holding Corp.
(Signed) Forrest Adams
President"

Following the execution of this document the brandy was exported to China for sale under appellant's export license. Respondent's president Adams testified that a friend of his, a Mr. Scanlon (who died prior to the trial) wished to buy the brandy from respondent for export. He told Scanlon that he could not sell it to him because he had no license. Scanlon asked where he had bought it, and when told, said that they would go down there and see if Adams could turn it back, and if so, he, Scanlon, would make arrangements to export it. Adams testified that he went to appellant's office with Scanlon, that they were not there very long, that Scanlon and Abrams talked of shipping other things besides brandy to China, and that he didn't pay much attention to this discussion as he wasn't interested. As they were leaving someone in the office said that Scanlon would pay them and they in turn would pay The Breakers. That was the only time he was in appellant's office. When asked if he had not sold 150 cases of the lot of 400 in China at $100.00 per case, he flatly denied it, saying that the Breakers Corporation had nothing to do with the brandy after it was released.

Appellant's sole proprietor, Abrams, who attended the conference with Adams and Scanlon, was questioned very briefly by his counsel on direct examination. In regard to what took place at the conference he was asked only if he had made the remark "Now we have the merchandise—you can whistle for it", which he denied.

Davis, a former employee of appellant who was present with Abrams, Adams and Scanlon at the meeting in appellant's office, testified that Adams said he wished to dispose of the brandy by shipping it to China. Davis said he advised him that it could not be done without a Federal export license. He was asked if Josebra Company could export it for the account of The Breakers, and he told them it could be done legally if title rested with Josebra. He suggested that it could be transferred back without other monetary consideration than $1.00. Adams, he said, told him that he wished to export it, and that Scanlon would handle disposition of it in China. He thought that the transfer of title was drawn up in the next day or so. Davis said that he pointed out to Adams and Scanlon the large amount of detail work involved in preparing an export shipment, that his firm would take care of these matters for $1.50 per case or a total of $600.00. Appellant introduced in evidence a check signed by Adams with date stamped December 10, 1945, for $600.00 on which was written "Warehouse Expense Exportation of 400 cases of Brandy." Another check for $724.85 signed by Adams matched in amount appellant's invoice dated January 2, 1946, for charges in preparing and loading the shipment.

Jaeger, an insurance broker, who had dealt with respondent's Mr. Adams for years, and who had also been an accountant for respondent, handled the policy of marine insurance on the cargo. He stated that Scanlon paid for the policy and that Adams was to pay for the ocean charges. Adams testified that Scanlon needed help, therefore he advanced him the money and had his bookkeeper draw the check.

On this appeal appellant contends (1) that the trial court's findings are not supported by the evidence; (2) that the judgment is based on findings of fact and conclusions of law outside the issues joined by the pleadings; (3) that the amount of the judgment is not sustained by the evidence.

The Amended Complaint contains three causes of action: the first, a claim for damages in fraud for knowingly selling plaintiff merchandise unfit for human consumption; the second, for breach of warranty; the third, a claim for $600.00 for money had and received.

[1] Appellant contends that the first paragraph of the Findings imply that respondent proved all five elements essential to the proof of fraud. However, in the conclusions of law no mention is made of a cause of action for fraud, but they are based solely on breach of implied warranty. The judgment is based entirely on the second cause of action for breach of implied warranty. Rescission and return of the purchase price is proper when there has been a breach of warranty. Fox v. Stockton Combined Harvester, etc., Works, 83 Cal. 333, 23 P. 295; § 1789, Civ.Code; subd. (d); 22 Cal. Juris. 1009 and cases cited.

The main question involved is whether there is evidence in the record to support the trial court's finding of a rescission entitling the respondent to a return of the purchase price.

[2] The document executed by respondent and accepted by appellant, together with the discussion between Adams, respondent's president, and Salbert, appellant's agent, was ample to justify the trial court's finding that there had been an agreed rescission by the parties and that respondent was entitled to the return of the purchase price paid.

Evidence offered by respondent showed that the merchantability of the Portuguese brandy depended to a great extent on the demand occasioned by the lack of other domestic liquors being produced. By the time the several months quarantine had elapsed, the demand for Portuguese brandy had died down because of domestic production, and because of the unfavorable publicity, it had become a drug on the market. Respondent points out that what the inspection disclosed as to the contents of these 400 cases of brandy was within the knowledge of appellant, but he did not disclose the results of the examination at the trial. But, as respondent contends, the discussion of these matters is really beside the point, since the parties themselves construed the contracts and the quarantine as justifying a rescission which was carried out to the extent of the return and acceptance of the merchandise as evidenced by the document of December 11, 1945.

[3, 4] Appellant contends that unreasonable delay can defeat a claim for breach of implied warranty. Williams v. Lowenthal, 124 Cal.App. 179, 187, 12 P.2d 75. It was respondent's duty to inspect within a reasonable time, § 1767, Civ.Code. The trial court, however, found that a reasonable time for inspection had not expired in April 1944 when respondent was notified that the brandy was quarantined, and that such quarantine continued until December 1944. The trial court also found that upon being advised of the quarantine respondent advised appellant that it would not accept said brandy and that appellant must retake the same. These findings are supported by the evidence reviewed above.

[5] In contending that the evidence does not support the judgment, appellant argues that the evidence in regard to the export arrangements clearly shows that respondent and Scanlon entered into a joint venture to ship the brandy to China, and that appellant was merely acting for respondent in the performance of certain services. In the original Complaint there had been a fourth cause of action which does not appear in the Amended Complaint, which asked damages occasioned by alleged wrongful acts of appellant in connection with the export shipment to China. At the trial one of respondent's counsel testified that this cause of action was inserted by mistake, that it had been intended as part of a complaint to be filed by Scanlon against appellant. This matter was gone into at some length during the trial. The trial court evidently believed respondent's explanation. This court cannot, therefore, say that the allegations in the original Complaint impeach respondent's testimony as a matter of law.

Defendants asked for a Bill of Particulars in regard to the third count in the Amended Complaint—the claim for $600.00. The Bill of Particulars furnished by respondent stated that the money was paid to defendants to perform services in connection with preparation of brandy for sale in the China market, that defendants prevented its sale by their misconduct, rendering the expenditure useless. The trial court found the allegations of this cause of action to be untrue.

[6, 7] Appellant attacks the trial court's general finding wherein Paragraph VI of the second cause of action was found to be true. However, since the court subsequently made a specific finding in regard to the discovery of the unfitness of the brandy and the rejection thereof by respondent, this specific finding controls the general finding and is sufficiently supported by the evidence. Where in addition to general findings a court makes specific findings as to particular averments of the pleadings, the latter will control in the case of inconsistency. See 24 Cal.Jur. 974, § 206, and cases there cited.

It is claimed by appellant that the finding of rescission is not within the scope of the issues as framed by the pleadings and cannot support the judgment. Respondent's complaint was framed on a damage theory, and appellant maintains that since damages and rescission are inconsistent remedies, respondent must make an election of one or the other. Respondent did not amend its complaint during trial to plead a rescission. Shaw v. McCaslin, 50 Cal.App.2d 467, 123 P.2d 102, is cited by appellant to the effect that issues are made by the pleadings, not by the evidence introduced. Although the rules are very liberal, they have not gone so far as to make pleadings meaningless. Gwinn v. Goldman, 57 Cal.App.2d 393, 405, 134 P.2d 915.

[8, 9] Respondent contends that the case of Hartzell v. Myall, 115 Cal.App.2d 670, 252 P.2d 676, supports its position, and that appellant is confusing remedies with causes of action. In the cited case it is explained, 115 Cal.App.2d at page 677, 252 P.2d at page 681, that a cause of action is stated when the facts constituting fraud are alleged and a resulting injury pleaded, that damages constitute the relief afforded, and that the extent of the relief depends upon proof, "the relief being limited by the measure of the damage which the law prescribed. This measure need not be pleaded, nor is the plaintiff required to state in his pleading the manner in which he computes the amount of damages which he demands. 15 Am.Jur. 747. These are matters which are to be regulated upon the trial in accordance with prescribed legal limitations." The law affords under section 1789, Civil Code, the remedy of rescission for breach of warranty. That respondent is not required to elect between recoupment after rescission and damages was reaffirmed in the case of Williams v. Marshall, 37 Cal.2d 445, 457, 235 P.2d 372. Appellant points out, however, that in the cited case the complaint asked for relief in the alternative. Nevertheless, if the parties proceed throughout the trial as if a certain issue is presented for adjudication, both parties are estopped from claiming that no such issue was raised by the pleadings. But if evidence admissible for one purpose tends to establish another issue, if such issue is not before the court, it cannot be used to establish that issue. Miller v. Peters, 37 Cal.2d 89, 93, 230 P.2d 803. Respondent has pointed out certain transcript references showing that counsel stated that respondent was suing for the purchase price. On one occasion appellant's counsel stated: "You're not suing here for rescission" whereupon respondent's counsel replied: "We are suing to get back the money you people got for the brandy. That is what we are suing for, the money that these people have been deprived of."

Appellant contends finally that the judgment in the amount of $10,876.74 is without support. The purchase price of the brandy was $9,751.74. The judgment provided for $1,125.00 for reimbursement for the amount expended in storage and protection of the brandy. Since storage charges were at the rate of $28.00 per month, appellant says that the total could not exceed $672. However, as respondent points out, appellant is ignoring insurance charges and repackaging charges. Appellant's reply brief does not further urge this contention.

[10] We conclude that the trial court's finding that there was an agreed rescission is ample to support its judgment for the purchase price paid together with incidental costs and expenses borne by respondent.

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.

BIRD v. KENWORTHY.*

Civ. 8326.

District Court of Appeal, Third District, California.

Feb. 3, 1954.

Hearing Granted March 31, 1954.

Action by buyer to rescind conditional sales contract, to be relieved of forfeiture thereunder, and to recover payments made thereunder. The Superior Court, San Joaquin County, Thomas B. Quinn, J., entered judgment for seller, and buyer appealed. The District Court of Appeal, Schottky, J., held that where buyer bought machinery for $29,412 under conditional sales contract which contained provision giving seller option to accelerate payments upon default, and where, after buyer paid $22,832, which seller accepted without objection although payments were generally delinquent, seller demanded full payment and repossessed machinery, which was then worth $28,000, seller was beneficiary of "unjust enrichment", and buyer was entitled to equitable relief.

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* Subsequent opinion 277 P.2d 1.

Judgment reversed and cause remanded.

1. Sales 🔑130(3), 481

In action by buyer to rescind conditional sales contract, to be relieved of forfeiture and to recover payment made thereunder, evidence supported findings that seller did not waive prompt payment of installments and that buyer's failure to pay promptly was grossly negligent and willful.

2. Sales 🔑476

Statute providing that party who incurs forfeiture under obligation may be relieved from forfeiture upon making full compensation to other party except in case of grossly negligent, willful, or fraudulent breach of duty did not afford relief to buyer under conditional sales contract who suffered forfeiture arising from his grossly negligent and willful failure to make prompt payments. Civ.Code, § 3275.

3. Sales 🔑476, 481

"Obligation" within statute providing relief from certain forfeitures under obligations or under rule that party who incurs forfeiture under obligation may recover payments made if failure to allow such relief would result in unjust enrichment of other party includes obligations arising from conditional sales of personalty as well as of realty. Civ.Code, § 3275.

See publication Words and Phrases, for other judicial constructions and definitions of "Obligation".

4. Money Received 🔑3

Rules affording relief in cases of unjust enrichment should be the same in cases of transactions involving personal property as those involving real property.

5. Sales 🔑481

Where buyer bought machinery for $29,412 under conditional sales contract which provided that seller could accelerate payments upon default, and where, after buyer paid $22,832, which seller accepted without objection although payments were generally delinquent, seller demanded full payment and repossessed the machinery, which was then worth $28,000, seller was beneficiary of "unjust enrichment," and buyer was entitled to equitable relief.

See publication Words and Phrases, for other judicial constructions and definitions of "Unjust Enrichment".

6. Sales 🔑481

Where seller under conditional sales contract was unjustly enriched when he declared forfeiture and repossessed property after large share of payments had been made, buyer was entitled to equitable relief based on consideration of, inter alia, payments made, value of machinery when repossessed, damages to seller caused by delay, and rental value of property while in buyer's possession.

John G. Evans, San Francisco, for appellant.

Rutherford, Jacobs, Cavalero & Dietrich, Stockton, for respondent.

SCHOTTKY, Justice.

On June 17, 1948, appellant and respondent entered into a conditional sale contract under which appellant purchased certain construction equipment from respondent for $29,412.78 and was credited with a down payment thereon of $5,207.78. The balance, with interest, was payable in monthly installments of $2,017.08 each, the first of which was due July 17, 1948, and the last on June 17, 1949. The contract contained the usual "time is of the essence" clause and further provided:

> "Should I fail to make any monthly payment above specified when the same is due, * * * then the entire unpaid balance of purchase price shall at your option become immediately due and payable and shall bear interest thereafter at the highest lawful rate, and I agree to make full payment of such balance. Should I return said chattels to you or if you repossess said chattels, then you may retain all payments previously made as compensation for use of said chattels, and you may, at your

> option, sell said chattels at public or private sale, with or without notice, and credit the net proceeds, after expenses, on the amounts unpaid hereunder. Any balance over the said amounts unpaid hereunder shall be paid to me on demand. If the net proceeds of such sale are insufficient to cover the amount unpaid hereunder, I agree to pay any deficiency on demand."

However, no provision was made as to what notice, if any, was to be given in the event that the vendor exercised either of the foregoing options.

It is admitted that appellant was continually delinquent in his payments and, in fact, at one time made none for almost five months. However, respondent accepted eight overdue payments and took no steps to declare the appellant in default nor did he advise appellant that acceptance of the overdue payments would not constitute a waiver of the right to prompt payments in the future.

The last payment made by appellant was on August 23, 1949, receipt of which was acknowledged by letter of respondent's agent, but no demand was made therein for the remaining three monthly installments which were then, respectively, more than two, three and four months overdue. However, respondent testified that oral demands for payment were made and that sometime in the latter part of October he advised appellant over the telephone that unless payment in full were made, he would repossess the equipment. However, nothing further was done until November 22, 1949, when respondent retook the property. A week later appellant tendered the balance due on the principal and interest in the amount of $6,525.57 but respondent refused to accept same. Thereupon appellant served notice of rescission and demanded repayment to him of the sum of $22,979.43, and thereafter instituted the present action to rescind the conditional sale contract, to be relieved of forfeiture under the contract, and to recover the payments made thereunder.

The trial court found that the purchase price of the equipment, with interest, was $29,412.78, that $22,832.67 was paid on account of the principal thereof, and that the reasonable value of the use of the equipment while in appellant's possession from June 17, 1948 to November 22, 1949 was $2,200 per month or a total of $37,400. At the time of repossession the balance due on principal and interest, exclusive of additional interest for delinquency, was $6,051.24.

The court also found that "at no time did defendant Kenworthy or his agent, Union Safe Deposit Bank, or anyone else, waive prompt payment of future installments, or waive the right to repossess the equipment," and "that plaintiff Bird's failure promptly to pay the installments to defendant Kenworthy under the conditional sale contract was grossly negligent and willful."

The trial court did not make a finding as to the reasonable value of the equipment at the time of its repossession, but respondent accepts appellant's statement that the uncontradicted evidence shows that it was $28,000 as he states in his brief: "The uncontradicted value of the equipment when repossessed was $28,000.00."

In accordance with said findings the court rendered judgment denying appellant any relief and this appeal is from said judgment.

[1] Appellant first contends that the court's findings that there was no waiver by respondent of prompt payment of future installments or of the right to repossess the equipment, and that appellant's failure to make payments promptly was grossly negligent and willful, are not supported by the evidence. However, it is clear from the record that there is sufficient evidence to support these findings, although it must be stated that such evidence is far from strong.

[2] Appellant next contends that he was entitled to relief under the provisions of section 3275 of the Civil Code which reads as follows:

> "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full

compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

But as pointed out by the Supreme Court in the recent cases of Barkis v. Scott, 34 Cal.2d 116, 208 P.2d 367, and Baffa v. Johnson, 35 Cal.2d 36, 216 P.2d 13, a plaintiff is only entitled to relief under said section 3275 if his breach was neither willful, fraudulent nor grossly negligent, and in the instant case the trial court has found upon sufficient evidence that appellant's failure to pay the installments when due was grossly negligent and willful.

Appellant contends further that even if his default must be considered willful, where, as here, the forfeiture results in the vendor receiving more than a fair compensation for the injury he sustained, he is still entitled to equitable relief from forfeiture under the rule laid down by the Supreme Court in Freedman v. Rector, Wardens & Vestrymen, 37 Cal.2d 16, 230 P.2d 629, 31 A.L.R.2d 1, and by this court in Crofoot v. Weger, 109 Cal.App.2d 839, 241 P.2d 1017. We believe that these authorities sustain this contention of appellant.

In Freedman v. Rector, supra, plaintiff vendee entered into a contract to buy two lots from defendant vendor. Plaintiff paid $2,000 down and agreed to pay $16,000 into escrow within thirty days. Plaintiff did not pay the $16,000, repudiated the contract, and demanded that the $2,000 be returned. Shortly thereafter, defendant sold the lots to a third person for $20,000. Plaintiff then brought suit for restitution of his down payment. The trial court rendered judgment for defendant but the Supreme Court reversed the judgment and held that even a wilfully defaulting vendee may recover that portion of the down payment which is in excess of the vendor's damage. The Supreme Court said, 37 Cal.2d at pages 20–23, 230 P.2d at page 631:

> "As was pointed out in the Baffa case, if the right to restitution rests solely on the provisions of section 3275, a vendee who has been guilty of a wilful default must be denied relief. We have concluded, however, that the damage provisions of the Civil Code together with the policy of the law against penalties and forfeitures provide an alternative basis for relief independent of section 3275.
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> "In adopting a rule allowing restitution to the defaulting vendee the Supreme Court of Utah stated:
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> "The vital question to be determined is: What is the correct measure of damages in a case of this kind? Shall we apply the rule of compensatory damages, or is it a case in which punitive damages should be allowed? Upon what principle can punitive damages or damages in excess of compensation for the injury done be justified in the case at bar? These are questions that appeal both to the judgment and conscience of the court. * * *
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> " 'The rule contended for by respondent, carried to its logical sequence, would forfeit every dollar paid by appellant and still leave respondent in possession of the land even if appellants had paid the last installment but one, and then defaulted. In answer to this, it may be said that such is not the case at bar. But where are we going to draw the line?' Malmberg v. Baugh, 62 Utah 331, 340, 345, 218 P. 975, 978; see also, McCormick on Damages, § 153, p. 616; Corbin, The Right of a Defaulting Vendee to the Restitution of Installments Paid, 40 Yale L.J. 1013.
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> "The failure of courts adopting a contrary viewpoint to recognize that they are permitting unjustifiable penalties for breach of contract has led to the comment that 'The law, while looking with righteous abhorrence on forfeitures, and washing its hands of their enforcement, after the manner of Pontius Pilate, yet has been reluctant to intervene with affirmative relief or to formulate any consistent principle condemning the validity of cut-throat provisions which in their essence involve forfeitures. Although the law will not assist in the vivisection of the victim, it will often permit the creditor to keep his pound of flesh if he can carve it for himself.' (Ballantine, For-

feiture for Breach of Contract, 5 Minn. L.Rev. 329, 341.)

"To permit what are in effect punitive damages merely because a party has partially performed his contract before his breach is inconsistent both with section 3294 of the Civil Code limiting the right to exemplary damages and sections 1670 and 1671 dealing with liquidated damages. 'A penalty need not take the form of a stipulated fixed sum; any provision by which money or property would be forfeited without regard to the actual damage suffered would be an unenforceable penalty.' Ebbert v. Mercantile Trust Co., 213 Cal. 496, 499, 2 P.2d 776, 777. Such penalties cannot reasonably be justified as punishment for one who wilfully breaches his contract. Not only does section 3294 of the Civil Code express the policy of the law against the allowance of exemplary damages for breach of contract regardless of the nature of the breach, Chelini v. Nieri, 32 Cal.2d 480, 486, 196 P.2d 915, but if a penalty were to be imposed it should bear some rational relationship to its purpose. A penalty equal to the net benefits conferred by part performance bears no such relationship. It not only fails to take into consideration the degree of culpability, but its severity increases as the seriousness of the breach decreases. Thus a vendee who breaches his contract before he has benefited the vendor by part performance suffers no penalty, whereas one who has almost completely performed his contract suffers the maximum penalty.

"Moreover, to deny the remedy of restitution because a breach is wilful would create an anomalous situation when considered with section 3369 of the Civil Code. That section provides that 'Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case * * *', and precludes the court from quieting the vendor's title unless he refunds the excess of the part payments over the damage caused by the vendee's breach. Baffa v. Johnson, 35 Cal.2d 36, 39, 216 P.2d 13; Barkis v. Scott, 34 Cal.2d 116, 121, 208 P.2d 367, and cases cited. Unless the same rule is adopted when the vendee seeks restitution, the rights of the parties under identical fact situations will turn on the chance of which one first seeks the aid of the court."

In Crofoot v. Weger, supra, plaintiff contracted to buy timber off defendant's land, and to make certain installment payments as the timber was removed. The contract provided that upon a breach by plaintiff, all his rights under the contract would be terminated, and all his payments forfeited. After plaintiff failed to make a payment, defendant terminated the contract under this provision. Plaintiff then brought an action alleging certain wrongful conduct by defendant, and also that termination of the contract would impose a forfeiture upon him. Plaintiff then asked for either equitable relief or damages, and offered to pay whatever amount the court should require as a condition to equitable relief. The trial court held for defendant. On appeal, this decision was reversed and remanded for a determination on the issues of whether the plaintiff's breach was willful and whether, in any event, termination of the contract would impose a penalty upon him. It was this court's view that if plaintiff's breach was not willful, either a reinstatement of the contract upon equitable conditions or a recovery by plaintiff of the amount of payments constituting a forfeiture would be proper under Civil Code section 3275. And even if plaintiff's breach was willful, the court continued, if the termination of the contract would result in the unjust enrichment of the defendant, plaintiff could recover the amount of payments constituting unjust enrichment under the rule of the Freedman case.

Respondent concedes the force of these decisions but contends that both section 3275 and these decisions are inapplicable to the sales of personal property but apply only to realty transactions. The trial court evidently was of the same opinion and so indicated in its memorandum opinion. However, Rayfield v. Van Meter, 120 Cal. 416, 52 P. 666, upon which respondent relies, merely held that the facts in that case did not justify the interposition of equity, and Bray v. Lowery, 163 Cal. 256, 124 P. 1004, which he likewise cites, did not even mention this statutory provision.

[3, 4] We do not believe that there is any good reason why an "obligation" under section 3275 of the Civil Code or under the foregoing rule announced in Freedman v. Rector, supra, should not include one arising under a conditional sale of personalty as well as realty. 40 Cal.Law Rev. 593, 598; Miller v. Modern Motor Co., 107 Cal. App. 38, 44, 290 P. 122. The primary consideration underlying the rule in the Freedman case, and in fact the reason for Civil Code section 3275, is the avoidance of unjust enrichment at the expense of the breaching party. We do not believe that where unjust enrichment can be proved, courts should draw technical distinctions as to the types of contracts or property involved in order to obtain different results, but rather that the rule in all these classes of cases should be the same.

In the instant case the purchase price was $29,412.78. Appellant made payments totaling the sum of $23,440.74, $22,832.67 being applied upon principal and $608.07 being applied on interest. The last payment accepted by respondent was a payment of $2,017.08 on August 23, 1949, and this left unpaid three overdue installments of $2,017.08 each. In October, 1949, respondent made a demand upon appellant to either pay up the balance or respondent would repossess the equipment. No payment was made, and on November 22, 1949, appellant repossessed the equipment. On November 29, 1949, appellant tendered to respondent $6,525.57, being the balance of principal and interest due under the contract but respondent refused to accept it.

It thus appears that respondent, after receiving $22,832.67 on account of the principal amount of $29,412.78, repossessed the equipment which, while there is no finding as to its then value, both parties appear to agree was of a value of $28,000.

Applying the principles laid down in the Freedman and Crofoot cases to this factual situation it is difficult to understand how the judgment that appellant was entitled to no relief whatever can be sustained, as it certainly appears that here is a case of unjust enrichment if it is possible to have one. The following quotation from Crofoot v. Weger, supra, 109 Cal.App.2d at pages 842, 843, 241 P.2d at page 1019, is quite applicable here:

> "In addition to the foregoing, if the court had found that the breach was willful or grossly negligent so as to prevent equitable relief under Section 3275 of the Civil Code there was still the duty of the court to go further and find whether or not the termination of the contract by the respondents for the appellants' default resulted in the unjust enrichment of the respondents. If such were the result then it would have been the duty of the court to give judgment for so much of the funds paid in as constituted unjust enrichment. Freedman v. Rector, [W. & V. of St. Matthias Parish,] supra. * * * It is apparent that a situation was portrayed by the evidence which would have justified findings of unjust enrichment if relief could not be given through reinstatement of the contract, and it was therefore the duty of the court to proceed and find upon these matters and if it found unjust enrichment had resulted to give judgment for the amount thereof."

[5, 6] We conclude, therefore, that the judgment must be reversed in so far as it fails to adjudicate the issues of forfeiture, unjust enrichment and relief therefrom. Upon a further trial the court should determine what damage respondent has sustained by reason of appellant's delay in making payments, including legal and other expenses, reasonably made necessary by said default, and should determine the reasonable rental value of the equipment during the time it was in appellant's possession. Appellant should be given credit upon the contract price for the amount of payments made under the contract, and should also be given credit for the reasonable value of the equipment at the time it was repossessed, said value to be determined upon the evidence taken or such additional evidence as the parties may see fit to offer. From these and any other factors relevant

upon the issues of forfeiture, unjust enrichment and relief therefrom, the court should determine to what extent, if any, respondent has been unjustly enriched and render judgment in accordance with such determination.

The judgment is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

PEEK, J., and PAULSEN, J. pro tem., concur.

122 Cal.App.2d 813

BARTON et al. v. MESSMORE et al.

Civ. 19615.

District Court of Appeal, Second District, Division 1, California.

Jan. 26, 1954.

Hearing Denied March 25, 1954.

Action by widow and children of overtaken motorist against defendant owner and operator of overtaking truck for motorist's death and widow's injuries resulting from collision between truck and motorist's automobile as motorist was allegedly attempting a right turn from the wrong lane without a signal. The Superior Court of Los Angeles County, H. J. Borde, J., entered judgment on verdicts for defendants and entered order denying motion for new trial, and plaintiffs appealed. The District Court of Appeal, White, P. J., held that, where question of husband's contributory negligence was for jury, giving of instruction imputing such negligence to widow in her personal injury action constituted prejudicial error.

Attempted appeal from order dismissed, judgment affirmed in wrongful death action, and judgment reversed and cause remanded in personal injury action.

1. Appeal and Error 🔑110

Order denying motion for new trial was not appealable.

2. Automobiles 🔑244(36)

In action by widow and children of overtaken motorist against defendant owner and operator of overtaking truck for motorist's death and widow's injury resulting from collision between truck and motorist's automobile as motorist was allegedly attempting a right turn from the wrong lane without a signal, evidence was not sufficient to establish that operator's negligence was sole proximate cause of accident.

3. Automobiles 🔑245(15)

In action by widow and children of overtaken motorist against defendant owner and operator of overtaking truck for motorist's death and widow's injuries resulting from collision between truck and motorist's automobile as motorist was allegedly attempting a right turn from the wrong lane without signal, it was province of jury to resolve conflicts in testimony and to determine what inferences should be drawn therefrom.

4. Automobiles 🔑245(15, 81)

In action by widow and children of overtaken motorist against defendant owner and operator of overtaking truck for motorist's death and widow's injuries resulting from collision between truck and motorist's automobile as motorist was allegedly attempting a right turn from the wrong lane without a signal, question whether motorist was guilty of contributory negligence or whether operator was free from negligence was for jury.

5. Trial 🔑296(8)

In action by widow and children of overtaken motorist against defendant owner and operator of overtaking truck for motorist's death and widow's injuries resulting from collision between truck and motorist's automobile as motorist was allegedly attempting a right turn from the wrong lane without a signal, instructing jury that, if they believed operator's testimony, they should find a verdict for defendants did not constitute reversible error in view of other instructions given.

6. Negligence 🔑89(2)

In action for injuries sustained by surviving spouse in accident in which decedent spouse sustains fatal injuries, negligence of deceased spouse is not imputed to surviving spouse, and, therefore, surviving spouse may recover for his personal injuries.

7. Appeal and Error ⚷1064(1)
Negligence ⚷141(11)

In action by widow and children of overtaken motorist against defendant owner and operator of overtaking truck for motorist's death and widow's injuries resulting from collision between truck and motorist's automobile as motorist was allegedly attempting a right turn from the wrong lane without a signal, wherein question of husband's contributory negligence was for jury, giving of instruction imputing such negligence to widow in her personal injury action constituted prejudicial error.

Donkin & Mulholland, Santa Monica, Robert A. Cushman, Los Angeles, for appellants.

George A. Kuittinen, Studio City, for respondents.

WHITE, Presiding Justice.

[1] On December 2, 1951, at about 9:45 in the evening, Clarence O. Barton was operating his automobile in a southerly direction on Lincoln Boulevard in Santa Monica, California, accompanied by his wife, one of the plaintiffs herein, Happy May Barton. Their automobile was struck from the rear by a tractor and semi-trailer operated by the defendant Orval Messmore and owned by defendant Union Truck Company. As a result of the accident Clarence O. Barton was killed and Happy May Barton was injured. Plaintiffs, the wife and children of the decedent, Clarence O. Barton, by their complaint sought damages for the death of the latter, and by a second cause of action Happy May Barton sought recovery for personal injuries sustained by her. The jury returned two verdicts, one as to each cause of action, finding for the defendants as to each cause of action. Plaintiffs appeal from the judgments and from the order denying a motion for a new trial. The attempted appeal from the order denying a motion for a new trial, being unauthorized by law, must be dismissed.

[2] Appellants contend that the evidence is insufficient to support the verdict, in that, viewing the evidence in the light most favorable to respondents, the only conclusions to be drawn are that the negligence of the truck driver was the sole proximate cause of the accident and that any negligence on the part of the deceased, Clarence O. Barton, was not a proximate cause of the accident. This contention cannot be sustained.

The vehicle operated by Clarence O. Barton was struck as Barton was making a right turn onto Ozone Street. The defendant truck driver testified that he first saw the Barton car four or five blocks north of Ozone Street, in what would be the second lane from the center of the street if there had been marked lanes; that he followed the car at a distance of about thirty feet; that when he was about 100 feet north of Ozone Street he looked in his rear view mirror to see if he had clearance to pass; when he looked back the car was about fifteen feet from the front of his truck, moving very slowly, and appeared to be starting a right-hand turn. He "hit the brakes", but it was "too late."

Appellants emphasize the evidence that the truck driver was looking into his rear view mirror for "two or three seconds" while traveling about 20 miles per hour, and did not know whether Barton gave a hand signal, and would not have seen such a signal if it had been given. It is argued that the truck driver's own testimony shows that he was negligent in following the Barton car too closely and in failing to keep the car within his vision as it approached Ozone Street, particularly since he had observed the car slow down as if to turn at a previous intersection. With respect to the conflict in the evidence as to whether Barton gave a signal of his intention to make a turn, appellants assert that failure to give a signal did not contribute proximately to the happening of the accident for the reason that the truck driver was looking to the rear during all of the time that Barton was required by law to give a signal.

In referring to lanes of traffic, it is to be understood that there were no marked lanes on Lincoln Boulevard, but only a double line down the center of the street. The distance from the center line to the west curb was 27 feet. The truck driver testified that the Barton car had been swerving from lane to lane for three blocks prior to reaching the scene of the collision; that (assuming three lanes, the "first" lane being nearest the center of the street, and the "third" or outside lane being the lane adjacent to the curb) when the truck driver again observed the Barton car after looking in the rear view mirror it was partly in the first lane and cutting over into the second lane and practically stopped. The point of impact was thirteen feet east of the west curb and twelve feet north of the north curb of Ozone Street. The right wheels of the tractor-trailer were ten to twelve feet from the west curb. The Barton car was struck on the left side of its rear. Appellants' contention that "the Barton car was relatively close to the right-hand curb and in a proper place for the commencement of a right turn," is unsound, since the physical facts above stated would support a conclusion that Barton attempted to make a right turn from the first or second lanes.

[3, 4] From the evidence, the jury could reasonably conclude that the accident was caused by the negligence of either driver or that they both were negligent. It was the province of the jury to resolve conflicts in the testimony and to determine what inferences should be drawn therefrom. Under the evidence it could reasonably be found that Barton was guilty of contributory negligence or that the truck driver was free from negligence, and in such circumstances the verdict may not be disturbed on appeal.

Appellants contend that the court erred in giving the following instruction:

"The testimony of one witness worthy of belief is sufficient for the proof of any fact *and would justify a verdict in accordance with such testimony,* even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of witnesses and after weighing the various factors of evidence, you should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness."

[5] It is urged that by the italicized language the jury was told that if they believed the testimony of the truck driver they should find a verdict for the defendants, which would be incorrect, since under the evidence the jury might believe all the testimony of the truck driver and still find that his conduct constituted negligence. It must be held that the error is not such as to require a reversal. It is true that the instruction was criticized in Long v. Standard Oil Co., 92 Cal.App.2d 455, 462, 207 P.2d 837, and Ford v. Chesley Transportation Co., 101 Cal.App.2d 548, 554, 225 P.2d 997, but in the former case it was concluded that the error was not prejudicial, and in the latter case the court expressly refrained from basing its reversal upon the giving of the instruction. In view of all the instructions given, it cannot be said that the jury was misled into believing that if they gave credence to the truck driver's testimony they were bound to find that his conduct was not negligent.

[6] The judgment rendered on the verdict as to the second cause of action (for injuries to Mrs. Barton) must be reversed. The court, at the request of defendants, instructed the jury that the negligence of the driver, Mr. Barton, was imputed to Mrs. Barton. Subsequent to the trial of this cause the rule applicable to a situation such as is here presented was enunciated in Flores v. Brown, 39 Cal.2d 622, 630, 631, 248 P.2d 922, wherein it was pointed out that a cause of action for injuries to either husband or wife arising during the marriage and while they are living together is community property, and consequently the negligence of one spouse must be imputed to the other in order to prevent the negligent spouse from profiting by his own wrong; but that the reason for the rule ceases to exist when the marriage is dissolved, and the objective of preventing unjust enrichment may be accomplished by barring only the interest of the negligent spouse or his estate. Therefore, as in the cited case, the surviving spouse may recover for her personal injuries sustained in the

accident in which her husband died, and in an action to recover for such injuries the negligence of the deceased spouse is not imputed to her.

[7] Respondents urge that the error in the giving of the instruction complained of was not prejudicial, citing Shields v. Oxnard Harbor Dist., 46 Cal.App.2d 477, 491, 116 P.2d 121, to the effect that a general verdict imports findings in favor of the prevailing party on all material issues. We see, however, no escape from the fact that under the evidence presented to it the jury might well have based its verdict upon a finding that while the truck driver was negligent, the negligence of the husband also proximately contributed to the accident, and in such circumstances the prejudicial effect of the instruction is manifest. The argument that the general verdict imports findings in favor of the prevailing party on all material issues and that therefore there was no prejudicial error was rejected in Huebotter v. Follett, 27 Cal.2d 765, 770, 167 P.2d 193, 196, in which case the trial court left to the jury the determination of whether plaintiff was a guest or a passenger. The Supreme Court held that the question, on undisputed facts, was one of law, and that it was prejudicial error to place the question in the hands of the jury, "where, as here, the evidence upon the issue of negligence is such that it would amply support a factual finding either for or against defendant upon that issue". So in the present cause, where the evidence would support a verdict based upon a finding of contributory negligence by the husband, the giving of an instruction imputing such negligence to the wife in her action for personal injuries constitutes prejudicial error.

The attempted appeal from the order denying a motion for a new trial is dismissed. The judgment on the verdict as to the first cause of action (wrongful death) is affirmed. The judgment on the verdict as to the second cause of action is reversed and the cause remanded for a new trial thereon. Each of the parties will bear their respective costs on appeal.

DORAN and DRAPEAU, JJ., concur.

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122 Cal.App.2d 724

GRANT v. DE OTTE et al.

Civ. 4708.

District Court of Appeal, Fourth District, California.

Jan. 22, 1954.

Action for equitable subrogation of a claimed lien to the lien of a deed of trust on realty, or in the alternative, to declare an equitable lien upon proceeds of sale of such realty. The Superior Court of Riverside County, O. K. Morton, J., rendered judgment sustaining a demurrer to complaint without leave to amend, and dismissing the action, and plaintiff appealed. The District Court of Appeal, Griffin, J., held that complaint stated a cause of action for enforcement of an equitable lien against proceeds of sale of realty for advancements made at mortgagor's request in payment of installments of principal and interest on note secured by deed of trust on realty.

Judgment reversed.

1. Executors and Administrators 🔑231

Failure to file claim against estate of deceased mortgagor for money allegedly advanced at her request in payment of monthly installments of principal and interest on note secured by deed of trust on realty did not preclude maintenance of action to enforce an equitable lien for such advancements against proceeds of sale of the realty. Probate Code §§ 707, 716.

2. Appeal and Error 🔑917(1)

On appeal from judgment sustaining a general demurrer to complaint and dismissing action, appellate court must assume that facts alleged in complaint could be established at trial.

3. Liens 🔑22

Petition stated a cause of action for enforcement of an equitable lien against proceeds of sale of realty for advancements made by attorney for mortgagor at her request in payment of installments of principal and interest on note secured by deed of trust on the realty in order to prevent foreclosure of deed of trust and in reliance on mortgagor's promise to repay advancements and pay claim for attorney's fees out of proceeds of sale of the realty, in absence of allegation of facts indicating that allowance of lien would render deceased mortgagor's estate insolvent or prejudice other creditors. Probate Code, § 716.

4. Subrogation ⚷1

The fundamental prerequisites for "equitable subrogation" are payment of debt for which subrogee was not primarily liable, made by subrogee to protect his own interest and not acting as a volunteer, payment of entire debt, and absence of any injustice to rights of others as a result of subrogation.

See publication Words and Phrases, for other judicial constructions and definitions of "Equitable Subrogation".

5. Subrogation ⚷10(1)

One who, acting in a representative capacity, satisfies obligations for the benefit of his principal, is subrogated to the rights of the creditor against the principal.

◆

Wadsworth & Fraser, Los Angeles, for appellant.

Paul N. McCloskey, Jr., Palo Alto, for respondents.

GRIFFIN, Justice.

This is an action for equitable subrogation of a claimed lien to the lien of a deed of trust, or in the alternative to declare an equitable lien upon the proceeds of the sale of the real property formerly covered by the deed of trust. It was brought by plaintiff and appellant Alfred A. Grant III, as executor of the last will and testament of Alfred A. Grant II, deceased, against Donald F. de Otte, as executor of the last will and testament of Ruth de Otte Hitchner, deceased, the Corporation of America, a corporation, and Eugene Best, defendants and respondents. A general demurrer to the amended complaint was sustained without leave to amend, and the action was dismissed. Plaintiff appeals.

The only question presented is whether the facts pleaded would entitle plaintiff to an equitable lien on the property involved. The amended complaint is voluminous. It alleges generally that Ruth and Adam Hitchner were husband and wife and made their promissory note for $20,000 in 1945, to defendant Corporation of America, as trustee. They gave as security a trust deed on acreage and a home in Palm Springs, which they held as joint tenants. The property carried certain rights to water stock appurtenant to it which were also transferred as security. Mr. Hitchner met his death on October 12, 1946. Ruth was charged with his murder. Alfred A. Grant II and defendant Eugene Best, attorneys, were employed by her to defend her, and in December, 1946, she was acquitted.

It is alleged that Ruth agreed to pay Alfred A. Grant II $2500 for his fee, and that in November, 1947, an account was stated in this amount between them; that she did not have sufficient money to pay said amount and that she orally agreed that she would sell the real property described and pay this amount from the proceeds of the sale. No claim is made in the amended complaint for this amount.

It is then alleged that in October, 1946, Ruth also employed Grant II for the purpose of assisting her in selling the property; that he listed it with real estate agents and advertised it extensively at his own expense and showed the property until his death on January 9, 1950; that he was unable to effect a sale; that during this period Ruth was unable to pay the monthly installments of principal and interest on the note and trust deed and she defaulted in the payment thereof; that she was also financially unable to care for and keep up the property, as required by the provisions of the trust deed attached to the amended complaint; that Ruth requested Grant II to make the payments necessary for these purposes; that to prevent the loss of his $2500 by reason of the foreclosure of the trust deed then in default, and in reliance on the promise of Ruth to repay him from the proceeds of the sale, he advanced, from November 13, 1946, to February 4, 1949, $7,672.96, as itemized; that after Ruth's death on February 4, 1949, defendant de Otte, as executor of her will, requested Grant II to continue the former payments made, since the estate had no assets and that from February 4, 1949, until his death on January 9, 1950, he advanced

$1300.64 for this purpose. He does not make claim to this last mentioned sum in this action.

It then alleges that after Grant II's death plaintiff Grant III was appointed executor of Grant II's estate and the note and trust deed became delinquent for nonpayment of monthly installments, taxes, etc.; that the defendant Corporation of America paid, under the terms of the trust deed, delinquent taxes amounting to $1,197.78 on May 15, 1950; that on May 26, 1950, the trustee gave notice of default and election to sell the property; that de Otte informed Grant III he could not cure the default and requested Grant III to purchase the note and trust deed so that the property could be sold on the market and pay preferred claims; that accordingly plaintiff purchased them on August 12, 1950, for $13,988.99 in cash, and notice of recession was given and recorded; that thereafter he and de Otte, as executor, diligently attempted to sell the property but were unsuccessful; that finally, on June 6, 1951, plaintiff Grant III commenced this action; that thereafter the sale of the property for $35,000 was made and confirmed in the estate; that since this action was a cloud on the title it was stipulated by the executor and plaintiff that upon payment to plaintiff of the principal and interest accrued on the trust deed, plaintiff would release his trust deed lien and that $9500 of the proceeds of the sale would be impounded by the court until the final judgment in this action and that said sum would constitute the only fund or property of the estate of Ruth Hitchner, deceased, of which resort might be had to satisfy any judgment obtained.

It then prayed that said sum of $9500 be declared subject to the lien of the deed of trust in lieu of the real property formerly subjected thereto, and that plaintiff be subrogated to the rights of the defendant Corporation of America, trustee, with respect to the payments of $7672.96, made by Grant II, deceased, plus interest; and that the lien of the trust deed be revived for said purpose, and for equitable relief.

There is no allegation that plaintiff filed any claim in the estate of Ruth Hitchner, deceased, for the amounts advanced, and plaintiff concedes that none was filed. Defendant Eugene Best filed and has an approved claim in the estate for his attorney's fees, totaling $3,000, which remains unpaid. The defendant Corporation of America was eliminated from the action by plaintiff's purchase of the trust deed and note.

It is respondents' contention: (1) that the advancements made under the claimed oral agreement between Grant II and Ruth were only made by Grant II for the protection of his $2500 attorney's fees due him, and not for the protection of the estate; (2) that by the agreement Grant II agreed to advance the money for a particular purpose solely upon the promise of the client to repay him from a particular fund to be created in the future; and that accordingly, repayment was not due until the property was sold, and that thereafter it could not be a lien upon the property but could only be satisfied by means of a claim against the estate, citing such cases as Estate of Dobkin, 38 Cal.App.2d 276, 100 P.2d 1091; Thompson v. Orena, 134 Cal. 26, 66 P. 24; Lesser v. Pomin, 3 Cal.App.2d 117, 39 P.2d 451; and Sec. 707, Probate Code; (3) that the agreement made no provision for interest or security; (4) that as attorney and client a confidential relationship arose, and that accordingly the agreement between them was presumptively void and was without consideration, citing Estate of Kromrey, 98 Cal.App.2d 639, 220 P.2d 805; (5) that the amended complaint fails to state a cause of action because it fails to allege that a probate claim was filed, citing such cases as Estate of Grant, 2 Cal.2d 661, 43 P.2d 266; and Burke v. Maguire, 154 Cal. 456, 463, 98 P. 21; (6) that plaintiff will not be granted relief by subrogation where he has been guilty of negligence in not filing a claim or where, to grant such relief, would operate to the prejudice of another; and (7) that if the lien were allowed, as prayed for, it would render the estate insolvent and would prejudice others interested in the estate, including a creditor, Mr. Best, who did file a claim for his attorney's fees, and that accordingly equity will not come to the aid of one who, through his own delay or his own fault has lost the remedy which the law has provided, citing such cases as Howard v. Societa Di Unione

E Beneficenzo Italiana, 62 Cal.App.2d 842, 145 P.2d 694.

[1] Plaintiff correctly points out that if this action to enforce an equitable lien is maintainable, it may be brought without first filing a claim in the estate. Sec. 716, Probate Code; Silva v. Dias, 46 Cal.App.2d 662, 116 P.2d 496; Fullerton v. Bailey, 17 Utah 85, 53 P. 1020; Estate of Schluter, 209 Cal. 286, 286 P. 1008; Grayson v. Crawford, 189 Okl. 546, 119 P.2d 42; Calkins v. Steinbach, 66 Cal. 117, 4 P. 1103.

[2, 3] The only remaining question is whether grounds for an equitable lien are stated. Considering the facts pleaded which, for the purpose of this decision we must assume could be established at the trial, the contentions made by defendants appear to be untenable. The allegation of the amended complaint is that the payments were made by Grant II not only to secure the payment of his $2500 fee, but to secure the property from loss, to prevent foreclosure in order that he might sell the property pursuant to the terms of his employment agreement, and upon the agreement of Ruth that she would repay him such advancements from the proceeds of sale in the amounts alleged.

[4] Generally, the fundamental prerequisites in every case for equitable subrogation are stated to be: (1) Payment must have been made by the subrogee to protect his own interest. (2) The subrogee must not have acted as a volunteer. (3) The debt paid must be one for which the subrogee was not primarily liable. (4) The entire debt must have been paid. (5) Subrogation must not work any injustice to the rights of others. (50 Am.Jur. p. 688, § 10; 50 Am.Jur. p. 742, § 97.)

In Estate of Henshaw, 68 Cal.App.2d 627, 157 P.2d 390, 394, it was held that while ordinarily a promise to pay an obligation out of the proceeds of a specific fund is not a present assignment of any portion of the fund, a court may, in an effort to see that equity is done, relax this rule and permit evidence to show the intention of the parties beyond the limited words of the contract. There, petitioner agreed to cancel a note and look to payment out of the beneficiary's contingent interest in the trust estate. The court said:

> "The accepted rule is that equitable liens are favored to do justice and prevent unfair results. (Citing cases.) When therefore after a full and impartial hearing the trial court finds upon the only reliable evidence presented that the parties intended to create an equitable assignment and an equitable lien such finding should not be disturbed."

See, also, 33 Am.Jur. pp. 428, 429, §§ 19–20; 50 Am.Jur. p. 686, § 8. In Pomeroy's Equity Jurisprudence, Fifth Ed., Vol. 4, pages 640–641, § 1212, it is said, in speaking of equity subrogation:

> "The doctrine is also justly extended, by analogy, to one who, having no previous interest, and being under no obligation, pays off the mortgage, or advances money for its payment, at the instance of a debtor party and for his benefit; such a person is in no true sense a mere stranger and volunteer."

[5] It is a general rule that one who, acting in a representative capacity, satisfies obligations for the benefit of his principal, is subrogated to the rights of the creditor against the principal. McColgan v. Bank of California Ass'n, 208 Cal. 329, 281 P. 381, 65 A.L.R. 1075.

In Redington v. Cornwell, 90 Cal. 49, 58, 27 P. 40, 42, in speaking of equitable subrogation, the court, quoting from Sheldon on Subrogation, said:

> " 'It is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter; but it is not to be applied in favor of one who has, officiously and as a mere volunteer, paid the debt of another, for which neither he nor his property was answerable, and which he was under no obligation to pay; and it is not allowed where it would work any injustice to the rights of others.' "

See, also, Fuller v. Harwell, 126 Cal.App. 654, 15 P.2d 562, where the subrogee, an execution creditor, satisfied a mortgage under the mistaken belief that he had an execution lien on the property. Subrogation was granted. Also, in Fresno Investment Co. v. Brandon, 79 Cal.App. 387, 249 P. 548, taxes were mistakenly assessed and became a lien on the subrogee's property. The subrogee paid the taxes and was subrogated to the rights of the tax collector against the party whose taxes the subrogee had paid. See, also, Zeigler v. His Creditors, 49 La. Ann. 144, 21 So. 666, where it was specifically held that a general creditor has a sufficient interest in the property of the debtor to warrant the payment of a lien on the debtor's property. The court held that such an interest is sufficient to invoke the doctrine of subrogation, and stated, 21 So. on page 684, that:

> "* * * Until the superior mortgage debt is discharged, the creditor of inferior rank gets nothing. He is concerned, therefore, in making that payment of the superior debt which prevents a sacrifice of the common pledge, and affords the creditor who makes the payment the opportunity to make the property bring enough to pay and leave a surplus after the superior debt is satisfied."

See, also, Lietka v. Hambersky, 167 Pa. Super. 304, 74 A.2d 698, where the court held a general creditor could satisfy a mechanic's lien on the debtor's property and be subrogated to the rights of the mechanic's lien holder.

It is only respondents' statement in their brief that indicates the estate of Ruth Hitchner, deceased, would become insolvent if the lien here claimed were allowed. The amended complaint here involved does not so allege, nor do the facts alleged so indicate. This, as well as the many other contentions made by defendants, are questions for the trial court to determine on a full hearing after issues joined. Accordingly, we conclude that the trial court erred in sustaining the demurrer without leave to amend and in dismissing the action.

Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.

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122 Cal.App.2d 857

WHARTON
v.
PRUDENTIAL INS. CO. OF AMERICA.

Civ. 4715.

District Court of Appeal, Fourth District, California.

Jan. 26, 1954.

Rehearing Denied Feb. 16, 1954.

Hearing Denied March 25, 1954.

Action to recover benefits under accidental means clause of life insurance policy. The Superior Court, Orange County, Raymond Thompson, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that evidence raised question for jury as to whether fall suffered by insured was accidental or resulted from sudden convulsion without intervention of accident.

Affirmed.

1. Insurance ⟹668(13)

In action to recover benefits under accidental means clause of life insurance policy, evidence raised question for jury as to whether fall suffered by insured was accidental or resulted from sudden convulsion without intervention of accident.

2. Appeal and Error ⟹1064(1)

In action to recover benefits under accidental means clause of life insurance policy, giving of instruction permitting jury to consider the incident further if seizure caused insured's fall was not prejudicial where jury could not have been mislead on the real question whether death resulted from convulsion while insured was unconscious or from fall growing out of action on insured's part.

Adams, Duque & Hazeltine, Robert W. Driscoll, Los Angeles, for appellant.

Tobias & Bernard, Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an action to recover on an insurance policy. The policy, issued on August 1, 1947, insured the life of Joseph E. Wharton, with an additional benefit in the event of death by accidental means. Wharton died on April 4, 1950. The life insurance was paid, but the defendant refused to pay the accident insurance, contending that death was not caused by accidental means within the meaning of the policy. A jury returned a verdict in favor of the plaintiff and the defendant has appealed from the judgment, from an order denying its motion for a directed verdict, and from an order denying its motion for judgment notwithstanding the verdict.

The policy provided for the payment of the accident insurance upon "due proof that the death of the insured occurred as a result, directly and independently of all other causes, of bodily injuries effected solely through external, violent and accidental means," subject to the further provision that no such benefit shall be payable if such death results "directly or indirectly from bodily or mental infirmity or disease in any form, or medical or surgical treatment therefor."

The plaintiff was the wife of Wharton, and both were doctors. They moved to Santa Ana in September, 1947, and Wharton began a medical practice there. In November, 1949, a psychiatrist, who made a diagnosis of chronic alcoholism with dependency on barbiturates and general exhaustion and anxiety, sent him to a sanitarium where he remained from November 29 to December 19. He returned to the sanitarium on January 7, 1949, and stayed until January 11, 1949.

On January 6, 1950, Wharton was committed to the Orange County Hospital based on an affidavit of intemperance signed by the plaintiff. On January 10, a nurse in that hospital heard a cry from Wharton's room. She ran downstairs and found him on the floor of his room having, apparently, "a grand mal convulsion." His face was rather purple, he was frothing slightly, and his body was shaking and convulsing. After regaining consciousness he complained of a pain in his shoulder but the X-rays revealed no fracture or dislocation. This nurse testified that she had had considerable experience in treating alcoholics with convulsions, and that some of them do not realize that they are going into a convulsion. On January 13, while still in the hospital, Wharton suffered from delirium tremens and had to be restrained. He was discharged from the county hospital on January 20, 1950, on the suggestion that he had cleared up mentally and that further hospitalization would not be beneficial. On that day, the court continued the intemperance proceeding for six months on condition that he refrain from the use of intoxicants. Shortly thereafter, he started drinking again and on March 30, 1950, the court committed him to the Norwalk State Hospital for a period of two years, as an alcoholic person.

The doctor who examined Wharton on his admission to Norwalk on March 30, testified that he appeared to be on the verge of delirium tremens; that he appeared undernourished, run down and shaky, but was cooperative; and that on March 31, he appeared to be still shaky, so he arranged to have him transferred to the medical ward of the hospital. Another doctor examined him that day and found that he was in general good physical condition except for "arterial hypertension and vasomotor instability," probably due to a post-alcoholic state. At 2:00 p. m. on March 31, his condition was such that he was allowed to be up and dressed. On the morning of April 1, 1950, he was up and dressed and was in the recreation room of this ward where other patients were playing cards and other games. About 9:40 a. m. the medical director of the hospital came into the room and talked with him for a couple of minutes. He noted that Wharton seemed nervous but otherwise normal and rational. As this doctor left the room he heard a thump or a thud, but did not return. The ward attendant saw this doctor talking to Wharton but did not hear the conversation. After this doctor left, Wharton went over to a table to watch a game being played by other patients, and the ward attendant went to another table and stood with his back to Wharton. While they were thus standing, from six to eight feet apart, this attendant heard a scream and turning saw Wharton, who was turned slightly away, in the process of falling over backward. Wharton hit the floor before the attendant got to him. The attendant described the fall as something like a rigid backward fall, and testified "he didn't just crumple to the floor, it was more of a fall," and that he did not see Wharton trip, stumble or slip, nor did he see anyone push him. On the hospital records the incident was described as follows:

> "Remarks: 4/1/50 9:45 convulsion, falling on floor.
>
> Injured hip. Sent to x-ray."
>
> "Physician's Report: About 9:45 a. m. he had a convulsion during which he fell heavily, fracturing the proximal end of the right femur."

The report to the county coroner stated: "On April 1, he was up and dressed, ate fairly well, and at 9:45 a. m. he suddenly developed a grand mal type of seizure and fell to the floor."

The attendant testified that after Wharton fell he was in tremor "threshing around," that his complexion was blue, and that a little froth was coming from his mouth. X-rays were taken which disclosed a comminuted intertrochanteric fracture of the femur. An orthopedic physician, who saw him at 3:30 p. m. on April 1, testified that at that time Wharton was very nervous but appeared to be in fairly good shape. Later that day, he had projectile vomiting and continued to be quite confused and hyperactive. During the early part of April 2, his condition was fairly satisfactory. On the morning of April 3, he tried to get out of bed and fell to the floor. During that day, he was confused, unable to cooperate, restless and jittery, and developed marked increase in motor activity, requiring force to keep him in bed. He did not respond to a sedative and from 6:45 p. m. to 11:30 p. m. was reported to be "continuously in seizure." He quieted down about 11:30 p. m., and at 12:05 a m. he died. During the interval, Wharton told his wife that he had no recollection of what had happened after he had talked to the doctor in the recreation room until he woke up in the X-ray room.

A doctor who had examined Wharton on March 31, stated that Wharton's projectile vomiting after the fall was due to increased brain pressure, possibly caused by fatty emboli which could be fatal, and that his hyperactivity could be compatible with shock. While he expressed no opinion as to the cause of death, he suggested that fatty emboli should be considered in that connection. Another doctor, who had treated hundreds of femur trauma cases, in response to a hypothetical question, expressed the opinion that the primary cause of death was the fracture of the femur, and that there were three possibilities as to the immediate cause of death, shock, fatty embolism and delirium tremens. He further stated that had Wharton not fractured his leg he would not have died since then the delirium tremens would not have played a fatal rolè and there would have been no shock or fatty embolism, and that it was the fracture which "set in train a set of circumstances which terminated in Doctor Wharton's death." Another doctor, an orthopedist with considerable experience in the treatment of fractures of the femur, was of the opinion that Wharton "died as a result of secondary shock or fatty embolus or emboli or a combination of those factors, or possibly complete cardiac arrest from exhaustion, all factors being the secondary result of his fractured femur." He further testified that this was a bad fracture; that he had seen close to a hundred fractures of this type in people of Wharton's age group (around 35 years), and that of these between 10 and 15% had died as a result of such fracture setting in motion a series of events consisting of fatty emboli and secondary shock; that he found no evidence of a convulsive fracture; that the X-rays revealed that the force causing the fracture was a force from the side; that Wharton would have had to fall in such a way as to strike his hip; and that he would have to fall so that the outer thigh would strike first. This doctor also explained that in such a fracture blood vessels are broken around the fracture site; that from this condition fatty emboli are apt to get into the blood stream; and that they are then carried to various organs, including the brain, and can be fatal if they lodge at critical points. He also explained why the presence of fatty emboli might not be discovered in making an autopsy.

The autopsy surgeon expressed the opinion that death was caused by fatty degeneration of the liver, due to alcoholism. He testified that the liver appeared to the naked eye to be entirely damaged; that he did not consider that the fracture had played any part in Wharton's death because he did not find any evidence to that effect; that there were sufficient medical and pathological evidence for this man to have died "whether suddenly or gradually or rapidly, from his preexisting medical conditions, regardless of whether or not he had had or had not had the fracture." He further testified that he thought Wharton died of the various disease processes that were present, rather than from the fracture, and that "according to my interpretation of the history, the fracture did not start the series of events, the series of events was started by the onset of a convulsion." He further testified that he had been able to find no fatty emboli. When asked to explain why Wharton had suffered no injury in his previous fall at the county hospital, but had died within 60 hours of his fall at Norwalk, he said that Wharton's fatty degeneration had grown worse in that period and had reached "a point which is what we call irreversible," and that the second "was the crucial episode."

Another doctor, who reviewed the hospital records and the autopsy report, expressed the opinion that the cause of death was fatty degeneration of the liver, alcoholic. Another doctor, the orthopedic physician who treated Wharton after his fall, testified that he was told that Wharton had fractured his hip as a result of the convulsion alone; that he was not told of the fall; that this fracture was of a serious type which is usually seen in elderly people; that the younger people he had seen with this type of fracture had usually been involved in auto accidents; that he had occasionally seen it in young people who had had shock treatment; that he had never seen death from such a fracture without some added cause; that such a fracture could happen in many ways, and could be caused by a convulsion; that such a fracture results from an abnormal leverage or pressure which twists the femur; that there was "more apt to be a twisting type of injury" to cause such a fracture; that such a fracture could come from a rigid fall backward if one leg falls under the other leg in such a way that there is torsion placed on the body; that "there has to be a torsion-type of force"; and that he did not know whether or not this patient would have died if the fracture had not occurred. The psychiatrist who examined Wharton upon his admission to Norwalk and observed him several times later, was of the opinion that the cause of death was fatty degeneration of the liver. He further testified that this fatty degeneration was produced by excessive alcoholism over a long period of time; that the fracture also contributed to his death to some extent; that the immediate cause of death was exhaustion from the "D.T.'s" and alcoholism; that the fracture "is the thing that broke the camel's back, but it is my opinion that he would have died even if he didn't have the fracture"; and that "It would have been possible that if he went into the D.T.'s, if he didn't have the fracture, the D.T.'s might have lasted a few days and he would have exhausted himself on the following day or two days or three days later."

The appellant contends that the evidence is insufficient to support a verdict that this death occurred as a result, directly and independently of all other causes, of bodily injury effected solely through external, violent and accidental means; and that the evidence clearly shows that death resulted directly or indirectly from bodily or mental infirmity in that the cause of the fall was disease, an alcoholic convulsion.

It does not conclusively appear that a convulsion caused the fall, or even that a convulsion preceded the fall. The evidence shows some signs of a convulsion after the fall but there is nothing, aside from a possible inference, to show when it started. Wharton may have slipped or tripped, have cried out and tried to save himself, and the convulsion, if any, may have followed the fall. It is true that something occurred before the fracture, and that in one sense the fracture did not start the "series of events." Even if the series of events was started by the "onset" of a convulsion that fact is not necessarily controlling. The evidence justified the inference that the immediate cause of death was one or more of the effects of the fracture, and that the fracture was caused by the fall. The most important question is not what started the series of events but what caused the fall. Whatever caused the fall would reasonably be considered as the prime or moving cause of the death. If the fall resulted solely or directly from a convulsion caused by Wharton's physical and mental condition, as argued by the appellant, the resulting death would not be caused by accidental means within the meaning of the policy. If the fall resulted from something else, it might well involve such accidental means. If the fall was caused by an accident which was the proximate cause of death, the mental and physical condition of the deceased would not be controlling, even though it caused a convulsion.

In Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 163 P.2d 689, 691, where similar terms of a policy were involved, the court said:

> "On the other hand there is authority for what in our opinion is the correct rule, that the presence of preexisting disease or infirmity will not relieve the insurer from liability if the accident is the proximate cause of death; and that recovery may be had even though a diseased or infirm condition appears to actually contribute to cause the death if the accident sets in progress the chain of events leading directly to death, or if it is the prime or moving cause."

In that case, as here, there was no direct evidence of the accident itself. Since conflicting inferences could be drawn from the circumstances shown it was held that it could not be said, as a matter of law, that the evidence compelled the conclusion contended for by the insurance company. A similar situation was involved in the case of Happoldt v. Guardian Life Ins. Co. of America, 90 Cal.App.2d 386, 203 P.2d 55, where no evidence is set forth as to the cause of the fracture, and the medical evidence was conflicting. The question in such a case is what caused the death at that particular time, and not whether something existed which would otherwise have caused death at an early future date.

It cannot be said here, as a matter of law, that the evidence conclusively shows that this fall resulted from a convulsion without the intervention of any accident. The question was one of fact, and an inference that an accidental fall occurred may reasonably be drawn. No one saw the beginning of the fall or the beginning of the convulsion. Whether the convulsion was sudden and complete or came on slowly and partially, and whether it preceded or followed the beginning of the fall is not disclosed by the evidence. There is evidence that a patient sometimes realizes that an alcoholic convulsion is coming on. There are many conflicts in the evidence, including the medical evidence. There is expert evidence that death resulted from the fracture and the effects caused thereby, and other expert evidence that death resulted from the condition of the deceased's liver. Not only was this evidence conflicting, but there was no direct evidence to show what caused the fall, and the jury may well have refused to accept the implied conclusion of some of the doctors that the fall was caused by a sudden convulsion, without further acts or incidents.

[1] While the evidence is conflicting, some of the evidence as to Wharton's condition prior to this incident would throw considerable doubt on the other evidence, and make it seem unlikely that his condition was such that death could be expected almost momentarily. Wharton had had a similar fall less than three months before with no serious results. In each case no one saw the beginning of the fall but a sharp cry was heard, which would indicate that in each case Wharton knew that something was happening to him. In such a case, a person would naturally take a step, try to grab something or endeavor in some way to protect himself. In the first fall in January, Wharton may have taken some action with sufficient success to prevent serious injury. In the fall in question, he may have slipped when he started to go somewhere, or he may have slipped or

twisted his legs causing the fall, while trying to reach the table near which he stood, in an effort to protect himself when he felt that he was becoming dizzy. This view is somewhat supported by the testimony of one of appellant's doctors, to the effect that this type of fracture is more apt to be caused by a twisting type of injury, and that even if it came from a rigid fall backward there would have to be a twisting, "a torsion type of force." This explanation of the difference between the two falls may have been more persuasive to the jury than the one offered by the autopsy surgeon to the effect that Wharton's condition had deteriorated, in the interval between the two falls, to the extent that he was no longer able to withstand the effects of a fall. In our opinion, the controlling question was one of fact for the jury and the evidence, with the reasonable inferences therefrom, is sufficient to sustain the verdict.

[2] The appellant also contends that the court erred in giving the following instruction.

> "In this connection you are instructed that if you find from the evidence that the fracture was directly caused by the pulling of the muscles by their contraction due to a seizure—in other words, due solely to the seizure and not due to a fall occasioned by a seizure—that such would not constitute an accident and your verdict must be for defendant. If, however, you believe from a preponderance of the evidence that the muscle pull of seizure did not itself fracture the femur but that the seizure or something else caused deceased to fall and the force of the fall fractured the femur, you must consider the incident further and apply the rules I shall hereafter state to you to determine whether the injured hip was caused by accidental means."

Complaint is made only of the last sentence, and it is argued that it was error to permit the jury to consider the incident further if they found that the seizure caused the fall, since there could be no accident where the fall was caused by disease. Even if the seizure caused the fall in the beginning there could still be accidental means, and the instruction merely told the jury that if it did not find that the fracture was caused by a muscular pulling due to a seizure, it must consider the incident further and apply the rules thereafter to be given. No complaint is made of the other instructions which followed, and in view of all the instructions and the evidence as a whole it cannot be held that prejudicial error appears. The jury could not have been misled on the real question presented throughout the case, which was whether death resulted from a convulsion, in effect while Wharton was unconscious, or from a fall growing out of some action on his part.

The judgment and orders are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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123 Cal.App.2d 31

LOGAN v. FORSTER et al.

Civ. 19858.

District Court of Appeal, Second District,
Division 1, California.

Feb. 3, 1954.

Proceeding on a remittitur wherein the Superior Court, Los Angeles County, John J. Ford, J., granted a motion to retax costs on appeal, and an appeal was taken. The District Court of Appeal, Drapeau, J., held that an appellant must pay costs of original and one copy of clerk's and reporter's transcript as provided by judicial council's rules relating to appeals from superior court, but since copies required to be filed with clerk of superior court may be used by respondent, unsuccessful appellant cannot be charged for additional copies.

Affirmed.

See, also, 114 Cal.App.2d 587, 250 P.2d 730.

Costs 🔑254(6)

An appellant must pay costs of original and one copy of clerk's and reporter's transcript, as provided by judicial counsel rules relating to appeals from superior court; but since copies required to be filed with clerk of superior court may be used by respondent, unsuccessful appellant cannot be charged for additional copies. Code Civ.Proc. § 1034; Rules on Appeal, rules 4(d), 5(d), 10(a, c), 26(c).

Alfred S. Chapman, and Wallace & Cashin, Los Angeles, for appellants.

B. R. Ware, Los Angeles, for respondent.

DRAPEAU, Justice.

On February 5, 1953, a remittitur was filed in Superior Court Case No. 566,590 between the parties hereto, in which it was ordered that respondents therein (defendants Forster and Steinike) should recover their costs on appeal.

Thereafter said Forster and Steinike filed their memorandum of costs and disbursements on appeal amounting to $574.60. Plaintiff Logan filed notice of motion to have such costs retaxed by striking from the memorandum items 26 and 27. This motion was granted and the two items, i. e., 26 and 27 for $209.90 and $27.40 paid by Forster and Steinike for the cost of reporter's and clerk's transcripts, respectively, were deleted from the memorandum, thus reducing costs to $337.30.

Defendants appeal from the order which followed.

The question presented by this appeal is stated by appellants as follows:

> "Where the remittitur provides that the *successful* party will recover his costs on appeal, may that party recover the costs for a Reporter's Transcript and a Clerk's Transcript paid for by said party?"

The instant motion to retax costs was made upon the ground that items 26 and 27 of defendants' memorandum were not legally chargeable, were not necessary disbursements and were not necessarily incurred.

The affidavit in opposition to the motion recites:

> "That it was necessary for respondents to have a copy of the Reporter's Transcript in order to properly prepare a reply brief on appeal, and it was also necessary to have a copy of the Clerk's Transcript.
>
> "That had appellant provided a copy of the Reporter's Transcript and a copy of the Clerk's Transcript for use by respondents, they would not have had to order and pay for the same."

Section 1034, Code of Civil Procedure, provides that on an appeal from the Superior Court, costs shall be awarded as provided by the rules adopted by the judicial council.

Rule 26(c) of Rules on Appeal, as amended, effective Jan. 1, 1951, 36 Cal.2d 23, reads: "The party to whom costs are awarded may recover *only* the following, when actually incurred: (1) The cost of preparation of an original and one copy of any type of record on appeal *authorized by these rules*".

Rules 4(d) and 5(d) require that the reporter and the clerk shall respectively prepare and file with the clerk of the Superior Court an original and one copy of the Reporter's and Clerk's Transcripts, within thirty days after *appellant* has arranged for payment thereof.

Rule 10(a) provides for transmission of original transcripts to the reviewing court.

And Rule 10(c) reads: *"(Use of Copies)* The additional copy of the record required by these rules shall be made available for the use of the parties to the appeal in such manner as the judge, or the clerk under his direction, shall prescribe; provided that the parties may stipulate to its use, and in such event only the original need be filed with the clerk of the superior court."

In Cartwright v. Superior Court, 98 Cal. App.2d 300, 303, 219 P.2d 862, 864, the petitioner Cartwright appealed from a judgment of the Superior Court of Los Angeles County and duly made request for preparation of reporter's and clerk's transcripts on appeal. He willingly paid fees for the original transcripts, but under protest paid for the copies thereof. He then proceeded in mandamus to recover the sums paid under protest. This court in denying the writ referred to Rule 10(c), supra, as follows:

> "The rule permits the parties appellant and respondent access to, and use of one copy of the reporter's transcript on appeal. It requires the appealing party to pay for the original and one copy. If he is successful on his appeal, of course, the expense may be taxed as costs.
>
> "In effect this is a saving to litigants, because otherwise both parties would ordinarily have to have and to pay for a copy of the transcript. Thus one copy serves the place of two."

Since copies of the reporter's and clerk's transcripts required to be paid for by the appealing party are made available to the prevailing party, the items struck from the instant memorandum were not necessarily incurred. The trial court properly followed the rules.

The order is affirmed.

WHITE, P. J., and DORAN, J., concur.

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122 Cal.App.2d 948

RICKETTS
v.
MOREHEAD CO., Inc. et al.
Civ. 8279.

District Court of Appeal, Third District, California.
Jan. 29, 1954.

Action against hotel proprietor and managers for loss of money and jewelry, worth in excess of $250, delivered by hotel guest to managers for deposit in safe maintained by hotel. The Superior Court, Butte County, McGregor, J., gave judgment against hotel proprietor for $250 and against hotel managers for $1,500, and plaintiff and defendant hotel managers appealed. The District Court of Appeal, Schottky, J., held that since no written receipt had been given guest for money and jewelry deposited in hotel safe, guest could recover only $250 against hotel proprietor and managers, jointly and severally, even though loss of property was due to negligence of hotel managers.

Judgment affirmed in part and reversed in part with directions.

1. Innkeepers 🔑11(11)

Managers, conducting hotel business as agents or employees of corporation which was the owner and proprietor of hotel, were "hotel keepers" within meaning of statute limiting liability of hotel keeper for loss of guest's personal property. Civ. Code, § 1860.

See publication Words and Phrases, for other judicial constructions and definitions of "Hotel Keeper".

2. Innkeepers 🔑11(11)

The purpose of statute limiting the liability of hotel keepers for loss of guest's personal property was to limit to $250 the amount that a hotel guest can recover, where hotel maintains a fireproof safe and gives due notice thereof to guests, unless guest was given a written receipt for property delivered to hotel keeper for safekeeping. Civ.Code, § 1860.

3. Innkeepers 🔑11(11)

Where no receipt was given for money and jewelry worth in excess of $250 delivered by guest to managers of hotel for deposit in safe maintained by hotel pursuant to statute limiting the liability of hotel keepers, corporation, which was the owner and proprietor of hotel, and managers, who conducted hotel business as agents or employees of corporation, were liable jointly and severally, in the amount of only $250 for loss of such property, even though loss was due to negligence of hotel managers. Civ.Code, § 1860.

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Peters & Peters, Chico, for appellant.

Goldstein, Barceloux & Goldstein, J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, Chico, for cross-appellant.

Price & Morony, Chico, for cross-respondent.

SCHOTTKY, Justice.

Plaintiff above named recovered judgment against defendant The Morehead Company, Inc., for $250 and against defendants Heater for $1,500. Defendants Heater and plaintiff Ricketts have appealed from the judgment and the appeals are on the judgment roll alone.

The material facts as they appear from the pleadings and findings are as follows:

The Morehead Company, Inc., a corporation, was the owner and proprietor of a hotel in Chico, California, known as the Travelers Hotel. The hotel was managed by William Heater and his wife, Cora Heater, as comanagers, and the trial court found in this regard that the Heaters were the servants, agents and employees of the corporation. A safe was maintained in the hotel for the safekeeping of money, jewelry and other valuables belonging to the guests, and notice of this was posted in the hotel office and in the rooms occupied by the guests. A similar notice was printed on the registration forms filled out by the guests. There is no contention that either the safe or the giving of notice fell short of the requirements set out in section 1860 of the Civil Code which limits the liability of a hotel keeper, under certain circumstances, for loss of or damage to valuables belonging to the guests.

One C. A. Ricketts was a guest at the hotel when, on May 13, 1949, he delivered certain money and jewelry for deposit in the safe. It is not clear whether actual delivery was made to Mrs. Heater alone, or to both Mr. and Mrs. Heater. When Ricketts later asked for his property it was not in the safe and it has never been redelivered to him. It does not appear what became of the property or who removed it from the safe, except for the finding, with respect to the fourth cause of action, that the Doe defendants had expropriated it and carried it away. Ricketts did not inform either the corporation or Mr. or Mrs. Heater as to the amount of money or the value of the jewelry so deposited for safekeeping, nor was he given any receipt for the property prior to the loss. Ricketts brought an action for recovery of the value of the property so deposited.

The complaint states four alleged causes of action: First, a cause of action against the corporation for breach of the contract of bailment; second, a cause of action against the corporation for negligence; third, a cause of action against the Heaters for negligence; and fourth, a cause of action against unknown Doe defendants for conversion. The trial court found, with respect to the second cause of action, that Ricketts delivered the money and jewelry to Mrs. Heater as agent and/or manager of the corporation, and that the corporation, by and through its agents, servants and employees, including Mrs. Heater, negligently and carelessly kept said property so that it was lost or stolen. However, regarding the third cause of action, the court found that Ricketts delivered the property to both of the Heaters as managers and agents of the corporation, and that the Heaters placed the property in a deposit box in a safe and then carelessly and negligently placed the keys to the box in the cash register, knowing that the keys were thus accessible to other employees.

The corporation tendered $250 to Ricketts prior to the commencement of the action and, upon answering the complaint, deposited the money in court. The Heaters acknowledged liability for the loss, also before the commencement of the action, and paid $500 to Ricketts on account thereof. The case was tried by the court, sitting without a jury.

The trial court found that the value of the property was $2,250, and gave judgment in favor of Ricketts and against the corporation and the Heaters. The judgment against the corporation is for $250 (already paid into court), and that against the Heaters is for $1,500 (being $2,250, the full value of the property, less the $500 previously paid by the Heaters and the $250 paid into court by the corporation). The court explained, in a written opinion which is included in the judgment roll, that the corporation's liability was limited to $250 by reason of section 1860 of the Civil Code, but that this limitation of liability did not apply to the Heaters. The Heaters, claiming that the limitation does apply to them, have appealed from the judgment against them. Ricketts, claiming that the limitation does not apply to the corporation, has appealed from the judgment against the corporation.

While there are two separate appeals in the instant case the basic question involved is a construction of section 1860 of the Civil Code, which provides as follows:

> "If an innkeeper, hotel keeper * * or lodging house keeper, keeps a fireproof safe and gives notice to a guest * * * or lodger, either personally or by putting up a printed notice in a prominent place in the office or the room occupied by the guest * * * or lodger, that he keeps such a safe and will not be liable for [specified articles of personal property] or other articles of unusual value and small compass, unless placed therein, he is not liable; except so far as his own acts shall contribute thereto, for any loss of or injury to such articles, if not deposited with him to be placed therein, nor in any case for more than the sum of two hundred fifty dollars ($250) for any or all such property * * * unless he shall have given a receipt in writing therefor to such guest * * or lodger."

This section is analyzed and its purpose clearly stated by our Supreme Court in the case of Gardner v. Jonathan Club, 35 Cal. 2d 343, at pages 347, 349, 217 P.2d 961, at page 963, as follows:

> "Before the amendment of sections 1859 and 1860 to substantially their present form in 1895, an innkeeper, like a common carrier, was liable as an insurer for loss of or injury to the goods of his guests. Mateer v. Brown, 1 Cal. 221, 227. Under the statutes as amended, however, his liability is that of a depositary for hire. To impose liability on him for loss of the property of his guests, the loss must be caused by his own negligence or dishonesty or that of his employees. If a bailor alleges and proves the deposit of property with the bailee, a demand therefor, and the failure of the bailee to redeliver, the burden of proof rests upon the bailee to explain his failure. George v. Bekins Van & Storage Co., 33 Cal.2d 834, 839–841, 205 P.2d 1037; U Drive & Tour, Ltd. v. System Auto Parks, Ltd., 28 Cal.App.2d Supp. 782, 784, 71 P.2d 354; Cussen v. Southern Calif. Savings Bank, 133 Cal. 534, 537, 65 P. 1099, 85 Am.St.Rep. 221; Dieterle v. Bekin, 143 Cal. 683, 687, 77 P. 664. If he fails to prove that the loss did not result from the aforementioned causes, he is liable for that loss under sections 1859 and 1860, but his liability is limited to the specified amounts unless he has assumed a greater liability or has himself stolen the property. Since defendant is a corporation it can act only through its employees. By its motion for summary judgment for plaintiff for $250, defendant conceded that the loss resulted from the negligence or theft of its employees. Section 1860 limits its liability therefor unless it gave a receipt in writing for the contents of the envelope, and summary judgment for that amount was proper unless such a receipt was given.
>
> "It is contended, however, that if the loss resulted from theft by an employee, the $250 limitation is inapplicable, and plaintiff is therefore entitled to a trial on the issue of theft. We cannot agree. Section 1860 unequivocally limits liability for loss 'in any case' to $250; it does not except losses caused by employees' dishonesty. The same is true of the provision of section 1859 that 'in no case' shall liability exceed the specified amounts. Neither statute furnishes support for the contention that the limitation was not designed to apply to losses resulting from theft by an employee of the innkeeper.
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> * * * * * *
>
> "Sections 1859 and 1860 are designed to relieve the innkeeper from his insurer's responsibility, 'to protect (him) from an undisclosed liability' for the deposited property. They are as ap-

> plicable to losses resulting from theft by employees as to losses from negligence. Theft by an employee is often the cause of such losses, see, Millhiser v. Beau Site Co., 251 N.Y. 290, 294, 167 N.E. 447; Muehlebach v. Paso Robles Spring Hotel, 65 Cal.App. 634, 640, 225 P. 19 and cannot be excluded from the operation of sections 1859 and 1860 without vitiating their terms and purpose."

The Heaters' Appeal

As hereinbefore stated, the Heaters, comanagers of the hotel, have appealed and it is their main contention that the judgment against them should have been limited to $250, in accordance with section 1860 of the Civil Code.

[1] Said appellants argue that they were in charge of the hotel as managers, i. e., were keeping the hotel and that therefore they were "hotel keepers" within the meaning of the statute. While they cite no authority there is much merit in their argument. For although a hotel keeper has been defined as the proprietor of a hotel as distinguished from an employee, 43 C.J.S., Innkeepers, § 2, p. 1135; 28 Am.Jur. 539, and the trial court found that defendant corporation was the proprietor of the hotel and appellants Heater were the agents, servants and employees of the corporation, yet as stated in Gardner v. Jonathan Club, supra, a corporation can only act through its employees, and we believe that, for the purposes of the statute here involved, it must be considered that there is only one hotel operation and one hotel keeper, or set of hotel keepers, and that the corporation and its managers engaged in conducting the hotel are the hotel keeper or innkeeper.

Plaintiff Ricketts in reply contends (1) that appellants Heater were not innkeepers within the meaning of the code provision, and (2) that, even if they were, their liability would not be limited, because section 1860 of the Civil Code does not exempt an innkeeper from full liability for his own negligent acts. It should be noted that section 1860 applies to "innkeepers" as well as to "hotel keepers", and that although there is a distinction between an inn and a hotel the words are sometimes used interchangeably. 14 Cal.Jur. 317.

[2] We are unable to agree with either contention of plaintiff. We believe that it was the intention of the legislature in enacting section 1860 in its present form to limit the amount that a hotel guest could recover, where the hotel kept a fireproof safe and gave due notice thereof, to the sum of $250 unless the guest shall have been given a receipt. As stated in Gardner v. Jonathan Club, supra, 35 Cal.2d at page 350, 217 P.2d at page 965:

> "Sections 1859 and 1860 were designed to cover an innkeeper's liability for all articles of personal property carried by his guests. They have a common purpose and must be read together. In each section, the reason for the exception to the liability limitation is clear. Should a guest wish protection in excess of the statutory limitation he must declare the value of his property to give the innkeeper an opportunity to confirm the estimate of value. He can then refuse to assume the greater liability or if he assumes it he can take proper precautions for the protection of the property. Liability in excess of the statutory limitation is thus based on the innkeeper's agreement to assume it."

A case involving a statute similar to section 1860 of our Civil Code, and cited with approval by our Supreme Court in Gardner v. Jonathan Club, supra, is Goodwin v. Georgian Hotel Co., 197 Wash. 173, 84 P.2d 681, 119 A.L.R. 788. In that case the Supreme Court of Washington said at page 686, of 84 P.2d:

> "The statute clearly intended that, upon compliance with its requirements, the liability of the hotelkeeper should be limited to $1,000. In enacting the statute, the purpose of the legislature was to compel the hotelkeeper to provide a safe or vault for the safekeeping of the property of his guests, but at the same time to set a limit upon the amount, in value, of property which the hotelkeeper could be compelled to receive or assume liability for, except

> by a specific agreement in writing. Beyond that limit, the guest who has been properly notified according to the terms of the statute is forced to assume the risk of loss unless he makes a different arrangement with the hotelkeeper. It is apparent that the statute intended to create mutual and reciprocal duties and rights between the hotelkeeper and his guests and in that way to prescribe and maintain a fair and reasonable balance of protection to both. The reason for such limitation, is we think, practically and legally sound."

[3] We think it is clear from the foregoing decisions and from an analysis of language and purpose of the statute, that the plaintiff in the instant case was only entitled to recover the sum of $250 jointly and severally, against all defendants and that the judgment against appellants Heater for any sum in excess of that amount cannot be sustained. We do not believe that it was ever the intention of the legislature by said statute to permit a recovery in such a case against a corporation owning and operating a hotel and also to permit a recovery of an additional $250, or more, against the manager or managers who were physically conducting the hotel business for the corporation. Such a construction is neither required nor justified by the language of the statute, and would in our opinion nullify the purpose of the statute and be in conflict with its spirit and intent.

Since it appears from plaintiff Rickett's answer to the cross-complaint of defendants Heater and also from the findings of fact that defendants Heater voluntarily paid to plaintiff the sum of $500 after said loss was incurred, which sum was in excess of the amount of the judgment that could properly have been awarded against the Heaters, the judgment against the Heaters in the sum of $1,500 should be reversed with directions to enter judgment in their favor.

Plaintiff Ricketts' Appeal

As hereinbefore stated, the appeal of plaintiff Ricketts is based upon his contention that the court erred in limiting his recovery against the hotel corporation to $250. Plaintiff's sole argument is that the loss to plaintiff was caused by the corporation's negligence and that therefore the statutory limitation does apply. This same argument was made by plaintiff in reply to the Heaters' appeal, and, as hereinbefore pointed out, the Supreme Court, in Gardner v. Jonathan Club, supra, has decided adversely to plaintiff's contention. There is, therefore, no merit in the contention that the judgment against the defendant Morehead Company for $250 should be reversed and judgment entered against it for the sum of $1,500.

In view of the foregoing, that portion of the judgment which awards plaintiff the sum of $1,500 against defendants and appellants Heater is reversed, with directions to enter judgment in favor of said defendants; and in all other respects the judgment is affirmed. Defendants and appellants Heater and defendant and respondent The Morehead Company, Inc., to recover their costs on appeal.

PAULSEN, J. pro tem., and PEEK, J., concur.

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123 Cal.App.2d 30

POSELLA v. POSELLA.

Civ. 19565.

District Court of Appeal, Second District,
Division 1, California.
Feb. 3, 1954.

Action by a husband for divorce. On plaintiff's motion to vacate and set aside an order of the District Court of Appeal staying execution and enforcement of an interlocutory judgment of the Superior Court, Los Angeles County, for plaintiff after affirmance thereof, 261 P.2d 37, the District Court of Appeal, Drapeau, J., held that the motion must be granted, where a review of the record because of defendant's assertion that she was denied due process of law shows that all the proceedings were regular and that there is no good ground for recalling the remittitur or continuing the stay of execution.

Motion granted, and order vacated and set aside.

Divorce ⚷186

A wife's motion to vacate and set aside order of District Court of Appeal, staying execution and enforcement of Superior Court's interlocutory judgment granting husband a divorce after affirmance of such judgment, must be granted, where review of record because of wife's assertion that she was denied due process of law shows that all proceedings were regular and that there is no good ground for recalling remittitur or continuing stay of execution.

Julia Blanche Posella, in pro. per.

Zagon, Aaron & Sandler, Los Angeles, for respondent.

DRAPEAU, Justice.

December 8, 1953, this court made its order staying execution and enforcement of the superior court judgment in this case. This was done upon the representation of the defendant that she had been denied due process of law and that she was perfecting proceedings for review of the case by certiorari by the Supreme Court of the United States.

This case was decided in this court September 29, 1953, 120 Cal.App.2d —, 261 P.2d 37, remittitur issued November 30, 1953.

Plaintiff now moves to vacate and set aside the order.

The motion was submitted so that we might go over the record, in view of defendant's assertion of denial of due process.

From a review of the record it appears that all of the proceedings were regular and that there is no good ground for recalling the remittitur or continuing the stay of execution, In re McGee, 37 Cal.2d 6, 229 P.2d 780.

The motion is granted. The order is vacated and set aside.

WHITE, P. J., and DORAN, J., concur.

CALIFORNIA REPORTER

266 PACIFIC REPORTER
SECOND SERIES

CALIFORNIA REPORTER

266 PACIFIC REPORTER

SECOND SERIES

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42 Cal.2d 227

RECORD MACHINE & TOOL CO.
v.
PAGEMAN HOLDING CORP.

L. A. 22601.

Supreme Court of California.
In Bank.
Feb. 11, 1954.

Declaratory judgment action by buyer against seller under conditional sales contract, relating to realty, personalty, and patents, and for declaration of rights under the contract, and determination of amount due, and for damages for breach by defendant. The Superior Court, Los Angeles County, Leon T. David, J. pro tem, entered judgment adverse to seller, and seller appealed. The Supreme Court, Carter, J., held, inter alia, that when refusal of seller to accept tender of unpaid balance of purchase price and to execute title instrument was because of inability to transfer title to one of the patents, court should have given complete relief by determination of value of patent to which seller could not give good title, as bearing upon reduction to be made in the purchase price.

Judgment reversed, with directions. Prior opinion 257 P.2d 80.

1. Vendor and Purchaser 🔑77

Although, when money is to be paid at a specified time, the creditor is ordinarily not required to accept it before that time, when conditional sales contract, calling for payments on purchase price in installments, authorized the payment of $1,000 or more on the first day of every month, buyer was entitled to pay the unpaid balance before all the installments became due.

2. Vendor and Purchaser 🔑170

Where conditional sales contract authorized the payment of $1,000 or more on the purchase price on the first day of every month, and gave buyer 60 days grace within which he could cure any late payment, payment at other times than first of month was contemplated, but in any event when seller was notified of tender of unpaid balance on August 22 to be effective on September 5, seller was not entitled to complain that tender was not effective because it did not provide for payment on first of the month, when seller waited until September 4 before it notified buyer of refusal of tender.

3. Vendor and Purchaser 🔑170

Where rejection of tender of unpaid balance of purchase price on conditional sales contract relating to realty and patents made no specific objection to escrow opened by buyer in which it had instructed bank to pay unpaid balance to seller concurrently with receipt of instruments transferring title, and indicated that regardless of how required amount of money was supplied, tender would have been rejected, seller was not thereafter entitled to insist that tender was insufficient because seller had no duty to act through an escrow, and because payments were to be made by mail at stated address rather than at bank.

4. Declaratory Judgment 🔑385

Where plaintiff, who had entered into conditional sales contract for purchase of realty, personalty and patents from defendant, brought action to have its rights under contract declared, and to have its damages for breach of contract by defendant determined, upon determination that defendant had breached its contract by refusing tender of unpaid balance of purchase price, and refusing to transfer title, allegedly because of its inability to give good title to certain patent, court should have determined value of patent to which defendant could not give good title in determining reduction to be made in the purchase price payable, and it was improper to merely declare that all of the title to the property had passed to plaintiff.

5. Declaratory Judgment ⚷384

Although the trial court has discretion as to the extent of the relief to be afforded in a proceeding for declaratory relief, where a case is made for such relief, court should not deny it.

6. Specific Performance ⚷127(1)

Where a contract is specifically enforced the court should do complete justice between the parties.

Max Tendler and Olin N. MacKay, Los Angeles, for appellant.

Fred N. Howser, Arcadia, and Arthur A. Worth, Los Angeles, for respondent.

CARTER, Justice.

Defendant appeals from a judgment in an action by plaintiff to have declared its rights under a conditional sales contract, in which plaintiff is buyer and defendant seller, to have it determined how much plaintiff still owes under the contract, and for damages for breach of the contract by defendant.

According to the findings, plaintiff and defendant contracted in writing for the sale of real property, personal property and patents. The purchase price was $100,000, $10,000 of which was paid on execution of the contract and the balance was to be paid in installments of $1,000 "or more" plus interest on the first day of each month commencing on June 1, 1947; plaintiff was to have immediate possession of the property but could not dispose of or remove it; "in the event" plaintiff performs the contract and makes all required payments, defendant "shall then but not otherwise" convey the real property with title insurance and transfer good and sufficient title to the personal property and patents, defendant to retain title to the property until plaintiff has performed; risk of loss is to rest with plaintiff, and it is to have during the life of the contract an exclusive license to use the patents. Time is made of the essence of the contract.

Possession of the property was given to plaintiff under the contract. The court found that plaintiff had performed as required by the contract and was not in default. On August 23, 1951, to be carried into effect September 5, 1951, plaintiff tendered the then unpaid balance of the purchase price in the amount of $26,549.18. (Defendant questions the tender, a matter later discussed.) Defendant refused the tender. Defendant did not own prior to the contract and has never owned one of the patents agreed to be sold under the contract.

On September 14, 1951, plaintiff commenced his action setting forth the foregoing facts and asking that it be declared that it was not in default under the contract and would not be in default by failure to make the payments on the purchase price until defendant gave good title to all the property and that the matter be handled by an escrow to hold the purchase money and title papers. It also claimed damages in that it had been unable to sell at a profit two lathes (part of the property sold under the contract) because the contract forbade disposal thereof by plaintiff and defendant refused to deliver the documents of title.

The court found as above indicated, and further, that plaintiff should not be required to run the risk of being in default for failure to make the purchase price payments nor should it be required to make them without assurance the defendant could give good title (such assurance was unlikely as defendant did not own one of the patents); that payment through escrow was proper to avoid the risk; that defendant had been in default under the contract since its inception and after the tender because of its inability to deliver good title to the patents which it did not own; that since the refusal of the tender plaintiff was the owner of all the interest of defendant in all the property described in the contract; that defendant should within 5 days of entry of judgment deposit with the clerk instruments transferring all the property to plaintiff; that on September 5, 1951, plaintiff owed $26,524 under the contract and had since paid $7,640.12, leaving a balance of $18,884.21; that it was impossible for defendant to give good title to one of the patents because it did not own it; that defendant was not entitled to any further payments under the contract until it could give good title to all the property but plaintiff might make payments to the clerk; that under the contract the delivery of the instruments of title transferring good title was to be made concurrently with the full payment of the purchase price; that plaintiff could not recover damages in the action as it was one for declaratory relief but might recover same in another action; that to avoid further litigation the trial court might order the method of completing performance of the contract and retained jurisdiction to do so.

The judgment declared the foregoing rights and obligations and further ordered defendant to deliver to the clerk transfer instruments giving plaintiff good title to all the property and if it failed to do so the clerk should execute them; that they were then to be delivered to plaintiff; that any payments made by plaintiff to the clerk (plaintiff was authorized but was not required to make them) should be used to pay for title insurance and the balance was to be held by the clerk until further order of the court; that defendant was "remitted to an action for the balance due under" the contract "as payments become due" thereunder; that if payments were made by plaintiff to the clerk, defendant might obtain them upon petition to the court showing it had deposited instruments transferring good title to the property; that defendant was afforded the opportunity to deliver such good title but if it failed to do so, plaintiff had its action for damages.

Summarized, it appears that the judgment declares plaintiff to be the owner of all defendant's interest in the property and defendant must transfer good title thereto. If it cannot or does not do so, it must bring an action for the payments due under the contract as there provided, presumably taking into consideration the amount thereof and the effect of its inability or failure to give good title to all the property. Plaintiff may, but is not required to make payments to the clerk, and if its does, defendant cannot get them unless it produces good title to all the property; any damages claimed for breach by defendant must be asserted in another action.

Defendant appealed, contending (1) That the tender was not valid and therefore the effect on the rights of the parties given to it by the judgment was erroneous; (2) that the court failed to dispose completely of the controversy, as it should in an action for declaratory relief, in that it did not determine the value of the patent to which defendant could not give good title so as to show the amount by which the unpaid balance of the purchase price should be reduced.

With regard to the tender, it appears that on August 22, 1951, plaintiff sent a writing to defendant in which it offered to pay on September 5, 1951, the unpaid balance of the purchase price stating that it had opened a specified escrow for that purpose with a named bank in which it had instructed the bank to pay the sum of $26,549.18 to defendant concurrently with the bank's receipt from the defendant of instruments transferring good title to the property together with certificates of title insurance. It also advised defendant that it had a purchaser ready, able and willing to buy part of the personal property provided it could obtain title thereto. The money was not deposited with the bank but plaintiff had two other escrows, one of which was for the sale of some of the personal property, the money for which had been deposited, and the other was one under which the bank was to make plaintiff a loan on the real property to be secured by a trust deed thereon and which would require, of course, that title be vested in plaintiff. All escrow charges were paid by plaintiff. Defendant refused to proceed, stating its reasons in a letter, dated September 4, 1951, in which it was claimed the arrangement did not comply with the sale contract in that: (1) The amount was not correct; (2) there was no duty on defendant to act through an escrow; (3) payments were to be made to defendant by mail at a stated address rather than at a bank; (4) defendant was not required to deliver the transfer instruments and title insurance until a reasonable time after it had received full payment. The letter concluded by stating that if plaintiff desired to pay the unpaid balance through escrow, defendant would give the matter consideration. The court found that when defendant sent its letter of refusal it could not, and knew it could not, give good title to the patent it did not own and that its refusal was based solely on that reason; that the reasons stated in its letter were not true to the defendant's knowledge; that the tender was made in good faith but the refusal was in bad faith and that plaintiff was able and willing to perform; that an ordinary and customary incident to the transaction of securing title insurance (the contract called for such insurance on the real property) would be that payment by plaintiff would be held in abeyance until such insurance had been procured.

Defendant now contends that the tender was faulty on the ground that under the contract the unpaid balance could be paid only on the first of the month, the day of payment of installments on the purchase price, and not on September 5th as was offered; that plaintiff did not have the ability to pay the unpaid balance because it had to be realized from the two other escrows above mentioned.

[1, 2] It has been held that when money is to be paid at a specified time, the creditor is not required to accept it before that time. Hanson v. Fox, 155 Cal. 106, 99 P. 489, 20 L.R.A.,N.S., 338 and Rhorer v. Bila, 83 Cal. 51, 23 P. 274, holding that a vendee in a contract for the sale of real property calling for payments in installments on specified dates cannot put his vendor in default by tendering the entire unpaid balance and demanding a deed to the property. Here, however, the trial court reasonably construed the contract in the case at bar to authorize payment of the unpaid balance by plaintiff before all the installments became due because the contract authorized the payment of $1,000 "or more" on the first day of every month. Thus there is no doubt that an amount in excess of $1,000 could be paid and that excess could consist of the entire unpaid balance. It was contemplated that such payment could be made at times other than the first of the month as another clause of the contract gave plaintiff 60 days grace "within which" he could cure any late payment. Hence any time within the 60 days the $1,000 "or more" could be paid. Moreover, defendant should not be permitted to maintain its position because it was notified of the tender on August 22 to be effective on September 5th. While it did mention the prematurity of the tender of all the entire balance in its refusal of the tender, it waited until September 4, after the first of the month had passed, before it notified plaintiff of its refusal. Plaintiff was not given the opportunity to change the effective date of its tender to the first of September which it would have been able to do had defendant acted promptly after the August 22nd notice.

[3] On the issue of plaintiff's ability to produce the required amount of money under its tender, several factors should be noted. It is conceded that defendant could not give good title to the patent at any time and apparently never will be able so to do. The court found that the only real reason for defendant's refusal of the tender was its lack of ability to give good title to the patent. In its rejection it specified many technical grounds which indicated that even if it had known that the money was to be supplied by the loan on the real property and the proceeds of the sale of some personal property it would still have rejected the tender. The bank was ready and willing to make the loan on the real property and there was no obstacle to the sale of the personal property. The purchase price had been deposited in escrow and it is not important that plaintiff did not prove that notice of bulk sale was given. It does not appear that the sale would not have been completed. The conditional sale contract required defendant to furnish title insurance on the property, a proceeding which ordinarily requires time, and is customarily done through an escrow when the delivery of the deed and title insurance and the payment of the purchase price are to

be concurrent. The defendant in its letter rejecting the tender made no real objection to an escrow as it said in the closing paragraph that it would consider such an arrangement. For these reasons we do not believe defendant's objection to the tender should prevail.

[4–6] The trial court failed to find the value of the patent to which defendant could not give good title, or, stated in another way, the damage plaintiff would suffer by defendant's inability to perform the contract in that respect. However, it did declare that title to all the property had passed, ordered defendant to execute transfer instruments, and permitted, but did not require, plaintiff to pay the purchase price. The court should have completed the determination of the controversy to avoid further litigation. The inability of defendant to supply good title to the patent, one item of the property sold, would have a bearing upon the amount of the reduction which should be made in the purchase price payable. An important factor in that determination would be the value of the patent and the proportion of the purchase price applicable to all of the property allocable to the patent. Defendant, as well as plaintiff, has an interest in having that determination made as otherwise it has passed title to all the property without knowledge of what amount of the balance of the purchase price it is entitled to receive. It is true that defendant objected during the proceedings to broadening the scope of the determination and the court declared that defendant's action to recover the purchase price as well as plaintiff's action for damages were preserved, but because of the scope of the judgment with respect to plaintiff's rights in the property (it in effect specifically enforces the contract on behalf of plaintiff) justice requires that defendant's rights also be determined. The trial court has discretion as to the extent of the relief to be afforded in a proceeding for declaratory relief, 5 Cal. Jur. 10-Yr. Supp., Declaratory Relief, §§ 22 et seq. but where a case is made for such relief the court should not deny it. Lord v. Garland, 27 Cal.2d 840, 168 P.2d 5. Where a contract is specifically enforced the court should do complete justice. 23 Cal.Jur. 509 et seq. That has not been done here.

The judgment is reversed and the trial court is directed to render the same judgment heretofore given, but in addition, shall ascertain and declare the rights of the parties with respect to the payment of the unpaid balance of the purchase price, if any, under the contract, and the effect thereon of defendant's inability to give good title to the patent it does not own. Each party shall bear his own costs of this appeal.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

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42 Cal.2d 164

H. J. HEINZ CO.

v.

SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.

S. F. 18605.

Supreme Court of California.
In Bank.

Jan. 29, 1954.

Rehearing Denied Feb. 24, 1954.

Patent holder instituted proceeding in contempt for violation of injunction restraining defendant from building or using vinegar generators infringing on patent, the Superior Court, Alameda County, entered order awarding damages and directing defendant to destroy vinegar generators, and defendant filed writ of review. The Supreme Court, Carter, J., held that Superior Court had jurisdiction to enjoin infringement of patent, and to conduct contempt proceeding based on injunction, when patent question arose in action within jurisdiction of Superior Court.

Annulled in part and affirmed in part.

Shenk, Edmond, and Spence, JJ., dissented in part.

Prior opinion, 252 P.2d 402.

1. Injunction ⚷229

Superior Court which, in action for judgment declaring invalid license under which defendant claimed right to build vinegar generators under patent and for order restraining defendants from exerting claim under license, had entered judgment declaring license void and restraining defendant from claiming right or license to build or maintain vinegar generators of type covered by patent, had authority to find defendant in contempt for erecting generators infringing on patent, even though defendant claimed right to build such generators independent of license. 28 U.S.C.A. § 1338(a); U.S.C.A. Const. art. 1, § 8.

2. Courts ⚷489(3)

Fact that action in common law or equity involves a patent question does not take case out of jurisdiction of state court. 28 U.S.C.A. § 1338(a); U.S.C.A. Const. art. 1, § 8.

3. Courts ⚷489(3)

Where patent holder brought action to have license, under which defendant claimed right to build vinegar generators under patent, declared invalid and for injunction against infringement, case was within jurisdiction of Superior Court, since patent question arose within case of which state had jurisdiction. 28 U.S.C.A. § 1338 (a); U.S.C.A. Const. art. 1, § 8.

4. Contempt ⚷72

Statutes authorizing fine or imprisonment as penalty for contempt establish limits within which courts can punish contempt. Code Civ.Proc. §§ 4, 1218.

5. Contempt ⚷70

The enforcement of an order of contempt is not for vindication of a private right but is for maintenance of dignity and authority of court, and to preserve peace and dignity of the state.

6. Injunction ⚷230(4)

Where patent holder brought proceeding in contempt for defendant's violation of injunction restraining defendant from building or using vinegar generators which infringed on patent, court did not have authority to enter judgment awarding patent holder compensatory damages. Code Civ. Proc. §§ 4, 1218.

7. Injunction ⚷230(2)

Affidavit initiating proceeding in contempt, for violation of injunction restraining defendant from asserting or claiming right or license to build or operate vinegar generators of type covered by patent, was sufficient. Code Civ.Proc. § 1211.

8. Injunction ⚷230(2)

In proceeding in contempt for violations of injunction, facts peculiarly within the knowledge of the one charged with violating injunction may be alleged on information and belief.

9. Injunction ⚷230(4)

Where defendant, in violation of injunction, infringed on patent holder's patent by building and using vinegar generators covered by patent, Superior Court had authority, in contempt proceeding, to order defendant to destroy the generators, regardless of their cost.

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Chickering & Gregory, William H. Parmelee, Frederick M. Fisk, San Francisco, Paul M. Duff, Pittsburgh, Pa., Moses Lasky, San Francisco, Christy, Parmelee & Strickland, Pittsburgh, Pa., Brobeck, Phleger & Harrison and Herman Phleger, San Francisco, for petitioner.

Morris Lowenthal, Juliet Lowenthal and Karl D. Lyon, San Francisco, for respondents.

CARTER, Justice.

This is a review of an order made after proceedings in contempt for violation of an injunction issued in an action in which Charles Owens was plaintiff, hereafter referred to as plaintiff, and H. J. Heinz Company, a corporation, petitioner here, was defendant, hereafter referred to as defendant.

In 1943, plaintiff commenced the above-mentioned action for declaratory and injunctive relief against defendant, charging that he was the owner of a patent for a vinegar generator; that a license agreement from plaintiff to defendant to use the patent in making and using the generator was obtained by fraud and lacked consideration. A declaration of the invalidity and unenforceability of the license was asked, together with a declaration that defendant had no right to build or use the patented generators, but threatened to do so, and should be restrained from asserting any claims under the license. On December 21, 1944, the court gave judgment in that action declaring the license invalid and unenforceable; that plaintiff owned the patent and defendant had no right to build or use generators of the character covered by plaintiff's patent. Defendant was enjoined from asserting any right under the license or any right to build or use the generator covered by the patent other than one at its plant in Berkeley, California. That judgment became and is final.

In September, 1949, plaintiff filed in that action an affidavit stating that the court had issued an injunction wherein it was adjudged and decreed that defendant had no right or license to build or use vinegar generators of the type covered by plaintiff's patent and that the purported license given by plaintiff to defendant was invalid; that the judgment provided (stating the exact words of the injunction) that notwithstanding the injunction plaintiff is "informed" that defendant has built and used the generators covered by plaintiff's patent; that in correspondence with defendant in June of 1949, the latter did not deny that it had built and installed generators but did deny that it violated plaintiff's rights; that when plaintiff was installing a generator at defendant's Berkeley plant the latter's agent took pictures and sketches thereof, and during the installation, one of plaintiff's assembly prints disappeared and plaintiff believes the agent took it; that plaintiff believes defendant has appropriated his patent and is claiming the right to make and use generators covered thereby; that defendant's conduct is in violation of the injunction. Pursuant to the affidavit the court issued an order reciting that it appeared that defendant had been making and using generators in violation of the injunction and directing defendant to show cause why an order should not be made holding it in contempt of court for violating the injunction and why there should not be made such other orders as may be required to "correct" the violations. Defendant filed a return to the order to show cause (later amended) asserting insufficiency of plaintiff's affidavit, the lack of jurisdiction of the court in granting the injunction because it involved patent rights over which the federal courts have exclusive jurisdiction, and denying that it had built or used generators of the type covered by the patent. Defendant moved to vacate the order to show cause and to modify the injunction by striking out the provisions thereof restraining it from building and using generators of the type covered by the patent, asserting that they invaded the jurisdiction of the federal courts.

The court made an "interlocutory order" reciting the foregoing and that it had denied defendant's motions; that the judgment in the action was res judicata of defendant's claims of lack of jurisdiction; that defendant was estopped to assert lack of jurisdiction; and that the sole issue was whether the injunction had been violated. The court made findings on those matters and also that the issues in the action embraced the right, if any, of defendant to build and use the generators in view of plaintiff's patent, independent of as well as under the license; that the issue of patent infringement was raised by both plaintiff and defendant therein but at no time did defendant question the court's jurisdiction; and that defendant was violating the injunction and infringing plaintiff's patent. It found that defendant was in contempt of court and ordered it to appear for the purpose of determining the penalty to be imposed and relief to be awarded plaintiff for violation of the injunction.

The court made its "Final Order," here reviewed, on March 24, 1952, incorporating its interlocutory order and awarding plaintiff compensatory damages against defendant in the sum of $375,934.66, for past damages suffered by reason of the violation of the injunction and $526 per day for the continuing violation of the injunction until defendant has destroyed the generators; if the damages were not paid, execution might issue against defendant's property and plaintiff might apply for a contempt order. To prevent future violation of the injunction defendant was ordered to destroy 16 specified generators (valued at over $160,000), being operated by it, within 45 days and report to the court. It was also ordered that the proceeding was in civil contempt and the relief granted was remedial and not for punishment for wilful disobedience of the injunction; that jurisdiction was retained to make further orders to carry out its order.

Defendant's main contentions are: That the court had no jurisdiction to grant the injunction in the action nor entertain the contempt proceedings because they involved patent rights within the exclusive jurisdiction of the federal courts and hence it could not properly be held in contempt for violating the injunction; that the court had no authority to award to plaintiff, in the contempt proceedings, compensatory damages resulting from the violation of the injunction.

On the question of jurisdiction to grant the injunction in the action and entertain the contempt proceedings, it should be noted that the Constitution of the United States provides that Congress shall have power "To promote the Progress of Science and useful Arts, by securing for limited Times to * * * inventors the exclusive Right to their respective * * * Discoveries". U.S.Const. art. I, § 8(8), and pursuant thereto Congress has provided by statute that: "The [federal] district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases." 28 U.S.C.A. § 1338(a). Before coming to the question of the jurisdiction of the court to grant injunctive relief in the judgment rendered in the action, other things must be considered.

Defendant claims that the action, and ensuing judgment granting plaintiff injunctive relief against defendant, dealt only with conduct by it in claiming and exercising a right under the license agreement to build and use the generators; that the court did not enjoin it from infringing plaintiff's patent independent of the license, but in the contempt proceeding the court construed the injunctive provisions in the judgment as prohibiting infringement as well as claiming rights under the license, and that so interpreted, the court lacked jurisdiction to render the judgment with its injunctive provisions because of the exclusive federal court jurisdiction. It is true that the complaint in the action charges that defendant threatens to exercise rights under the license, which plaintiff asserts is invalid, by building generators of the character covered by the patent, but it is also alleged that defendant threatens to build generators of the character covered by plaintiff's patent and, by so doing, is causing depreciation of the value of plaintiff's patent. In the prayer it is asked that it be declared that defendant has no right to build generators of the type covered by plaintiff's patent and that it be enjoined from claiming any rights under the patent and claiming any right to build generators covered by plaintiff's patent. Fairly interpreted, the complaint demands that the license be set aside and, prevailing on that issue, relief be granted for infringement. Defendant, in its answer, denied it had no right to build generators covered by the patent. In its findings the court stated that plaintiff was the owner of the patent; that the license was void; that a controversy existed between the parties concerning defendant's right to build generators covered by the patent and concerning the effect of the license; that defendant threatens to exercise and claim rights under the license and to build generators covered by the patent, which will cause depreciation in the value of the patent. In its judgment the court declared defendant has no right to build generators covered by the patent and that defendant is restrained "from asserting or claiming the *right or* license to build or have built for itself or to maintain or operate vinegar generators of the type, kind or character covered by any Letters Patent [issued to] * * * plaintiff * * *, other than the one vinegar generator installed by plaintiffs at the [defendant's] * * * factory in Berkeley, California." (Emphasis added.) Thus it is clear enough that defendant was enjoined not only from exercising any rights under the license but also any right to build generators covered by the patent independent of the license. Moreover, it was determined by the trial court (the same judge who tried the action) in the contempt proceedings that the injunction embraced infringement of the patent. It found in its "interlocutory order" in the contempt proceedings heretofore mentioned:

> "The allegations and prayer in the complaint [in the action] for declaratory relief and the evidence produced at the trial were not confined to the existence of the alleged license but went beyond said 'license' on plaintiff's contention that the defendant H. J. Heinz Company claimed the right and had been threatening to make generators of the kind covered by Owens' patents, independently of the alleged 'license'. It clearly appears that this action as filed and prosecuted by plaintiffs was not confined solely to the validity of the said 'license' but was equally concerned with the threats made by the defendants, both under the license and independent of the license, to build and operate vinegar generators of the kind and character covered by the said letters patent owned by Charles H. Owens, everywhere in the world and without paying any consideration therefor. It also appears that one of the issues raised by the plaintiffs' complaint, as well as by defendants' answer thereto, was whether or not this Court would decree and declare that the H. J. Heinz Company had no right of future infringement of the Owens patents and had no right in the future to erect generators, whether under the alleged license or otherwise, of the kind covered by said plaintiff's patents. * * *
>
> "The said answer filed by defendants did raise a question requiring an original interpretation by the Court of the scope and claims of the Letters Patent No. 2,089,412, owned by plaintiff Charles H. Owens, by contending and asserting that the said generator installed at the Berkeley plant was not identical with and similar to, in every respect, the Owens installation at the plant of the Frank Tea & Spice Co., Cincinnati, Ohio, and susceptible of operation in the same manner as the Frank installation was operated. * * * In said answer defendant H. J. Heinz Company asserted the right to build and erect generators of the type covered by the aforesaid patent of plaintiff not only upon the basis of the alleged 'license' of November 25, 1941, but also upon the basis of an alleged oral agreement claimed to have been made with plaintiffs prior to August 28, 1940. * * * The answer further affirmed that the H. J. Heinz Company claimed the right to build and have built for itself and to operate vinegar generators of the type, kind and character covered by the letters patent owned by Charles H. Owens and the answer admitted that a justiciable controversy existed between Owens and said defendant company on that subject. * * *
>
> "As appears from said judgment and decree and as intended by this Court, based upon and pursuant to the issues raised by plaintiffs' complaint and by defendants' answer and by the evidence, the said decree and injunction of this Court was not confined to the limited question of the existence or validity of the alleged 'license' agreement and any rights of defendant thereunder, but perpetually prohibited the defendant H. J. Heinz Company from either asserting the right to build or from building or erecting or operating such Owens Giant Type Generators, irrespective of whether the defendant company asserted a license from Owens to do so."

On several occasions during various proceedings in the trial court defendant in effect conceded that the infringement issue was adjudicated. The United States Court of Appeals passed upon that question of interpretation. After the contempt proceedings were initiated defendant sought declaratory relief in federal district court to enjoin plaintiff from prosecuting those proceedings in the superior court on the ground that the state court had no jurisdiction. Judgment was rendered in the federal district court against defendant and it appealed to the United States Court of Appeals. That court affirmed the judgment, H. J. Heinz Co. v. Owens, 9 Cir., 189 F.2d 505, certiorari denied 342 U.S. 905, 72 S.Ct. 294, 96 L.Ed. 677, reciting the facts as to the injunctive provisions of the judgment as above mentioned and stating that the injunction restrained an infringement on the patent. Defendant had claimed lack of jurisdiction in the state court. The United States Court of Appeals held that the federal courts had no authority, by reason of a federal statute, to enjoin a state court. Defendant moved for a correction of the opinion, asserting that the injunctive provisions of the judgment should not have been interpreted as restraining infringement of the patent. In denying the motion the court of appeals stated, defendant asserts "that this court has misconceived the factual basis and legal holding of a state court adjudication [the injunction judgment] with reference to the matter in controversy. In one particular, appellant [defendant here] is correct. Owens did not claim and the state court did not find that Heinz had actually infringed the Owens patent. Rather Owens *claimed* and the *court found* only a threatened *infringement.* However, nothing in our decision turns upon any difference between actual infringement and threatened infringement as a basis of adjudication in the state court. The important thing is the scope of the decree of the state court with reference to future *infringement.* On that point, despite appellant's renewed urging to the contrary, we understand the action of the state court to have been as heretofore stated in our opinion in this case." Emphasis added; H. J. Heinz Co. v. Owens, 9 Cir., 191 F.2d 257. To the same effect is an order made by the federal district court denying a petition by defendant, after the contempt proceedings were instituted, to remove the contempt proceedings to the federal court on the ground that the latter and not the state court, had jurisdiction. On motion of plaintiff the proceedings were remanded to the state court.

[1] We conclude, therefore, that the injunction action and judgment did involve threatened infringement of the patent as well as rights under the license and respondent court was correct in so determining in the contempt proceedings.

The question is, therefore, whether a state court has jurisdiction in an equity action to cancel and set aside a license agreement to use a patent, where there is also involved, and the judgment includes, an injunction against threatened infringement of the patent in view of the provisions of article I, § 8(8) of the Constitution of the United States and federal statute, 28 U.S.C.A. § 1338(a), supra. In other words, we have a case in which plaintiff, as the owner of a patent, sought to have declared invalid, for fraud and lack of consideration, a license given by him to defendant, and if he was successful in that endeavor, he wanted future protection by injunction against the use of the patent by defendant, that is, infringement. We have concluded that the state court had jurisdiction.

[2, 3] It will be noted that the statute, 28 U.S.C.A. § 1338(a), supra, states that the federal district court has exclusive jurisdiction of "action[s]" arising under federal patent law. It does not purport to cover all patent right "question[s]" which may arise in some other kind of an "action" or "case" such as one based upon common law or equity; the latter actions manifestly are within the jurisdiction of the state courts. As said: "Section 711 [the predecessor of 28 U.S.C.A. § 1338(a), supra] does not deprive the state courts of the power to determine *questions* arising under the patent laws, but only of assuming jurisdiction of 'cases' arising under those laws." Pratt v. Paris Gaslight & Coke Co., 168 U.S. 255, 259, 18 S.Ct. 62, 64, 42 L.Ed. 458. Accordingly, it is said that "* * * where a patentee complainant makes his suit one for recovery of royalties under a contract of license or assignment, or for damages for a breach of its covenants, or for a specific performance thereof, *or asks the aid of the court in declaring a forfeiture of the license, or in restoring an unclouded title to the patent,* he does not give the federal District Court jurisdiction of the cause as one arising under the patent laws. *Nor may he confer it in such a case by adding to his bill an averment that after the forfeiture shall be declared, or the title to the patent shall be restored, he fears the defendant will in-*

fringe, and therefore asks an injunction to prevent it. That was Wilson v. Sandford [10 How. 99, 13 L.Ed. 344]. If in that case the patentee complainant had based his action on his patent right and had sued for infringement, and by anticipation of a defense of the assignment had alleged a forfeiture by his own declaration without seeking aid of the court, jurisdiction [of the federal district court] under the patent laws would have attached, and he would have had to meet the claim by the defendant that forfeiture of the license or assignment and restoration of title could not be had except by a decree of a court, which, if sustained, would have defeated his prayer for an injunction on the merits. But when the patentee exercises his choice, and bases his action on the contract, and seeks remedies thereunder, he may not give the case a double aspect, so to speak, and make it a patent case conditioned on his securing equitable relief as to the contract." Emphasis added; Luckett v. Delpark, Inc., 270 U. S. 496, 510, 46 S.Ct. 397, 402, 70 L.Ed. 703. See also Pendleton v. Ferguson, 15 Cal.2d 319, 101 P.2d 81, 688; Seagren v. Smith, 63 Cal.App.2d 733, 147 P.2d 682; Deakins v. Superior Court, 90 Cal.App. 630, 266 P. 563; Wilson v. Sandford, 10 How. 99, 13 L.Ed. 344; National Clay Products Co. v. Heath Unit Tile Co., 8 Cir., 40 F.2d 617; 40 Am.Jur., Patents, § 170. There is no basis for any distinction based on the claim that plaintiff may have repudiated the license before suit. The action still was one to cancel or revoke the written license as it was still outstanding in defendant's hands and for the further relief against threatened patent infringement.

[4] On the question of the propriety of awarding compensatory damages, that is, damages suffered by plaintiff by reason of defendant's violation of the injunction, petitioner contends that the court had no authority in a contempt action to award such damages. This contention must be sustained. In this state "the power of the Courts to punish for contempt has been regulated by statute * * *" since 1851, Galland v. Galland, 44 Cal. 475, 478; Ex parte Rowe, 7 Cal. 175, 176, 177. Section 1218 of the Code of Civil Procedure provides that "* * * a fine may be imposed on him [one guilty of contempt] not exceeding five hundred dollars ($500), or he may be imprisoned not exceeding five days, or both * * *." Section 1219 authorizes imprisonment as a coercive measure where the contempt consists of a refusal to perform an ordered act. These provisions have been the law since their enactment in 1851 and have been recognized by the courts as establishing the limits within which a court may punish for contempt. Ex parte Cohen, 6 Cal. 318, 319, 321. In In re Garner, 179 Cal. 409, 177 P. 162, it was held that section 1218 was constitutional and that the imposition of a penalty in excess of that prescribed by that section was an act beyond the power of the court and therefore void.

So far as the alleged "inherent" power of the court to award compensatory damages is concerned, section 4 of the Code of Civil Procedure provides that the rule of the common law that statutes in derogation thereof are to be strictly construed has no application "to this code." Several cases have set forth the rule that section 1218 is a "limitation upon the power formerly exercised by the court to punish for contempt". Galland v. Galland, supra, 44 Cal. 475, 478; In re Garner, supra, 179 Cal. 409, 177 P. 162; Ex parte Abbott, 94 Cal. 333, 29 P. 622; Matter of Tyler, 64 Cal. 434, 1 P. 884. We are referred to no authority in support of the order of the trial court either in this state, or elsewhere, where contempt proceedings are regulated by statutory provisions similar to ours, and independent research discloses none. On the other hand, Idaho and Montana, whose Codes of Civil Procedure were taken from that of California, have both held that their statutory provisions precluded the courts from imposing compensatory damages for contempt. State ex rel. Flynn v. Fifth Judicial District Court, 24 Mont. 33, 60 P. 493; Levan v. Richards, 4 Idaho 667, 43 P. 574. Both decisions note that their contempt statutes are the same as in California and rely upon the California cases heretofore cited.

[5] The injured person's property rights may be adequately protected through re-

course to the remedies provided by other statutory law. In In re Morris, 194 Cal. 63, 69, 227 P. 914, 916, it was held that acts in contempt of court had a triple aspect, and that "It [was] apparent upon reflection that the same act may at the same time take on a third aspect in which it is to be regarded as an offense against private rights, and remediable as such by an ordinary action at law." See, too, Kirby v. San Francisco Savings & Loan Society, 95 Cal.App. 757, 273 P. 609. In 39 California Law Review, at page 560, the author states that "California has no provision for compensatory contempt proceedings. Civil damages may be collected in an ordinary civil action for an act otherwise a contempt." The enforcement of an order of contempt in this state is not for the vindication of a private right but is for the maintenance of the dignity and authority of the court, and to preserve the peace and dignity of the people of the State of California. In re Morris, supra, 194 Cal. 63, 69, 227 P. 914. Insofar as the contempt is against the authority of the court, section 1218 of the Code of Civil Procedure is adequate to compel the enforcement of its order since each day's violation is a separate offense.

[6] To allow compensatory damages in the contempt proceeding would have the effect of turning it into an action for damages. In an action for damages, the parties are ordinarily entitled to a trial by jury and an appeal, neither of which has been accorded the petitioner in this proceeding.

[7, 8] Defendant claims that the affidavit initiating the contempt proceeding was insufficient to confer jurisdiction on the trial court. We have heretofore set forth its contents. The code requires that where the contempt is outside the court's presence, the affidavit should set forth the facts constituting the contempt. Code Civ.Proc. § 1211. While the affidavit does state some things in language to the effect that affiant is so informed and believes, it is squarely stated in the last sentence that the conduct of defendant was a violation of the injunction. Sufficient facts were set forth, namely, that defendant had built and used generators covered by plaintiff's patent contrary to the terms of the injunction. Facts peculiarly within the knowledge of the one charged with violating the injunction may be on information and belief. Ballentine v. Superior Court, 26 Cal.2d 254, 158 P.2d 14. Certainly it was peculiarly within defendant's knowledge as to what extent it was building and using generators covered by plaintiff's patent.

Defendant makes other contentions such as that it was denied due process of law because the court would not pass upon the validity of plaintiff's patent in the contempt proceedings. The trial court found that issue was not relevant in those proceedings and that defendant had the opportunity to raise that issue in the action in which the injunction was obtained, and not having done so, it was res judicata.

[9] Ordering the destruction of the generators would seem supportable as a method of preventing defendant from further violating the injunction. It would seem that if a person may be deprived of his liberty until he complies with a valid judgment or order of a court, he may be required to destroy that which he created in violation of such judgment or order. In Morton v. Superior Court, 65 Cal. 496, 4 P. 489, a dam was ordered removed by court order and it was also ordered that the corporation, its officers, agents and employees and all persons acting under it be enjoined and restrained from continuing or maintaining the same. After its removal, pursuant to court order, one whom the court found to be an agent of the corporation reconstructed the dam. The agent who reconstructed the dam was ordered imprisoned until the dam was again removed from the property. It has been recently held that a court may order the destruction of a building constructed in violation of a provision in the grant of a right of way for a power line by a predecessor in interest of the owner of the servient tenement of which the latter had no knowledge. Pacific Gas & Elec. Co. v. Minnette, 115 Cal.App.2d 698, 252 P.2d 642. It would seem to follow that if such harsh consequences could flow from the unintentional violation of a provision in a deed, that similar consequences flowing from the intentional violation of a court decree cannot be successfully challenged.

That portion of the order awarding compensatory damages to the plaintiff is annulled; that portion of the order directing the destruction of sixteen specified vinegar generators is affirmed.

GIBSON, C. J., and TRAYNOR, J., concur.

SCHAUER, Justice (concurring).

[1–9] Although the "Final Order" in the contempt proceedings recites in Paragraph IX that the "object and purpose of the relief prayed for by the plaintiff and granted by this order are remedial and for the benefit of the plaintiff and not for the purpose or by way of punishment of defendant for its wilful and knowing disobedience and violation of the * * * decree and injunction * * *," nevertheless, in Paragraphs V and VI of its order wherein the court specifically directs that the generators in question be destroyed and prohibits further construction, maintenance and use of certain other generators then in the course of construction, the court expressly declares and reiterates that those particular portions of the order (set forth in Paragraphs V and VI) were made "To correct and prevent further and future violations of the injunction and decree * * *." It is thus apparent that the provisions of Paragraph IX have particular reference to the compensatory monetary relief awarded Mr. Owens and do not preclude sustaining the directions contained in Paragraphs V and VI on other grounds.

The same thought was expressed by the court in its written memorandum opinion which preceded by three days the "Final Order," and in which after determining the damages to be awarded to plaintiff the court continues: "The second important issue before the Court for determination is the nature of the *corrective* remedial relief to be granted. * * * The award of damages * * * will fairly and duly compensate plaintiff for the wrongful use and operation by defendant of his patented generators and for the unjust enrichment of the defendant. * * * Such an award, however, would not and should not allow defendant to secure the very benefits of the fraudulent 'license' which this Court cancelled in 1944 by the decree and injunction. The continuing use by the defendant of the Owens type generators is without authorization of this Court or of plaintiff and is a *continuing violation* of the decree and injunction. Under such circumstances there is an inherent power of a Court of equity, in a civil contempt proceeding such as this, to grant the necessary corrective remedial relief to *compel compliance with the injunction* and decree. This can be accomplished only by the destruction and demolition of the generators that have been constructed in violation of the decree and by stopping all new construction * * *." (Italics added.)

In the memorandum opinion the court also commented that "At the outset, it must be noted that the controversy is not simply one involving patent infringement, but concerns the *violation and disobedience of a final court injunction* * * *." (Italics added.)

And in the court's Interlocutory Order, which is expressly made a part of the Final Order in the contempt proceedings, it is noted that "This proceeding is one to enforce the injunction and decree issued in the original trial of this action * * *."

Since in a sense it is true that any contempt proceeding seeking to enforce the terms of an injunction theretofore issued in favor of a private plaintiff is for plaintiff's benefit, it appears to me that the court's express recognition of that fact should not deprive it of the power which it was here exercising, of compelling compliance with the injunction, and to that end ordering destruction of generators which defendant had constructed and was using in direct, deliberate and flagrant disregard of the injunction. The court repeatedly declared that the purpose of ordering the destruction was to enforce the earlier injunction. I believe it had power to do so and this view is supported by Morton v. Superior Court (1884), 65 Cal. 496, 4 P. 489.

For the reasons above stated I concur in the judgment and, generally, in the reasoning of Mr. Justice CARTER.

SHENK, Justice (concurring and dissenting).

I concur in the decision of the court insofar as it holds that the trial court had jurisdiction to grant the injunction and to entertain the contempt proceedings. I am also in agreement with the holding that the power of the court to punish for contempt is legally limited by the provisions of section 1218 of the Code of Civil Procedure to a fine of "not exceeding five hundred dollars", or to imprisonment "not exceeding five days," or both such fine and imprisonment. Therefore when the trial court assumed to fine the defendant $375,934.66 for offenses based on daily violations in the past and $526 per day for continuing daily violations, and then proceeded to direct these sums to be paid as compensatory damages in favor of the plaintiff, an excess of exercisable power is obvious.

Likewise the order based on the present record for the destruction of the generators valued at $160,000 was beyond the jurisdiction of the court and should be annulled. Paragraph IX of the order under review provides that "the object and purpose of the relief prayed for by the plaintiff and granted by this order are remedial and for the benefit of the plaintiff and not for the purpose or by way of punishment of defendant for its wilful and knowing disobedience and violation of" the injunction. There was nothing in the injunctive order requiring the destruction of the generators. If the decree had ordered them destroyed a situation would have been presented similar to that involved in Morton v. Superior Court, 65 Cal. 496, 4 P. 489, relied on by the majority. In that case there was a mandatory injunction ordering the dam removed. It was removed but was replaced by an agent of the party enjoined. There could be no question of the power of the court to punish the agent for contempt and order the reconstructed dam removed. That is not this case. Here there is no order for destruction in the judgment of injunction and the declared purpose of the order of contempt is for the benefit of the plaintiff. In Ex parte Gould, (1893), 99 Cal. 360, at page 362, 33 P. 1112, 21 L.R.A. 751, this court said, quoting with approval from In re Williamson's Case, 26 Pa. 9, 19, that the purpose of a contempt proceeding " 'is not to indemnify the plaintiff for any damages he may have sustained by reason of such misconduct, but to vindicate the dignity and authority of the court. It is a special proceeding, criminal in character, in which the state is the real plaintiff or prosecutor.' " In recognition of this rule the majority opinion here correctly states: "The enforcement of an order of contempt in this state is not for the vindication of a private right but is for the maintenance of the dignity and authority of the court * * *." Notwithstanding that uniformly supported principle an order in this contempt proceeding for the destruction of property for the benefit of the plaintiff is affirmed. Such an order is not necessary to vindicate the power of the court. This could be accomplished by proceedings against the defendant for contempt under the authority and within the limitations of section 1218 of the Code of Civil Procedure for daily violations of the order of injunction. I would annul the order in its entirety.

EDMONDS and SPENCE, JJ., concur.

Rehearing denied; SHENK, EDMONDS and SPENCE, JJ., dissenting.

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42 Cal.2d 110

CITY OF SAN DIEGO
v.
SOUTHERN CAL. TEL. CORP.

L. A. 22321.

Supreme Court of California.
In Bank.
Jan. 22, 1954.
As Modified on Denial of Rehearing
Feb. 17, 1954.

Action for determination of amount due city for telephone company's use of franchise to maintain and operate poles and wires on public streets. The Superior Court, San Diego County, L. N. Turrentine, J., entered judgment from which both parties appealed. The Supreme Court, Traynor, J., held, inter alia, that in apportioning telephone company's gross receipts under Broughton Act and ordinance entitling city to two per cent of gross receipts arising from use of franchise between distributing system and other operative property of company, gross receipts would be allocated between such items by ratio that company's investment in its distributing system in the franchise area bore to its total investment in plant therein.

Reversed with directions.

Carter, J., dissented in part.

Prior opinion 251 P.2d 739.

1. Telegraphs, Telephones and Radio ⚷10(1)

The franchise offered to telephone corporation by statute authorizing construction of lines along or upon any public road or highway is accepted when such a corporation constructs its lines on the public road or highway and maintains and operates a telephone system. Public Utilities Code, § 7901.

2. Telegraphs, Telephones and Radio ⚷10(4)

When telephone corporation obtains franchise under statute authorizing such corporation to construct lines along or upon any public road or highway, it need not obtain a franchise from local authorities. Public Utilities Code, § 7901.

3. Telegraphs, Telephones and Radio ⚷10(1)

The Broughton Act, providing for rate to be paid to county or municipality for franchise, unlike provision of Public Utilities Code offering telephone corporation franchise to construct lines along or upon any public road or highway, does not grant any right or privilege, nor does it purport to empower or authorize boards of supervisors to grant franchises or other privileges, but instead indicates intent to limit and restrict powers which may have been granted under other laws by specifying procedure which must be followed and the conditions which must be imposed in the granting of any franchises by subordinate legislative bodies. Public Utilities Code, §§ 6001–6017, 7901.

4. Telegraphs, Telephones and Radio ⚷10(9)

Where it had been judicially determined that statute offering telephone corporation franchise to construct lines along or upon any public road or highway did not give telephone company a franchise to use public streets within certain portion of city and that, under city charter, company was required to obtain franchise from city for use of such streets, provision of Broughton Act requiring holder of franchise to pay to county or municipality granting franchise two per cent of gross annual receipts arising from use, operation or possession of franchise was applicable to determine amount telephone company would be required to pay city for such franchise. Public Utilities Code, §§ 6001–6017, 7901.

5. Judgment ⚷852(1)

Where court order provided that injunction would not take effect until 30 days after judgment became final, until that time, there was nothing to be stayed.

6. Judgment ⚷720

Where judgment, which enjoined telephone company from occupying public streets because franchise had expired but which provided that the injunction should not take effect unless and until company failed to accept new franchise or city refused to grant it, was affirmed on previous appeal, city was foreclosed from challenging conditions attached to issuance of injunction.

7. Telegraphs, Telephones and Radio ⚷10(10)

After franchise expired, telephone company no longer had permission from city to use streets.

8. Telegraphs, Telephones and Radio ⚷10(7)

Trial court did not have power to grant telephone company a new franchise; it was the responsibility of the city, under its charter and limitations of Broughton Act, to determine whether company should receive a new franchise. Public Utilities Code, §§ 6001–6017.

9. Municipal Corporations ⚷697(1)

Action by city to enjoin telephone company from using city streets for system of telephone poles and wires on ground that, since franchise had expired, such system constituted a nuisance, presented question as to whether company needed a new franchise. Public Utilities Code, §§ 6001–6017, 7901.

10. Municipal Corporations 🔑697(4)

In action by city to enjoin telephone company from continuing to use public streets for system of telephone poles and wires on ground that such system, after expiration of franchise, constituted nuisance, to assure continued telephone service pending outcome of appeal, trial court in exercising its discretion as court of equity could delay taking effect of its injunction and could allow company to use streets until it was finally determined whether company was required to obtain a franchise, and requirement that company continue to pay amount due under its prior obligation adequately protected city in interim. Public Utilities Code, §§ 6001–6017, 7901.

11. Telegraphs, Telephones and Radio 🔑10(9)

Judgment providing that telephone company should pay city that sum of money determined by applying rate at which compensation for franchise was fixed by ordinance applicable to expired franchise for period between expiration of franchise and first day of calendar month preceding company's application for new franchise called for payment according to company's actual obligation as fixed by terms of expired franchise, not as fixed by previous practice of the company, even though computation by previous practice of company resulted in greater payment than was actually called for by terms of expired franchise. Public Utilities Code, §§ 6001–6017.

12. Municipal Corporations 🔑697(4)

Court had power to enter judgment, which enjoined telephone company from maintaining system of telephone poles and lines on public streets because franchise had expired and which provided that injunction should not take effect if company within 30 days after judgment became final should apply for new franchise and should pay for period between franchises an amount to be computed under terms of expired franchise, without requiring company to continue to use same method of accounting which had been used in computing payments under expired franchise and which had resulted in overpayment to the city. Public Utilities Code, §§ 6001–6017.

13. Appeal and Error 🔑458(3)

A court may protect parties on appeal by providing that its injunction or order is stayed under conditions that protect appellant by preserving subject matter of appeal pending outcome thereof and that at same time protect respondent by saving to it benefits of the judgment in event of affirmance.

14. Telegraphs, Telephones and Radio 🔑10(9)

In applying the Broughton Act and ordinance entitling city to two per cent of telephone company's gross receipts arising from use of franchise, it was necessary to determine how company's gross receipts were to be ascertained, to apportion such receipts between company's producing plant, which was entirely on private property, and its distributing system, which was partly on private property and partly on public property, and to apportion receipts attributable to the distributing system between private and public rights of way. Public Utilities Code, §§ 6001–6017.

15. Telegraphs, Telephones and Radio 🔑10(9)

Amounts collected by telephone company from subscribers for exchange service, which entitled subscribers to call any other subscribers within local area for flat monthly charge, were attributable to all equipment within calling area, so that in determining amount which should be paid to city, which was entitled to two per cent of company's gross receipts arising from use of franchise, the total receipts from the calling area would be apportioned according to relative investment between franchise area and remainder of calling area. Public Utilities Code, §§ 6001–6017.

16. Telegraphs, Telephones and Radio 🔑10(9)

Where telephone company used public streets of franchise area for telephone poles and lines in earning its revenue from toll calls, some of that revenue was "arising from use, operation, or possession" of the franchise within Broughton Act and ordinance entitling municipality to two per cent of company's gross receipts so arising. Public Utilities Code, §§ 6001–6017.

See publication Words and Phrases, for other judicial constructions and definitions of "Arising from Use, Operation, or Possession".

17. Telegraphs, Telephones and Radio
🔑10(9)

Where city under Broughton Act and ordinance was entitled to two per cent of telephone company's gross receipts arising from use of franchise, and part of intrastate toll revenue of company was attributable to use of franchise, portion of intrastate toll revenue so attributable would be computed by applying to total toll receipts in the state the ratio of the total investment of the company in toll plant within the state to its investment in toll plant within the franchise area. Public Utilities Code, §§ 6001–6017.

18. Telegraphs, Telephones and Radio
🔑10(9)

Where city under Broughton Act and ordinance was entitled to two per cent of telephone company's gross receipts arising from use of franchise, the gross receipts so arising would be apportioned between company's producing plant and its distributing system. Public Utilities Code, §§ 6001–6017

19. Telegraphs, Telephones and Radio
🔑10(9)

Franchise granted to telephone company, in common with all other operative property of company, contributed to its total gross receipts of which city, under Broughton Act and ordinance, was entitled to percentage. Public Utilities Code, §§ 6001–6017.

20. Telegraphs, Telephones and Radio
🔑10(9)

Reference in Broughton Act, which entitled municipality to two per cent of telephone company's gross receipts arising from use of franchise, rather than to receipts arising from use of all of the company's property, indicates that apportionment of receipts is to be made between distributing system and other operative property of the company. Public Utilities Code, §§ 6001–6017.

21. Telegraphs, Telephones and Radio
🔑10(9)

In apportioning telephone company's gross receipts arising from franchise, of which city was entitled to two per cent under Broughton Act and ordinance, between distributing system and other operative property of company, gross receipts would be allocated between such items by ratio that company's investment in its distributing system in the franchise area bore to its total investment in plant therein. Public Utilities Code, §§ 6001–6017.

22. Telegraphs, Telephones and Radio
🔑10(9)

Where city under Broughton Act and ordinance entitling it to two per cent of telephone company's gross receipts arising from use of franchise was entitled only to percentage of gross receipts attributable to public, not private, rights of way, gross receipts attributable to distributing system would be apportioned between public and private rights of way according to ratio based on relative investment in the two types of rights of way. Public Utilities Code, §§ 6001–6017.

23. Telegraphs, Telephones and Radio
🔑10(9)

Where city was entitled under Broughton Act and ordinance to two per cent of telephone company's gross receipts arising from use of franchise, city's compensation would be determined by using ratio based on relative investment in ascertaining city's share of receipts for local service within area outside the city and of intrastate toll charges, in ascertaining distributing system's share of amount attributable to city, and in ascertaining franchise's share of amount attributable to distributing system on both public and private ways. Public Utilities Code, §§ 6001–6017.

◆

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TRAYNOR, Justice.

Plaintiff City of San Diego by Ordinance No. 5681 granted defendant Southern California Telephone Company[1] a franchise to construct, maintain, and operate a system of telephone poles and wires upon the public streets of the City for a period of thirty years from August 7, 1914. When the franchise expired in 1944, the company assumed that under section 536 of the Civil Code (now Public Utilities Code, § 7901) it had the right to use the streets without a franchise, and therefore did not seek a new franchise. The City brought suit to enjoin the company from using its streets. On May 23, 1946, the Superior Court entered judgment declaring that the company was committing a public nuisance in using the public streets within so much of the City as was included within its boundaries on March 19, 1905, the day before section 536 was amended to apply to telephone corporations. (We refer to this area, as do the parties, as the Old City.) The judgment ordered the company within thirty days after the judgment became final to abate the nuisance and enjoined it from occupying the public streets within the Old City. The judgment provided, however, that if within thirty days after the judgment became final the company applied for a new franchise and paid for the use of the public streets in the Old City since August 7, 1944, the order to abate and the injunction would not take effect, unless and until the company failed to accept a new franchise or the City refused to grant it. Both parties appealed, and the judgment was affirmed. City of San Diego v. Southern Cal. Tel. Co., 92 Cal.App.2d 793, 208 P.2d 27. Upon the going down of the remittitur, the company, on October 4, 1949, within the time allowed, applied for a new franchise to use the public streets within the Old City.

The present controversy is over the amount that the company must pay the City for use of the public streets of the Old City between August 7, 1944, the date the franchise expired, and September 1, 1949, the first day of the calendar month preceding its application for a new franchise. The parties concede that their rights are governed by the terms of the 1946 judgment. The relevant part thereof provides that the company shall pay the City "that sum of money determined by applying the rate at which compensation for the franchise and privilege of such use was fixed by Ordinance No. 5681 of said City to the period from and including August 8, 1944 to, but not including, the first day of the calendar month immediately preceding the filing of such application." Ordinance 5681 fixed such compensation at "two per cent of the gross annual receipts of such grantee and his or its successors or assigns arising from the use, operation or possession of said franchise." During the thirty years the franchise was in effect, the company computed the amount due under the ordinance by a method that, according to the City, would result in a payment of $421,435.68, if applied during the period in question.

The trial court concluded that under the provision of the 1946 judgment quoted in the preceding paragraph, the amount due was $239,337.23. Both parties appeal. The City contends that the injunction was stayed on the condition that in the interim the previous method of computation would be continued and that the City is therefore entitled to $421,435.68. If that contention is not sustained, the City contends that $333,541.14 is nevertheless due under the 1946 judgment. The company contends that properly computed a payment of only $158,670.03 is required. It has paid that amount to the City.[2] We have concluded that the applicable decisions and principles of law sustain the company's method of computation and that the judgment appealed from must therefore be reversed.

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[1] Since entry of judgment defendant company has been merged into its parent corporation, the Pacific Telephone and Telegraph Corporation. The change of corporate identity is not material to the issues of this case.

With minor exceptions the parties are in agreement as to the facts. The controversy is over the application of the 1946 judgment to those facts. The following factual and legal background is material in passing on the respective contentions of the parties.

The company operates a state-wide and interstate communication system. For tariff purposes its service is divided into toll service and local or exchange service. Toll service permits a subscriber to call an exchange outside his local calling area, *e. g.* from San Diego to Los Angeles over the lines of defendant company or from San Diego to New York by use of a connecting system. A toll charge is made for each toll call. Exchange service is generally charged for at a flat or minimum monthly rate without a special charge for each call. Exchange areas are established by the Public Utilities Commission and the boundaries thereof do not necessarily follow political boundaries. Extended area service is an expanded exchange service whereby a subscriber may call several exchanges without payment of a toll charge. The San Diego extended area, which is over forty miles long and nearly thirty miles wide, includes most of the City of San Diego, all of the cities of Coronado, National City, La Mesa, El Cajon, Chula Vista, and several other communities, numerous military establishments, and a large unincorporated area. Most of the Old City is within the San Diego extended area; a small part is within the Del Mar exchange, which is not within the extended area.

The company provides its service by a complicated system of facilities. There are telephone instruments and drop wires upon the subscribers' premises; a network of poles, wires, cables, and conduits partly upon public streets and partly upon private rights of way, referred to as "outside plant"; central offices with the equipment that makes and unmakes connections between telephone instruments; and offices and equipment in which engineering, accounting, billing, and administrative activities are performed. Of these facilities, only a part of the outside plant occupies public streets; the remainder is on private property.

[1-4] In 1905 the Legislature amended section 536 of the Civil Code (now Public Utilities Code, § 7901) to apply to telephone corporations.[3] By that amendment the state offers to telephone corporations a franchise to construct lines along or upon any public road or highway. The franchise is accepted when such a corporation constructs its lines on the public road or highway and maintains and operates a telephone system. County of Los Angeles v. Southern Cal. Tel. Co., 32 Cal.2d 378, 382, 196 P.2d 773. When a telephone corporation obtains a franchise under section 536, it need not obtain a franchise from local authorities. City of San Diego v. Southern Cal. Tel. Co., supra, 92 Cal.App.2d 793, 808, 208 P.2d 27. At the same 1905 session the Legislature enacted the Broughton Act. Stats.1905, p. 777; formerly 1 Deering's Gen.Laws, Act 2720, now Public Utilities Code, §§ 6001-6017. This Act operates in a different field from that covered by section 536. "The Broughton Act, unlike section 536, does not grant any right or privilege, nor does it purport to empower or authorize boards of supervisors to grant franchises or other privileges, but instead indicates an intent to limit and restrict the powers which may have been granted under

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[2] Accordingly, the judgment appealed from is for $80,667.20 (the difference between $239,337.23 and $158,670.03) with interest from October 4, 1949 (the date the new franchise was applied for) of $11,293.40, or a total of $91,960.60.

[3] Section 536 was amended to read: "Telegraph or telephone corporations may construct lines of telegraph, or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

other laws by specifying the procedure which must be followed and in the conditions which must be imposed in the granting of any franchises by subordinate legislative bodies." County of Los Angeles v. Southern Cal. Tel. Co., supra, 32 Cal.2d at page 383, 196 P.2d at page 777. In the previous appeal in the present case, it was determined that section 536 did not give the company a franchise to use the public streets within the Old City and that under the city charter the company was required to obtain a franchise from the City for the use of such streets. City of San Diego v. Southern Cal. Tel. Co., supra, 92 Cal.App.2d at pages 803, 805, 208 P.2d 27. In 1914, when Ordinance No. 5681 was adopted, the Charter of the City of San Diego did not provide a procedure for the granting of such a franchise to telephone companies. The Broughton Act is therefore applicable. Section 3 of that Act provides that the payment by the holder of the franchise to the county or municipality granting the franchise shall be "two per cent (2%) of the gross annual receipts of the person, partnership or corporation to whom the franchise is awarded, arising from its use, operation or possession." (Now Public Utilities Code, § 6006.) Ordinance 5681 of the City of San Diego follows the language of section three of the Broughton Act.

That section was interpreted by this court in County of Tulare v. City of Dinuba, 1922, 188 Cal. 664, 206 P. 983, involving a dispute over the amount of payments to be made by an electric company to a city and a county under Broughton Act franchises. The company contended that section three was void for indefiniteness. This court held the Act valid, after a careful analysis of its language and the problems involved.

The court first pointed out that "The gross receipts of this defendant accrue from two distinct agencies. One is the generating plants or power houses of the company, located in three separate counties; the other is the distributing system, consisting of poles and wires extending throughout the three counties, partly upon and over streets and highways and covered by various county and municipal franchises, and partly over private easements owned by the company." 188 Cal. at page 673, 206 P. at page 986. The Broughton Act, the court continued, applies only to gross receipts "arising" from the "'use, operation, or possession' of the franchise". The payment required "is not a tax upon the property of the corporation, nor a license charge for the privilege of operating its business. It is a compensation for the use of the portions of the highway covered by the franchise easement, and it is limited to a percentage of such total gross receipts as can be shown to have arisen from the use of the franchise." 188 Cal. at page 674, 206 P. at page 986. The court prescribed a two-step apportionment for determining that percentage. The first step is to determine "what proportion of the total annual gross receipts of the public utility should be justly accredited to its distributing system over various rights of way, as distinguished from its power plants or other producing agencies." 188 Cal. at page 681, 206 P. at page 989. This apportionment "will establish the fund from which the percentage of earnings 'arising from the use, operation, or possession' of the various franchise easements shall be ascertained." 188 Cal. at page 681, 206 P. at page 989. The second step is to apportion the receipts attributable to the distributing system between the public and private parts thereof. The court rejected the contention that this apportionment should be based on the amount of revenues collected within each county or municipality, 188 Cal. at pages 678–679, 206 P. 983, and concluded that ordinarily an allocation on a mileage basis would be preferable, "not necessarily as an exclusive method of distribution of the gross receipts, but as a practicable one, where the contribution of the various franchise easements to the gross earnings cannot be otherwise determined." 188 Cal. at page 681, 206 P. at page 990.

The Tulare case was followed in City of Monrovia v. Southern Counties Gas Co., 111 Cal.App. 659, 296 P. 117, and Ocean Park Pier Amusement Corp. v. Santa Monica, 40 Cal.App.2d 76, 104 P.2d 668, 879. In the Monrovia case the utility had paid to the various counties and municipalities for Broughton Act franchises an amount estimated on the basis of the total mileage in each county or municipality, eliminating that part of the utility's earnings attributable to the use of its properties located on private property. The City of Monrovia, however, did not accept this allocation and contended that it should be paid two per cent of the gross receipts from the sale of gas within its boundaries. The trial court adopted the city's theory. The appellate court reversed, on the ground that under the Tulare case an apportionment should be made between receipts attributable to the use of the franchise and receipts attributable to other property of the utility. Similarly, in the Ocean Park case a wharf franchise followed the wording of the Broughton Act. Part of the wharf was on private land and part on city property. The court reversed a judgment awarding the city two per cent of the total receipts from the pier, holding that under the Tulare case the city could not collect for the occupancy of property not owned by the city.

At the outset, the City contends that interpretation of the 1946 judgment does not turn on application of the Broughton Act or Ordinance No. 5681 to the facts of this case. It contends that the trial court stayed execution of the 1946 judgment on the condition that the status quo be maintained pending outcome of the appeal and that the status quo to be maintained was "the last actual peaceable, uncontested status which preceded the pending controversy", namely, the status that existed for thirty years preceding August 8, 1944. Under any other interpretation, the argument continues, the stay would have been beyond the power of the trial court. The City then contends that maintenance of the status quo compelled continued application of the method of accounting used by the company between 1914 and 1944 under the expired franchise, and that the amount due by that method is $421,435.68.

[5] The trial court, however, did not issue an injunction and thereafter stay its effect pending appeal. Instead, it provided that the injunction would not take effect until thirty days after the judgment became final. Until that time, there was nothing to be stayed. Even after the thirty-day period, the injunction took effect only if the company had failed within that period to apply for a new franchise and pay for use of the public streets during the interim period, or if it subsequently failed to accept a new franchise or the City refused to grant it.

[6–10] Since the judgment was affirmed on the previous appeal, the City is foreclosed from challenging the conditions attached to issuance of the injunction. It bears noting, however, that a conditional injunction was appropriate to this litigation. It is true that after the former franchise expired the company no longer had permission from the City to use the streets. Cf. Village of Lapwai v. Alligier, 69 Idaho 397, 402, 207 P.2d 1025. It is also true that the trial court did not have the power to grant the company a new franchise; it was the responsibility of the City, under its charter to determine whether the company should receive a new franchise. Sunset Tel. & Tel. Co. v. Pasadena, 161 Cal. 265, 285, 118 P. 796. Nevertheless, the question to be determined in the previous trial and appeal was whether the company needed a new franchise. The company conducted that litigation in good faith and was partly successful. Aside from the rights of the company, it was clearly in the public interest that the trial court withhold issuance of an injunction and thus assure continued telephone service pending outcome of the appeal. See, State ex inf. McKittrick, ex rel. City of Lebanon v. Missouri Standard Telephone Co., 337 Mo. 642, 656, 85 S.W. 2d 613. Accordingly, the trial court in the exercise of its discretion as a court of equity could delay the taking effect of its injunction and allow the company to use the streets until it was finally determined whether it was required to obtain a franchise. The requirement that the company continue to pay the amount due under its prior obligation adequately protected the City in the interim.

[11] Moreover, even if the action of the trial court were viewed as a stay of an injunction that had previously issued, the terms of the judgment do not support the City's contention. The judgment provided that the company should pay "that sum of

money determined by applying the rate at which compensation for the franchise and privilege of such use was fixed by Ordinance No. 5681 of said City." It did not provide that payment should be computed according to the previous practice of the company; it called for payment according to the company's actual obligation as fixed by the terms of the expired franchise. The terms of the judgment are therefore controlling, whether or not the company misconceived its obligation under the ordinance during the years the franchise was in effect. The judgment did not give either the City or the company more or less rights in the interim than either had had under the expired franchise.

[12, 13] The City contends that the trial court did not have power to stay its injunction unless it required the company to continue to use the same method of accounting that had been used in computing payments under the expired franchise. A trial court is not so limited. It may protect the parties on appeal by providing that its injunction or order is stayed, under conditions that protect the appellant by preserving the subject matter of the appeal pending outcome thereof and at the same time protect the respondent by saving to it the benefits of the judgment in the event of an affirmance. Tulare Irrigation Dist. v. Superior Court, 197 Cal. 649, 669, 242 P. 725; see, also, City of Pasadena v. Superior Court, 157 Cal. 781, 795, 109 P. 620. The terms of the expired franchise were an adequate standard for determination of the amount that the company should pay the City.

[14] The determinative question on this appeal is thus the correct interpretation of the ordinance. The ordinance fixed the amount that the company should pay the City at two per cent of the gross receipts "arising from the use" of the franchise, following the language of section three of the Broughton Act. The controlling question is, what part of the company's gross receipts should be taken as arising from the use of the franchise, *i. e.* from the use of the public streets within the Old City? To answer this question we must (1) determine how the company's gross receipts are to be ascertained; (2) apportion those receipts between the company's producing plant, which is entirely on private property, and its distributing system, which is partly on private property and partly on public property; and (3) apportion the receipts attributable to the distributing system between private and public rights of way.[4]

(1) Gross receipts of the company from its telephone operations arise from two sources: its exchange service and its intrastate[5] toll charges. We will first consider the problem of determining the amount of gross receipts from exchange service. The amount collected from the extended area during the period in question was $27,724,579.76, and from the Del Mar exchange $116,896.63. The amount collected from stations and equipment within the Old City from the two local calling areas was $18,701,456. The trial court and the company agree that the total receipts from the exchange area must be apportioned between the Old City and the remainder of the local calling area; they differ, however, on the method of allocation to be used. The trial court made its apportionment by using the ratio of the mileage of the distributing system on public streets in the extended area to the mileage on public property on the Old City part thereof. The company used the ratio of the amount invested in plant within the two areas. The City, using the same method as did the company during the term of the expired franchise, contends that an apportionment of the entire receipts from the local calling area is unnecessary, and that the amount of gross receipts upon which to apply the Broughton Act is the amount actually collected within the franchise area, the Old City.

[15] We have concluded that the City's contention cannot be sustained. Receipts

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[4] The data used in the following discussion is from the company records, kept pursuant to a uniform system of accounting prescribed by the California Public Utilities Commission, the Federal Communications Commission, and regulatory bodies of the several states.

[5] The Broughton Act does not apply to interstate business of the company. Broughton Act, § 1; now Public Utilities Code, § 6001.

from exchange service represent a charge to the subscriber for use of all the company's property within the local area, since for a flat monthly charge he can call any subscriber therein. The amount collected by the company from any particular subscriber is not attributable solely to that subscriber's telephone; it is attributable to all of the equipment within the calling area. Receipts collected within the Old City are partly earned by the company's facilities in the remainder of the calling area and the converse is equally true.

It is therefore necessary to determine the Old City's share of the total amounts received from exchange service. If conditions throughout the area were uniform, an apportionment on the basis of mileage would be satisfactory. In the present case, however, an apportionment based on relative investment more appropriately measures the gross receipts attributable to the various parts of the local calling area, for there is more outside plant per mile of right of way in the heavily congested urban area comprising the Old City. It is reasonable to assume that the franchise area contributes more to the production of revenue per mile of right-of-way than does the more remote non-franchise area.

[16] The next problem is to determine the amount of intrastate toll revenue attributable to the Old City. The trial court did not take toll revenues into account. The company, however, uses the public streets of the Old City in earning its revenue from toll calls and some of that revenue thus necessarily arises "from the use, operation, or possession" of the franchise and comes within the Broughton Act. The City, following the method used by the company during the expired franchise, computes the amount of toll revenue attributable to gross receipts by ascertaining the amount of toll revenue originating within the Old City and allocating twenty per cent thereof to the Old City. No explanation is made to justify the use of the figure of twenty per cent. The company, on the other hand, begins its computation with its total toll receipts in the state. It determines the Old City's share thereof by using the ratio of the total investment of the company in toll plant within the state to its investment in toll plant within the Old City.

[17] Clearly, it would be impossible to compute with complete accuracy the Old City's share of each of the thousands of toll calls originating or terminating therein, for a separate calculation would have to be made for each call. An approximation must be made and, in our opinion, the company's method is practicable and allocates to the Old City its fair share of toll receipts.

[18] (2) The next step in determining the amount of gross receipts arising from the use of the franchise is to apportion the gross receipts arising within the Old City between the company's producing plant and its distributing system. The City does not make this apportionment in its computation. As pointed out in the Tulare case, however, in applying the Broughton Act it is necessary to determine "what proportion of the total annual gross receipts of the public utility should be justly accredited to its distributing system over various rights of way, as distinguished from its power plants or other producing agencies." County of Tulare v. City of Dinuba, supra, 188 Cal. 664, 681, 206 P. 983, 989.

The City contends that the Tulare case is not applicable here, on the ground that it involved an electric company that manufactured its product in one locality and distributed it in another, and that both factors contribute to the total gross receipts, whereas the receipts of a telephone company arise solely from its communication service and no revenues could be obtained without use of the city streets. The proposed distinction is untenable. A person buys electric service just as he buys telephone service. In the one case electric power supplies heat, light, and energy, in the other spoken words are converted into electric impulses and back again to spoken words. The power house of an electric company and the central plant of a telephone company are essential to the operations of each; neither would have any gross receipts if it had only its central plant and no other means of reaching its customers than by use of the public streets.

It is therefore apparent that the apportionment between the distributing system and the remainder of the company's plant must be made in the present case unless we overrule the Tulare case and disapprove the Ocean Park and Monrovia cases. We have re-examined those cases and have concluded that they were correctly decided.

[19, 20] The payment required under the Broughton Act is based on the gross receipts of the utility "arising from its use, operation or possession" of the franchise. It is a familiar concept in public utility legislation and regulation that the gross receipts of a utility arise from all of its operative property and not exclusively from any one part thereof. See Southern Cal. Tel. Co. v. Los Angeles County, 212 Cal. 121, 129, 298 P. 9; Third & Broadway Bldg. Co. v. Los Angeles County, 220 Cal. 660, 663, 32 P.2d 377; New Jersey Bell Tel. Co. v. State Tax Board, 280 U.S. 338, 348–349, 50 S.Ct. 111, 74 L.Ed. 463. Thus, in the present case the franchise, in common with all other operative property of the company, contributes to its total gross receipts. The words of the Broughton Act, referring to receipts arising from use of the franchise rather than to receipts arising from the use of all of the property, indicate that an apportionment was to be made. The City would compute the amount due under the Act as if it read, "the grantee shall pay the proportion of two per cent of its *entire* gross receipts attributable to the franchise area which the number of miles covered by the franchise granted bears to the total number of miles in the franchise area." The Act does not admit of that construction.

[21] It is necessary, therefore, to determine how to apportion gross receipts between the distributing system and the other operative property of the company. In our opinion, a reasonable method is to allocate gross receipts by the ratio that the company's investment in its distributing system in the area bears to its total investment in plant therein. Each category of the company's property contributes to its total gross receipts. As in rate making, it is reasonable to assume that there is a relationship between the value of the property and the amount that it earns. Moreover, no other method of apportionment is feasible, since invested value is the only common factor between the distributing system and the other operative property that fairly reflects the relative contribution of each category of property to the company's earnings. The City contends that an allocation could be made on a linear basis but, obviously, that method is not feasible, for powerhouses, office buildings, and the like cannot be measured by the mile.

(3) The final step in determining the amount of gross receipts arising from the company's use of the public streets within the Old City is to apportion the gross receipts attributable to the distributing system between the parts thereof on public and private rights of way.

In the Tulare case, the court stated that ordinarily the apportionment should be made according to the ratio that the mileage of the distributing system on public rights of way bore to the entire mileage of the distributing system within the area. The court pointed out, however, that "There may be instances where the extent or value of the distributing system over a given right of way may indicate its earning capacity * * *. In such cases these conditions should be taken into account." County of Tulare v. City of Dinuba, supra, 188 Cal. 664, 682, 206 P. 983, 990. An apportionment based on relative investment in the various parts of the distributing system was upheld on a subsequent appeal in the Tulare litigation. County of Tulare v. City of Dinuba, 87 Cal.App. 744, 748, 263 P. 249.

[22] As previously pointed out, in apportioning gross receipts between the Old City and the remainder of the extended area and the Del Mar exchange, a ratio based on relative investment should be used, so that the Old City will be allocated its fair share of gross receipts. As between different parts of the distributing system within the Old City, a ratio based on relative investment would likewise fairly apportion receipts between public and private rights of way.

In the light of the foregoing discussion we consider the interpretation of the 1946 judgment by the City, the trial court, and the company.

The City's method of computation: The City contends that if the amount due under the 1946 judgment is to be governed by the ordinance, the company owes it $333,541.14. The City arrives at that figure as follows: The total mileage of the distributing system in the Old City is 562.44 miles, of which 446.297 miles, or 79.35 per cent, is on public property. The gross receipts of the company collected from stations and equipment within the Old City are $21,017,085.16. Those receipts are apportioned between public and private parts of the distributing system by allocating to the former 79.35 per cent of the gross receipts, or $16,677,057.07. Two per cent of that amount is $333,541.14.

The City arrives at $21,017,085.16 as the company's gross receipts by taking the exchange service receipts actually collected by the company from stations and equipment within the Old City and adding thereto twenty per cent of toll service receipts from calls originating within the Old City. As previously pointed out, gross receipts cannot be computed in this manner. The City's method is also erroneous in that it attributes all of the receipts to the distributing system and does not allocate any receipts to the use of the company's other property. Finally, the City has erred in apportioning receipts between the public and private parts of the company's distributing system by use of a mileage ratio instead of a relative investment ratio.

The trial court's method of computation: The trial court concluded that the amount due under the 1946 judgment was $239,337.23. It arrived at that figure as follows: The mileage of the distributing system on public streets in the San Diego extended area is 1,026.214[6] miles, of which 442.882[7] miles, or 43.15 per cent is on public property in the Old City. The gross receipts of the company in the extended area during the period in question were $27,724,579.76. 43.15 per cent of that amount, or $11,963,156.17, is apportioned to use of the public streets in the franchise area. Two per cent of that amount is $239,263.12. The same fomula applied to that part of the Old City within the Del Mar exchange gives $74.11, which added to the preceding figure makes a total of $239,337.23. The trial court did not take toll receipts into account.

The trial court thus made the same error as did the City in failing to allocate any of the company's receipts to its powerhouses, office buildings, and other property not subject to any franchise charge. The trial court disregarded toll calls, although the company used the public streets in obtaining toll revenue. The trial court used a mileage ratio in making its apportionment between total receipts in the extended area and the receipts attributable to the Old City, although, as we have seen, a ratio based on relative investment is appropriate to the present case. Finally, the trial court did not take into account the fact that part of the company's distribution system is on private rights of way. Had it done so, its ratio would have been the ratio of outside plant on public streets in the Old City, 442.882 miles, to outside plant on public and private rights of way in the extended area, 1,409.573 miles, or 31.42 per cent.

The company's method of computation: The company contends that the amount due under the 1946 judgment is $158,670.03. It arrives at that figure as follows: The total investment in plant in the San Diego extended area (excluding the part allocated to toll use) is $26,916,709, of which $5,238,777, or 19.46 per cent, is invested in outside plant on public streets in the Old City. For a sample period, January 1 to August 31, 1949, the gross receipts from the extended area were $5,076,394.89. 19.46 per cent of that amount is $987,866.45, the amount of gross receipts attributable to the use of the streets in the Old City. The same formula applied to the Del Mar exchange gives $57.78. The company applies the same method to toll receipts from the entire

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[6] According to the company, the correct figure is 1,029.314 miles. If that mileage were used, the amount due under the trial court's method would be $238,672.08.

[7] The City's figure of 446.297 miles in the Old City is the total of 442.882 miles in the extended area, 0.795 miles in the Del Mar exchange, and 2.62 miles attributed to toll plant.

state, which results in $177,973.65 attributable to the Old City. The total gross receipts from the three sources of gross receipts attributable to the use of streets in the Old City is $1,165,897.88. Two per cent of that amount is $23,317.96, the amount due for 1949. Applying the same method to the other years results in the company's total of $158,670.03.

[23] Under the views expressed in this opinion, the company applied correct legal principles in its computation. It used a ratio based on relative investment in each of the three steps necessary to determine the amount of gross receipts arising from use of the public streets within the Old City: (1) ascertaining the Old City's share of receipts for local service within the extended area and the Del Mar exchange, and of intrastate toll charges; (2) ascertaining the distributing system's share of the amount attributable to the Old City; and (3) ascertaining the franchise's share of the amount attributable to the distributing system.

The company has requested that this court direct the trial court to enter judgment in its favor. Some of the data used by the company in arriving at its computation, however, have not been found to be true by the trial court. We have used these data in this opinion to illustrate application of the legal principles herein discussed but, of course, we cannot deny the City an opportunity to challenge the accuracy and completeness of the Company's figures in the trial court.

The judgment is reversed for further proceedings in conformity with the views expressed in this opinion. The City shall bear the costs of this appeal.

GIBSON, C. J., and SHENK, EDMONDS, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice (concurring and dissenting).

I concur in the judgment of reversal, but do not agree with the reasoning advanced by the majority nor do I feel that a judgment should be rendered in conformity with such views.

It is my considered opinion that the majority view is a departure from the rule established in the Dinuba case, County of Tulare v. City of Dinuba, 188 Cal. 664, 206 P. 983, in that it seeks to employ the capital investment method of apportionment beyond its limitations.

The same general principles which I enunciated in my dissent in the Southern Counties Gas case, County of Los Angeles v. Southern Counties Gas Co., Cal.Sup., 266 P.2d 27 should be applicable to the instant case, since in both cases the municipality granting the franchise is entitled to 2% of the gross annual receipts arising from the "use, operation, or possession" of the franchise. There are however a few problems in regard to telephone revenues which are not present in cases involving gas and electric companies. One such problem has to do with the apportionment of toll receipts. It is true that part of the tolls collected in an area are for communication services rendered in other areas, where the message is transmitted and received, however inasmuch as messages are also sent into and received in the local area without any revenues being collected there it would seem that the factors would balance each other out. Thus, by attributing all local tolls collected in an area to the gross receipts of that area, we are giving credit for some services rendered elsewhere; but this is counterbalanced by the fact that an equal proportion of toll calls are probably transmitted or received by the local area without any increase to its gross receipts.

In the case at bar the gross receipts (including toll receipts) collected by the telephone company within the extended area should be used as the starting point in our formula. These gross receipts should be apportioned between the distribution system and other systems (such as production facilities) so as to ascertain the proportion of gross receipts attributable to the entire distribution system. These gross receipts of the entire distribution system should then be apportioned between the public and private franchises on a mileage basis. Since 43.15% of the mileage in the extended area is on public property within the Old City, 43.15% of the entire distribution receipts should be allocated to the fund from which the 2% is to be taken.

For these reasons, and those given in my dissent in the Southern Counties Gas case, 266 P.2d 27, I feel it would be a grave error to follow the formula established by the majority. Such a formula is not consistent with the Dinuba case nor with the best interests of the general public.

Rehearing denied; CARTER, J., dissenting.

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42 Cal.2d 129

LOS ANGELES COUNTY

v.

SOUTHERN COUNTIES GAS CO. OF CAL.

L. A. 22570.

Supreme Court of California.
In Bank.
Jan. 22, 1954.
Rehearing Denied Feb. 17, 1954.

Declaratory judgment action for determination of amount due county from gas company under Broughton Act entitling county to 2 per cent of gas company's gross receipts arising from use, operation or possession of franchise. The Superior Court, Los Angeles County, Paul Nourse, J., rendered judgment from which the county appealed. The Supreme Court, Traynor, J., held, inter alia, that the two per cent charge was to be based upon gross receipts after deduction of capital invested in distribution facilities located on private rights of way in accordance with private way mileage and public way mileage and other operative property.

Affirmed.

Carter, J., dissented.

Prior opinion 259 P.2d 665.

1. Gas 🔑7(1)

For purpose of deducting gas company's gross receipts attributable to operative property from total gross receipts in order to determine amount due municipality under Broughton Act entitling municipality to 2 per cent of gross receipts arising out of use, operation or possession of franchise, gas company's "operative property" consists of various kinds of real and personal property, including land leased or owned, compressor stations and equipment, meter stations and equipment, regulator stations and equipment, gas production equipment, pipelines, valves, general office buildings, warehouses, transportation equipment, laboratory equipment, etc., and pipelines and appurtenances on public and private rights of way are but a component part of company's overall system. Public Utilities Code, §§ 6001–6017.

See publication Words and Phrases, for other judicial constructions and definitions of "Operative Property".

2. Gas 🔑7(1)

Under Broughton Act, entitling municipality to 2 per cent of gas company's gross receipts arising out of use, operation or possession of franchise, gross receipts arising from operative property other than franchise must be excluded from base to which 2 per cent charge applies. Public Utilities Code, §§ 6001–6017.

3. Gas 🔑7(1)

For purpose of determining compensation due municipality under Broughton Act, entitling municipality to 2 per cent of gas company's gross receipts arising out of use, operation or possession of franchise, gross receipts attributable to operative property must be deducted from total gross receipts and the apportionment of total gross receipts between operative property and distribution system must be based upon the ratio between investment values. Public Utilities Code, §§ 6001–6017.

4. Gas 🔑7(1)

Under Broughton Act, entitling municipality to 2 per cent of gas company's gross receipts arising out of use, operation or possession of franchise, "gross receipts arising from use of franchises" are the gross receipts attributable to that part of the property using public rights of way pursuant to the franchises. Public Utilities Code, §§ 6001–6017.

See publication Words and Phrases, for other judicial constructions and definitions of "Gross Receipts Arising from Use of Franchises".

5. Gas ⟹7(1)

Under Broughton Act, entitling municipality to 2 per cent of gas company's gross receipts arising out of use, operation or possession of franchise to use public right of way, gross receipts attributable to various rights of way are apportioned between public and private rights of way according to mileage, but such method of apportionment is not exclusive. Public Utilities Code, §§ 6001–6017.

6. Gas ⟹7(1)

Under Broughton Act, entitling municipality to 2 per cent of gas company's gross receipts arising out of use, operation or possession of franchise to use public way, gross receipts from parts of distribution system that are not subject to franchise charges are not subject to the 2 per cent charge. Public Utilities Code, §§ 6001–6017.

7. Gas ⟹7(1)

Under Broughton Act, entitling municipality to 2 per cent of gas company's gross receipts arising out of use, operation or possession of franchise to use public streets, gross receipts attributable to private rights of way and gross receipts attributable to private property not located on rights of way are separately excluded from base to which 2 per cent charge applies, without duplication or overlapping. Public Utilities Code, §§ 6001–6017.

8. Gas ⟹7(1)

The Broughton Act, entitling municipality to 2 per cent of gas company's gross receipts arising out of use, operation or possession of franchise, allows utility to retain not only 98 per cent but 100 per cent of its gross receipts from its private property not subject to franchise charges as well as 98 per cent of its gross receipts arising from use of the franchises, and provides for a 2 per cent charge not of total gross receipts but only of gross receipts arising from use of the franchises that is exacted as a payment for the use of such franchises. Public Utilities Code, §§ 6001–6017.

9. Gas ⟹7(1)

Under Broughton Act, entitling county to 2 per cent of gas company's gross receipts arising from use, operation or possession of franchise to lay pipes under county highways, 2 per cent charge was to be based upon gross receipts after deduction of capital invested in distribution facilities located on private rights of way in accordance with private way mileage and public way mileage and other operative property. Public Utilities Code, §§ 6001–6017.

Harold W. Kennedy, County Counsel, A. Curtis Smith and Gerald G. Kelly, Asst. County Counsel, and John H. Larson, Deputy County Counsel, Los Angeles, for appellant.

Le Roy M. Edwards, Oscar C. Sattinger and Frank P. Doherty, Los Angeles, for respondent.

Louis W. Myers and O'Melveny & Myers, Los Angeles, as amici curiae, on behalf of respondent.

TRAYNOR, Justice.

This appeal involves the same basic problems as those presented in City of San Diego v. Southern Cal. Tel. Co., Cal.Sup., 266 P.2d 14.

Defendant is a public utility engaged in purchasing and selling illuminating gas. It produces a small amount of the gas it sells. Its system is an integrated one and extends through six counties, including the County of Los Angeles. It holds franchises granted by these counties and many cities therein. By this action for declaratory relief and an accounting, plaintiff seeks a judgment establishing the basis on which defendant must compute the amount due for four franchises granted it by plaintiff to lay its pipes in the public roads, streets, and highways in the county. Each franchise was granted by a separate ordinance pursuant to the Broughton Act, Stats.1905, p. 777, now Public Utilities Code §§ 6001–6017. Section 3 of that act fixes the amount that must be paid for the franchises at "two per cent (2%) of the gross annual receipts of the person, partnership or corporation to whom the franchise is awarded, arising from its use, operation or possession." Each ordinance contains substantially the same provision.[1] Defendant filed statements and made payments for the years 1936–1939, which plaintiff claims were incorrect. Although this case is based on statements and figures for 1939, it will control all payments due from 1936 to the termination of each franchise. There is no dispute as to the figures in the accounting processes or what they represent and no dispute as to the end result for the other years once it is determined which of the accounting methods is correct. The trial court made findings and entered judgment sustaining defendant's computations and return of the amount due. Plaintiff appeals, contending that the judgment is not in accord with section 3 of the Broughton Act as construed by this court in County of Tulare v. City of Dinuba, 1922, 188 Cal. 664, 206 P. 983.

Defendant made the following computation of the amount due plaintiff for 1939, the year selected by the parties for presenting the issues:

From its total capital, $31,216,087.13, defendant deducted its intangibles, $152,351.98, leaving $31,063,735.15 as its total investment in operative property, i. e., property used and useful in purchasing, producing, and distributing gas. It then segregated the amount invested in property not on rights of way, public or private, $9,955,707.06, and the amount invested in facilities on all rights of way, public and private, $21,108,028.09. Defendant then divided its total gross receipts, $9,620,838.45 by its total investment in operative property, $31,063,735.15, which gave $0.309713 of gross receipts per dollar invested. The amount invested in operative property on all rights of way, public and private, $21,108,028.09, was then multiplied by $0.309713, which gave a total of $6,537,430.70 as the gross receipts arising from the use of rights of way. Defendant then prorated this amount between public and private rights of way on a mileage basis. Defendant uses 3,249.225 miles of rights of way; 2,969.673 miles thereof, or 91.3963% are public rights of way. The amount of gross receipts attributable to all rights of way, $6,537,430.70 was then multiplied by 91.3963%, the percentage of miles of right of way subject to franchises, which gave $5,974,969.77 as the amount of gross receipts attributable to such rights of way. Of the 2,969.673 miles of such rights of way, 456.829 miles or 15.3831% are public rights of way in Los Angeles County. Multiplying $5,974,969.77 by 15.3831% gave $919,135.57 as the gross receipts arising from the use of the franchises granted by plaintiff. Two per cent of that amount is $18,382.60, the charge for 1939 for the use of such franchises.

[1–5] The foregoing computations were based on the following principles, which defendant maintains, and which we agree, see City of San Diego v. Southern Cal. Tel. Co., ante, are in accord with the principles enunciated or implicit in the opinion of this court in the Tulare case:

1. Defendant's gross receipts arise from all of its operative property, whether or not such property is located on rights of way, public or private, or on land owned or leased by it or on land owned by others.

2. Defendant's operative property consists of various kinds of real and personal property, including land leased or owned, compressor stations and equipment, meter stations and equipment, regulator stations and equipment, gas production equipment, pipelines, valves, general office buildings, warehouses, transportation equipment, laboratory equipment, etc. Pipelines and appurtenances on public and private rights of way are but a component part of defendant's overall system.

3. Since the 2% charge applies only to gross receipts arising from the use of the

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[1] Ordinance 500 (new series) is typical. It provides: "* * * the said grantee and his or its successors or assigns shall, during the life of said franchise, pay to the county of Los Angeles * * * two per cent (2%) of the gross annual receipts of such grantee, and his or its successors or assigns, arising from the use, operation or possession of said franchise."

franchises, gross receipts arising from operative property other than franchises must be excluded from the base to which the 2% charge applies.

4. As in rate making there is a relationship between the value of the property and the amount it earns; the dollars invested in the property produce the dollars that form the gross receipts. Since every dollar invested in operative property earns an equal part of the gross receipts, gross receipts are attributed to a particular item or class of operative property according to the dollars invested in it. Moreover, the factors in the proration must be measured in the same terms, and since the gross receipts are measured in dollars, the property giving rise to them must be measured in dollars. City of San Diego v. Southern Cal. Tel. Co., 266 P.2d 24. Although this court's opinion in the Tulare case did not specify how the gross receipts were to be apportioned between the property on various rights of way and other property, the method here described is the only feasible method of making that apportionment and was used on the retrial of the Tulare case, 87 Cal.App. 744, 745–746, 263 P. 249. It is fair, practical, readily understood, and easily verified.

5. Gross receipts that arise from the use of the franchises are the gross receipts attributable to that part of the property using the public rights of way pursuant to the franchises.

6. Gross receipts attributable to the various rights of way are apportioned between public and private rights of way according to mileage, "not necessarily as an exclusive method", but as a practicable one, as suggested in the Tulare case. 188 Cal. 664, 681, 206 P. 983, 990. Defendant could have made this apportionment according to the amounts invested in rights of way as in (4) above, City of San Diego v. Southern Cal. Tel. Co., 266 P.2d 24, but plaintiff raises no question as to this method of apportioning gross receipts between rights of way and in fact adopts it in its own computations.

Plaintiff contends that in arriving at the base to which the 2% charge applies, defendant and the trial court erred in deducting all gross receipts attributable to (1) its office and other general facilities; (2) the part of its distribution system on private property owned by consumers and not under lease by defendant; (3) the part of its distribution system on private property owned or leased by defendant. Since this contention would not permit the allocation of any of defendant's gross receipts to the foregoing classes of property, it necessarily involves a repudiation of the principle that defendant's gross receipts arise from all of its operative property and that gross receipts arising from all operative property other than franchises must be excluded from the base on which the 2% charge is computed.

Plaintiff would justify this repudiation on the grounds that the Tulare case decided that the total gross receipts of a public utility can only be divided into two categories (1) that which is credited to its distribution system and (2) that which is credited to its production system; that the gross receipts attributable to its distribution system constitutes the fund from which the 2% charge shall be ascertained; that the only gross receipts of defendant from its operative property that can be attributed to its production system and therefore excluded from the fund from which the 2% charge is ascertained is the $134,111.96 investment in facilities for manufacturing the small amount of gas it produces and does not buy from others; and that the only gross receipts of defendant attributable to its distribution system that are not subject to the 2% charge are the gross receipts attributable to the use of private rights of way. In support of this contention, plaintiff cites the following language from the Tulare case:

"The gross receipts of this defendant accrue from two distinct agencies. One is the generating plants or power houses of the company, located in three separate counties; the other is the distributing system * * *. The first step in this accounting should be to determine, as a question of fact, what proportion of the total annual gross receipts of the public utility should be justly accredited to its distribution system over various rights of way, as distinguished from its power plants or other producing agencies." 188 Cal. 673, 681, 206 P. 983, 986.

This language, however, must be read in the light of the conclusions this court had reached as a basis for the steps in the accounting. Among these conclusions were: "The corporation's gross receipts, to refer to the language of the act *arise* from 'the use, operation, or possession,' not alone of these franchises over the streets and highways, but likewise from the use, operation, or possession of the power houses and private rights of way. The two last named are not subject to any franchise charges, and the county or municipality is not entitled under the law to any part of the gross receipts attributable to these privately owned parts of the system." 188 Cal. 673–674, 206 P. 983, 986. It should be noted that the reason for the conclusion that the county or municipality was not entitled to any part of the gross receipts attributable to power houses and private rights of way, was that the company's gross receipts arise, not alone from the "use * * *" of the franchise, but from the use of power houses and private rights of way, which are not subject to any franchise charges. It is clear from the opinion in the Tulare case that the principle that this court there enunciated was that the county was not entitled to any part of the gross receipts from utility property not subject to franchise charges. The gross receipts attributable to generating plants, power houses, and private rights of way were excluded, not because the court regarded them as the only source of gross receipts other than the use of franchises, but because they were privately owned parts of the system not subject to any franchise charges. See also City of San Diego v. Southern Cal. Tel. Co., ante; City of Monrovia v. Southern Counties Gas Co., 111 Cal.App. 659, 296 P. 117; Ocean Park Pier Amusement Co. v. Santa Monica, 40 Cal.App.2d 76, 104 P.2d 668, 879. Since that reason applies with equal force to all operative property of the company not subject to any franchise charges, it cannot reasonably be implied that this court meant that only operative property of the kind mentioned contributes to gross receipts. That such an implication is absurd is apparent from the statement, "The absurdity of the position that any integral part of an electric distributing system like this is entitled to credit for the whole of the earnings from deliveries and sales in a given county or municipality, when a large part of such service is over parts of the system not subject to such franchise permit, may be shown by various illustrations." 188 Cal. 674, 206 P. 983, 987. Operative property other than generating plants, power houses, and the distributing system consisting of poles and wires, are just as much an integral part of an electric or gas system as generating plants, power houses and private rights of way. Office buildings to house engineers and executive and administrative staff, warehouses, transportation equipment, communication equipment, meter devices, laboratory equipment and other facilities are all essential to an electric or gas company's operations and all contribute to its gross receipts. If it is absurd to say that any integral part of such a system is entitled to credit for the whole of its gross receipts, it is equally absurd to say that any number less than the whole is so entitled.

[6] Plaintiff's contention is based on the erroneous conclusion that in the Tulare case this court regarded all property of a public utility other than generating plants and power houses as part of its distributing system. This court was there concerned, not with labels or a division of the property into producing system and distributing system, but with property that was and property that was not subject to any franchise charge. The arbitrary classification of land, office buildings, warehouses, garages, construction equipment, automotive equipment, laboratory and other equipment as entirely part of the distribution system rather than as part of the production system or as part of both production and distribution systems or as "other [revenue] producing agencies," 188 Cal. 664, 681, 206 P. 983, 989, would not only be unreasonable but pointless. Even if all of the property other than generating plants and power houses could reasonably be regarded as entirely part of the utility's distribution sys-

tem, it would not follow that gross receipts attributable thereto should be included in the fund to which the 2% charge applies. Thus, property in private rights of way is admittedly part of the distribution system. Yet this court in the Tulare case made it abundantly clear that gross receipts attributable to such property were not subject to the 2% charge, since such property was "not subject to any franchise charges." For the same reason gross receipts from any other parts of the distribution system that are not subject to franchise charges are not subject to the 2% charge.

[7] Plaintiff does not quarrel with the capital investment method as such for allocating gross receipts to a particular item or class of operative property in it. In fact it uses that method itself in its own apportionment between production and distribution. Plaintiff contends that although this method is "plausible" and "entirely correct" there is no occasion to use it as defendant uses it and that unless it is limited to the use plaintiff makes of it to apportion gross receipts between production and distribution, defendant will get a double deduction for the same purpose: (1) the deduction taken by the proration on a mileage basis for gross receipts attributable to private rights of way and (2) the deduction taken, before the proration on a mileage basis, for operative property not located on rights of way. This contention assumes the validity of the distinction, discussed at length above, that plaintiff would make between production and distribution and the conclusions it would draw therefrom, and is simply another way of asserting that only gross receipts attributable to generating plants and private rights of way can be excluded from the base to which the 2% charge applies. There is no double deduction for the same purpose. Gross receipts attributable to private rights of way and gross receipts attributable to private property not located on rights of way are separately excluded from the base to which the 2% charge applies, without duplication or overlapping, and for the same reason—they arise from property not subject to any franchise charges.

[8, 9] Plaintiff would also justify its repudiation of the principle that defendant's gross receipts arise from all of its operative property and that gross receipts arising from all operative property other than franchises must be excluded from the base on which the 2% charge is computed, on the following theory: The Broughton Act allows the utility to retain 98% of its total gross receipts as the percentage applicable to its private property and requires it to pay to cities and counties 2% of its gross receipts (less those attributable to private rights of way) for the use of public property; if it were allowed to take any more of its gross receipts as applicable to its private property, it would get a double deduction: (1) the amount so taken, (2) the 98% it is allowed to retain. This theory ignores the limitation in the Broughton Act that the 2% charge applies, not to defendant's total gross receipts, but only to its gross receipts "arising from the use" of the franchise. Thus, by its express terms the Broughton Act allows the utility to retain not only 98% but 100% of its gross receipts from its private property not subject to franchise charges as well as 98% of its gross receipts arising from the use of the franchises. It is not 2% of its total gross receipts but only 2% of its gross receipts "arising from the use" of the franchises that is exacted as a payment for the use of such franchises. The foregoing theory of plaintiff's is simply a slight modification, purportedly made in obedience to the Tulare case, of another contention suggested by it that the Tulare case should be disregarded and that there should be only a proration of the entire gross receipts between rights of way on a mileage basis.[2] As

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[2] In advancing this contention plaintiff makes the specious argument that gross receipts means all receipts without deduction and that there is no more justification for deducting a cent from gross receipts than there would be to deduct manufacturing costs from the retail price of gas appliances in computing a sales tax based on gross receipts. There is no deduction here of manufacturing costs, cost of gas, costs of operation or other costs. Gross receipts that are attributed

we have pointed out at some length above, and in City of San Diego v. Southern California Telephone Co., 266 P.2d 24, that is not what the statute provides. There is no more justification for prorating the total gross receipts between rights of way than there would be for attributing the total gross receipts to each franchise used and requiring the utility to pay 2% of its total gross receipts to each of the numerous cities and counties granting the franchises.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

It appears to me that the Gas Company formula, accepted by the majority, attempts to deduct every possible dollar of invested capital from the distribution system before they compute the value of the distribution system attributable to either public or private ways. In this manner they seek to base the county's share on little more than *pipe in the ground.* This is a complete misconception of the Broughton Act and its interpretation by this court in the Dinuba case. County of Tulare v. City of Dinuba, 188 Cal. 664, 206 P. 983.

The Broughton Act provides that the utility "shall during the life of the franchise pay to the county or municipality two percent (2%) of the gross annual receipts of the grantee arising from the use, operation, or possession of the franchise." § 6006. In giving an interpretation to the meaning of these words this court, in the Dinuba case, supra, stated, 188 Cal. at page 673, 206 P. at page 986, that the corporation's gross receipts "*arise* from 'the use, operation, or possession,' not alone of these franchises over the streets and highways, but likewise from the use, operation, or possession of the power houses and private rights of way. The two last named are not subject to any franchise charges, and the county or municipality is not entitled under the law to any part of the gross receipts attributable to these privately owned parts of the system." This court then went on to say, 188 Cal. at page 681, 206 P. at page 989, that "The first step in this accounting should be to determine, as a question of fact, what proportion of the total annual gross receipts of the public utility should be justly *accredited to its distributing system over various rights of way, as distinguished from its power plants or other producing agencies.* This *will establish the fund* from which the percentage of earnings 'arising from the use, operation, or possession' of the various franchise easements shall be ascertained.

"The percentage of this fund, to be apportioned to the respective public franchises, will not include the proportion of such gross receipts of the distributing system as are attributable to the use of private rights of way occupied by the utility, as such part of the system is not subject to franchise charge." (Emphasis added.)

The clear import of this language is that we are *first* to deduct from gross revenue that amount attributable to the production system. This leaves us with the amount of gross revenue attributable to the *entire* distribution system. We then must determine what proportion of these earnings of the entire distribution system to attribute to the distribution system on public ways as contrasted to the distribution system located on private ways. Such was clearly this court's view in the Dinuba case when it said, 188 Cal. at page 676, 206 P. at page 987: "The reasonable construction of the language used, is that each county or municipality is entitled to its percentage of the gross earnings arising from the use of its highway, in the proportion that the receipts arising

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to the use of franchises and to other operative property are still gross receipts. There is no deduction from gross receipts but a proration of gross receipts between property that is subject to franchise charges and property that is not, just as there is no deduction from gross receipts in plaintiff's proration of gross receipts between rights of way. Plaintiff's argument would necessarily lead to the conclusion that there can be no proration of gross receipts, even between rights of way, and that for every franchise granted by each county and city, defendant must pay 2% of its total gross receipts.

from the use of such highways bears to the receipts attributable to all the rights of way of the entire system." In determining what share of the distribution earnings to attribute to the public ways and what share to the private ways this court felt that the relative mileage of each was the most appropriate basis. This was illustrated by the following statement in 188 Cal. on page 681, 206 P. on page 990: "We have adopted this appropriation to the various rights of way, according to mileage, not necessarily as an exclusive method of distribution of the gross receipts, but *as a practicable one, where the contribution of the various franchise easements* to the *gross earnings cannot be otherwise determined.* * * * There may be instances where the extent or value of the distributing system over a given right of way may indicate its earning capacity; or where the service of lateral lines may be differentiated from that of main conduits in the value of their use of the easements. In such cases these conditions should be taken into account. But where, as will often happen, contribution to the earnings of the various rights of way is general and indistinguishable, we can see no reason why the proportionate mileage basis should not be used in apportioning the statutory percentage of gross receipts." (Emphasis added.)

Thus we see that once we have determined what proportion of the gross receipts is attributable to the *entire* distribution system, we must find some method of determining what proportion is attributable to private ways and what portion is attributable to public ways. The most practical method of so doing is by use of the relative mileage basis. An example of its application was given by this court in the Dinuba case, 188 Cal. at page 676, 206 P. at page 987, where it said: "It may be assumed that the distributing system covers 600 miles of easements. *The proportion of the gross receipts derived from and chargeable to the use of the distributing system should be credited to this entire mileage.* One-third of this mileage may extend over private rights of way, which are not subject to any franchise liability. The remaining two-thirds of the mileage covered by county franchises is entitled to two-thirds of the two per cent. of the gross amount, and each county is entitled to the percentage of this two-thirds, in the proportion that the mileage of its franchises bears to the total mileage covered by all the franchises." (Emphasis added.)

By its language this court, in the Dinuba case, made it extremely clear that the 2% was to be taken from that portion of the *gross receipts of the total distribution system* attributable to the distribution system on public ways; that the exact earnings of each mile in the system cannot always be accurately determined; that the value of each portion of the distribution system is not necessarily indicative of its earning capacity and therefore the best method of prorating the earnings of the entire distribution system between public and private ways is to use the mileage basis. All of this makes it apparent that this court established a rather simple formula whereby we first determine what portion of the total gross receipts is attributable to the distribution system, and then, as the best practical method of prorating these total distribution receipts between public and private ways, we use the relative mileage basis. From the gross receipts attributable to public ways the governmental bodies granting the franchises are entitled to 2% of their proportionate interest. What could be clearer?

As stated by the District Court of Appeal in its opinion in this case, see County of Los Angeles v. So. Counties Gas Co., Cal. App., 259 P.2d 665, 671 [Hearing granted 266 P.2d 27]: "The Broughton Act recognized the justice of allowing a public utility a credit for its private property by exempting 98 per cent of the gross receipts from the franchise charge. The Dinuba case went a step further in allowing an apportionment of the two per cent toll so as to eliminate any charge for that proportion of the mileage over private rights of way. The Gas Company is not satisfied to accept the benefits granted by both the Broughton Act and the Dinuba decision, but in addition thereto it takes the additional deduction for the facilities located on private property by the utilization of the so-called 'capital investment method' of accounting."

The formula proposed by the county and accepted by the District Court of Appeal follows the pattern as established in the Dinuba case. The gas company, on the other hand, seeks to use a combination formula which includes some of the suggestions of the Dinuba case but which also includes several other calculations designed to reduce to a bare minimum the amount due the county. For a clearer understanding of the gas company's departure from the formula in the Dinuba case, it may be well at this time to compare the methods used by the county and by the gas company.

To begin with it should be noted that both the county and the gas company are in accord as to certain calculations even though they are made at different stages of the respective formulae. As a starting point both the county and gas company agree that in 1939 total invested capital equalled $31,216,081.13. From this both deduct intangibles, capital in general facilities and office and capital invested in production facilities. This leaves a total of $28,548,380.17 as that portion of the total capital which is invested in the distribution system. Once the *extent* of the distribution system, as contrasted to the producing system, has been ascertained the next step should (under the Dinuba case) be to determine what proportion of the gross receipts can be attributed to the total distribution system. This is required under the Dinuba formula and is done by the county. Thus the county calculates that the amount of capital invested in distribution is 99.1306% as contrasted to .8694% invested in production facilities. Since 99.1306% of the production and distribution capital is invested in distribution facilities it follows that 99.1306% of the gross receipts should be credited to the entire distribution system. This is the logical approach, this is the reasoning of the Dinuba case and this is the formula used by the county, but the gas company seeks still another deduction. Rather than determine the amount of capital invested in the entire distribution system they seek a figure which includes only the distribution capital invested in rights of way. To do this they deduct $7,556,603.15 which is the value of all distribution capital on consumer's property or on leased property. It is in this major respect that the gas company formula departs from the Dinuba case and differs from the county formula.

By so doing the gas company deducts over 25% of the value of the entire distribution system before computing the gross receipts attributable to the distribution system. This leaves only the capital invested in rights of way and has the effect of basing the gross receipts attributable to the distribution system on little more than the value of the pipe in the ground. It is a departure from the strict mileage formula established by the decision in the Dinuba case.

The net result of the gas company formula is that it does not compute the gross receipts for the entire distribution system as required by the Dinuba case, but it tries to limit the fund to those receipts attributable only to rights of way. It attempts to exclude some of the distribution system which is located on private property in this preliminary calculation, when such exclusion should properly be made only on the mileage basis when the ratio of public to private system is determined.

As has already been pointed out in the Dinuba case the value of an isolated portion of the distributing system is not necessarily indicative of its earning capacity. Certain portions which are new may have a greater value but far less earning capacity than some of the older sections which have little book value but a great deal of earning power. The terminus of a gas conduit may be one of the most extensive parts of the line but that does not mean that the meters and terminal equipment account for most all the earnings and that the transporting conduit earns little or nothing. Thus we can see that while the amount of capital invested in an entire system may be some indication of its earnings, we cannot segregate isolated portions of a system and determine that its dollar value is a correct measurement of its earning power. For this reason this court in the Dinuba case preferred to compute all the gross receipts attributable to the entire distribution system and then prorate them between the public and private ways on a mileage basis rather than deducting part of such system on a dollar value basis. This is necessary since as a practical matter the contributions of the various portions of the distribution system to the gross distribution receipts cannot otherwise be determined.

The majority fails to recognize the fact that some portions of the distribution system which are low in dollar value may have an earning power as great or greater than other portions which have a high book value. Based on this misconception it states that "As in rate making there is a relationship between the value of the property and the amount it earns; the dollars invested in the property produce the dollars that form the gross receipts. Since every dollar invested in operative property earns an equal part of the gross receipts, gross receipts are attributed to a particular item or class of operative property according to the dollars invested in it." Granted that there is a relationship between the value of a corporation's property and the amount it earns, we must recognize the limitations of such a broad generalization. Thus it might be said that there is a relationship between the value of the entire production system and the extent of its earning power; or it might be said that there is a relationship between the value of the entire distribution system and the amount it earns; but such a general relationship between the value of the property and the degree of earning power cannot be carried too far. For example, assume that every building on Block "A" has a direct conduit connection with the main gas line; that each conduit has a book value of $100; that one of the buildings serviced is a restaurant using gas ranges; that one of the buildings is a bakery using gas ovens; that two of the buildings are unoccupied; that one of the buildings is occupied by a frozen food locker; and that one of the buildings is occupied by a meat market. From this type of factual situation it can clearly be seen that the amount of gas consumed by the various customers serviced will vary to a considerable extent even though the value of the conduit into each building has the same $100 book value. Thus we see that the earning power of the various conduits will vary in spite of the fact that the same number of dollars is invested in each; and therefore the generalization that earnings have a relationship to dollars invested has its limitations.

Granting that there is a relationship between the dollars invested in an entire system and its earnings, there is not always an accurate relationship between the value of a particular portion of the system and its earnings. In view of this it is not correct to say (as the majority has) that "every dollar invested in operative property earns an equal part of the gross receipts," and that "gross receipts are attributed to a *particular item* or class of operative property according to the dollars invested in it." (Emphasis added.) By this reasoning the majority (following the theory advanced by the gas company) contends that the earning power of the public ways must be limited to the actual value of the investments in rights of ways after various other portions of the distribution system have been deducted. Thus they compute the dollars earned on a *particular portion* of the distribution system on a dollar investment basis even though such a method is only feasible when applied to an entire system as contrasted to an isolated part.

These limitations were recognized by this court in the Dinuba case when it stated, 188 Cal. at page 682, 206 P. at page 990: "There may be instances where the extent or value of the distributing system over a given right of way may indicate its earning capacity; * * *. But where, as will often happen, contribution to the earnings of the various rights of way is general and indistinguishable, we can see no reason why the proportionate mileage basis should not be used in apportioning the statutory percentage of gross receipts." Thus in order to compute the gross receipts arising from the use, operation or possession of the public franchise we must first determine the gross receipts of the entire distribution system and then on a mileage basis prorate these gross receipts between public and private ways.

By seeking to deduct the $7,556,603.15 as part of the distribution system on consumers' property or on leased property and later seeking to deduct 8.603% of the mileage as being located on private ways the gas company is attempting a form of double deduction. The portion of the distribution system located at the terminus of each line is high in value ($7,556,603.15) but low in mileage so the gas company seeks to deduct this portion on a dollar basis. The other portions of the distribution system on private ways do not account for as much value (approximately $2,400,000) so the gas company is willing to compute these portions on a mileage basis. Thus the gas company attempts to divide the distribution system on private ways into two parts. The one part having a high value ($7,556,603.15) they seek to deduct on a dollar basis. The other portions having a lower dollar value (approximately $2,400,000) but a higher mileage value they seek to deduct on a mileage basis. Actually the gas company is only entitled to one deduction from the receipts of the distribution system and that is a single deduction for the proportion of the distribution system on private ways. This should include that portion of the system running over private ways owned by the company, private ways leased by the company, private ways merely used by the company and all other forms of private ways including the conduits and equipment running to each consumer. Why should there be a distinction between private ways on consumers' property and other private ways? It is all part of the distribution system and the gas company will be credited with that portion of the distribution system on all private ways on a mileage basis.

By these calculations the gas company has reduced the total of distribution receipts to $6,537,430.70 rather than the total of $9,537,137.16 reached under the county formula. Since 91.3963% of the distribution mileage is on public ways the gross receipts *fund* attributable to public ways, from which the 2% is to be taken, should total $8,716,590.49 instead of $5,974,969.77 as computed by the company. The net result of the gas company's double deduction is that for 1939 the County of Los Angeles having 15.3831% of the public ways would only be entitled to $18,382.60 rather than $26,817.63.

There can be no doubt that the Broughton Act as well as the Dinuba case intended the 2% to be taken from the gross receipts attributable to the distribution system after the proportion attributable to private ways had been deducted. However, the manner of deducting or excluding such items must be consistent. It is not proper to exclude the part of the distribution system located on private property on a dollar invested basis and the balance on a mileage basis.

The term gross receipts was adequately defined by the District Court of Appeal, County of Los Angeles v. So. Counties Gas Co., Cal.App., 259 P.2d 665, 673, when it said: "No authority has been found to define the term 'gross receipts' to mean anything other than the total without deduction; it means '"all receipts on business beginning and ending within this state"'. Pacific Gas & Elec. Co. v. Roberts, 176 Cal. 183, 189, 167 P. 845, 847. The phrase is 'plain language which requires no interpretation * * * "perfectly plain, unequivocal language," * * * (it) must be taken in its plain sense without limitation or deduction save as expressly modified by the Legislature.' Bekins Van Lines, Inc. v. Johnson, 21 Cal.2d 135, 140, 130 P.2d 421, 424. Gross receipts mean all receipts arising from or growing out of the employment of the corporation's capital in its designated business. Robertson v. Johnson, 55 Cal.App.2d 610, 131 P.2d 388. Is there any doubt then that the Legislature intended for the utility to pay as a toll for the use of public highways on which to lay its pipes, tracks or cables, two per cent of its gross receipts?

"These conclusions are fortified by the doctrine of strict construction. The basic franchise ordinance (No. 1107, New Series, 1924) provides that 'the franchise is granted upon each and every condition contained herein, and in the ordinance granting the same and shall ever be strictly construed against the grantee.' When a franchise provides for the protection of the public interest, it is a fair assumption that the Board of Supervisors endeavored to perform its duty as trustees for the public and that the provisions were inserted for the purpose of securing for the public all substantial advantages. 38 Am.Jur. 214. It is a general principle of construction that franchises granted by the state to private persons or corporations must be construed most strongly in favor of the public. If a doubt arises, nothing is to be taken by implication as against public rights. Clark v. City of Los Angeles, 160 Cal. 30, 38, 116 P. 722; [City of] Sacramento v. Pacific Gas & Elec. Co., 173 Cal. 787, 791, 161 P. 978.

"From all that is said above it is unavoidable that the franchise must be construed strictly in favor of the County and as so construed respondent should pay its full two per cent of its gross receipts each year of the life of its franchise and no deductions except that attributable to production capital and the proportion of the distribution system belonging to the utility."

It would also appear that the cases cited by the majority and the gas company were adequately distinguished by the District Court of Appeal, County of Los Angeles v. So. Counties Gas Co., supra, Cal.App., 259 P.2d 665, in the following discussion: "Ocean Park Pier Amusement Corp. v. City of Santa Monica, 40 Cal.App.2d 76, 104 P.2d 668, 879, cited by the Gas Company in support of its position, is readily distinguishable. In that case the city exacted the full statutory toll for the use of its own property and in addition sought to exact a charge for the use of the corporation's property. It was therefore properly held that no franchise payment need be made for the use of private property with respect to which no public property was contributed or used. In the case at bar, however, the Gas Company has consistently utilized public property in its operations and of course could not operate for an instant without public franchises, but the record discloses no attempt by appellant 'to include in the grant, land over which it had no proprietary interest', as was true of the City of Santa Monica in the last cited authority, 40 Cal.App.2d at page 86, 104 P.2d at page 674.

"Respondent cites also City of Monrovia v. Southern Counties Gas Co., 111 Cal.App. 659, 296 P. 117, as authority for its contention. The court said 111 Cal.App. at page 660, 296 P. at page 118, 'In accordance with this method (from the Dinuba decision) the defendant * * * (eliminated) that portion of its earnings attributable to the use of its properties located on private property.' The context of the above sentence, a portion of which respondent quotes, makes it clear that the mileage allocation formula of the Dinuba decision, under no dispute in the instant case, is referred to. But in any event, the only issue involved in the Monrovia action was whether or not the city was entitled to two per cent of the gross receipts collected within the city, a point not at all involved in the instant controversy."

If we are to abide by the decision of the Dinuba case, if we are to insist on a fair and consistent formula without double deductions, and if we are to construe the franchise most strongly in favor of the public (as is required by law), then we must reverse the judgment rendered by the trial court.

For these reasons I would reverse the judgment.

Rehearing denied; CARTER, J., dissenting.

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42 Cal.2d 219

PEOPLE v. JONES.

Cr. 5464.

Supreme Court of California.
In Bank.

Feb. 5, 1954.

Rehearing Denied March 3, 1954.

Defendant was convicted of violations of Pen.Code, § 288, and from an order of the Superior Court of Los Angeles County, John J. Ford, J., denying motion for new trial, defendant appealed. The Supreme Court, Edmonds, J., held that testimony of psychiatrist that in his opinion defendant was not a sexual deviate and was incapable of having necessary intent to be lustive was relevant and admissible and that exclusion of such testimony constituted prejudicial error.

Order denying a new trial reversed. Prior opinion, 255 P.2d 479.

1. Criminal Law ⚷338(1)

All facts having rational probative value are admissible in evidence, unless some specific rule forbids. Code Civ.Proc. § 1868.

2. Criminal Law ⚷338(1)

The general test of relevancy of indirect evidence is whether it tends logically, naturally and by reasonable inference to prove or disprove a material issue. Code Civ.Proc. § 1832.

3. Infants ⚷20

Statute making it a felony to commit lewd or lascivious acts upon a child with intent of arousing or gratifying lust or passions requires proof of stated intent. Pen.Code, § 288.

4. Infants ⚷20

In prosecution for violations of statute making it a felony to commit lewd or lascivious acts upon a child with intent of arousing or gratifying lust or passions, such intent was established by the circumstances connected with offenses charged. Pen. Code, §§ 21, 288.

5. Criminal Law ⚷377

Evidence as to character of accused is relevant in determining probability of guilt, the purpose of such evidence being to show accused's disposition and to base thereon a probable presumption that he would not be likely to commit, and, therefore, did not commit the crime charged.

6. Criminal Law ⚷381

Proof of good character of accused may be considered as a fact tending to rebut the truth of testimony of an incriminatory character sufficient to establish truth of charge against him.

7. Criminal Law ⚷379

Character of accused is proved by evidence of his general reputation in the community for the traits which are in issue.

8. Criminal Law ⚷381

Proof as to good character of accused is sufficient to create a reasonable doubt of guilt.

9. Mental Health ⚷442

Under Welfare and Institutions Code, a sexual psychopath may be dealt with as a person who is a menace to the health or safety of others, and when one is convicted of a sex offense involving a child under 14 years of age and constituting a felony or second misdemeanor offense, there must be a subsequent proceeding to determine whether such person is a sexual psychopath. Welfare and Institutions Code, §§ 5500 to 5521, 5501(b, c); Pen.Code, § 288.

10. Mental Health ⚷442

Upon release from imprisonment, one convicted of a felony or second misdemeanor sex offense involving a child under 14 years of age must register with sheriff or chief of police in city of his residence and give notice of change of residence, regardless of judicial finding as to whether he is a sexual psychopath, and a first offender convicted of a sex offense involving a child under 14 years of age may not be placed on probation until report of reputable psychiatrist as to mental condition of such offender is obtained. Pen.Code, §§ 288, 288.1, 290; Welfare and Institutions Code, §§ 5500 to 5521, 5501(b, c).

11. Infants ⚷20

An inference that accused did not commit act denounced by Pen.Code, § 288, making it a felony to commit lewd or lascivious acts upon a child with specified intent, may reasonably be drawn from evidence that accused is not a sexual psychopath. Pen.Code, § 288; Welfare and Institutions Code, §§ 5500 to 5521; Code Civ. Proc. §§ 1832, 1960.

12. Evidence ⚷510

Statutory procedure for determination of sexual psychopathy established the competency of expert opinion in such field of evidence. Welfare and Institutions Code, §§ 5504–5506.

13. Criminal Law ⚷469

In prosecution for violations of Pen. Code, § 288, making it a felony to commit lewd or lascivious acts upon a child with intent to arouse or gratify lust or passions, testimony of psychiatrist that in his opinion accused was not a sexual deviate and was incapable of having necessary intent to be lustive was relevant and admissible on general issue of whether accused committed acts charged. Pen.Code, § 288; Welfare and Institutions Code, §§ 5500 to 5521, 5504–5506; Code Civ.Proc. §§ 1832, 1960.

14. Criminal Law ⚷388

Testimony of psychiatrist that in his opinion accused was not a sexual deviate and was incapable of having the necessary intent to be lustive was not objectionable on ground that such opinion was based in part upon examination of accused while subject to sodium pentathol. Welfare and Institutions Code, §§ 5504–5506.

15. Criminal Law ⚷388

Statements made by accused while subject to truth drugs are inadmissible to prove the truth of the matter asserted.

16. Criminal Law ⚷338(7)

Where offense charged is of itself sufficient to inflame the mind of average person, rules governing admission of evidence must be rigorously enforced, both as to exclusion of objectionable and prejudicial matter and admission of competent and relevant evidence offered by defendant.

17. Criminal Law ⚷1134(1)

On appeal from conviction of an offense against a child, any procedural error must be carefully considered to determine whether rights of accused were prejudiced thereby, since no charge can be more easily made, and none is more difficult to disprove.

18. Criminal Law ⚷469, 1186(4)

Where charges made by nine year old girl and accused's denials constituted only direct evidence in prosecution for violations of Pen.Code, § 288, and testimony as to accused's good reputation for morality was not contradicted, while testimony of prosecuting witness was impeached to some extent and there was evidence that her reputation for truth and veracity was bad, excluding testimony of psychiatrist that in his opinion accused was not a sexual deviate and was incapable of having the necessary intent to be lustive constituted prejudicial error resulting in a miscarriage of justice. Pen.Code, § 288; Welfare and Institutions Code, §§ 5500 to 5521, 5504–5506; Const. art. 6, § 4½.

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Bertram H. Ross, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James and Lester Ziffren, Deputy Attys. Gen., for respondent.

EDMONDS, Justice.

Rayburn Jones was convicted by a jury upon each of two counts of an information which charged him with having violated section 288 of the Penal Code. His motion for a new trial was denied and he was placed on probation for five years, subject to certain conditions, one of which is that he serve one year in the county jail. The principal point presented upon his appeal from the order denying his motion for a new trial concerns rulings rejecting certain evidence.

At the time of the alleged offenses, Carol, nine years of age, was living with Jones and his wife, her uncle and aunt. Carol described the conduct of Jones upon the two occasions specified in the information, and it clearly was a violation of the statute. In addition, she testified that Jones indulged in similar acts "lots of days". Upon one occasion, Carol told the jury, Jones, prior to his lewd and lascivious conduct, showed her four books containing pornographic pictures and writing. Another time, she said, Jones attempted to persuade her to engage in acts denounced by section 288a of the Penal Code.

Briefly stated, what Jones did, as related by Carol, amounted to sexual relations without penetration. Her testimony was that the acts commenced approximately one month after she arrived at the Jones' home, and continued for about a year. She then moved to the residence of another aunt and uncle, Mr. and Mrs. Scrivner.

Although Carol had stayed with the Scrivners upon two occasions for as long as four to six weeks during the time of her residence with Mr. and Mrs. Jones, Mrs. Scrivner testified that Carol had not informed her or her husband of any wrongful conduct of Jones. According to Carol, and Mrs. Scrivner corroborated her, she told the Scrivners about it a few days after she went to live with them. She made no complaint at the time she was living in the Jones' home, she testified, because he said that if I did "he would spank me". She told the jury that after moving to the Scrivner home Jones "wasn't around and I thought it was safer".

Jones denied having committed any of the acts related by Carol. He testified that he did not show Carol any pornographic books but he admitted having had eight or nine pictures of nude women in his bedroom. Jones testified, and his wife agreed, that their sexual relationship was mutually satisfactory. To the contrary, the mother-in-law of Jones told of complaints by him that his wife did not satisfy him sexually. There was character evidence that Jones had a good reputation for morality in the community in which he resided. Mrs. Jones said that Carol's reputation for truth and veracity was bad.

Jones does not claim that the evidence is insufficient to support the verdicts of the jury. He urges that because it is directly conflicting and evenly balanced, errors of law occurring at the trial compel a reversal.

The principal ground relied upon is the refusal of the trial court to admit certain expert opinion evidence. Specifically, Jones' offer of proof in this connection was as follows: "If produced as a witness, Dr. Solomon [a psychiatrist] will testify that at my request he examined Mr. Rayburn Jones on two occasions, one without the use of drugs and on the second occasion with the aid of a drug known as sodium pentathol; that as a result of those examinations he reached the conclusion that Mr. Jones is not a sexual deviate and he is incapable of having the necessary intent to be lustive, either for himself or to satisfy the lusts of a child of nine and a half years of age." The trial judge commented, "I take it the purpose of producing the evidence would not be to show an abnormal mental state which would preclude the defendant from having a particular specific intent; in fact, your evidence would be offered to show what is a normal state of mind of a person who would not be prone to commit such an act." Counsel for Jones agreed with that statement of his position.

[1, 2] "All facts having rational probative value are admissible, unless some specific rule forbids." 1 Wigmore on Evidence, 3d Ed., 1940, § 10, p. 293; and cf. Code Civ.Proc. § 1868. The general test of relevancy of indirect evidence is whether it tends logically, naturally, and by reasonable inference to prove or disprove a material issue. Code Civ.Proc. § 1832; People v. Eldridge, 147 Cal. 782, 784, 82 P. 442; People v. Donnolly, 143 Cal. 394, 398, 77 P. 177; cf. People v. Peete, 28 Cal.2d 306, 315, 169 P.2d 924.

Jones contends that the offered evidence was admissible upon the question of specific intent. Relying upon People v. Wells, 33 Cal.2d 330, 202 P.2d 53, he takes the position that a defendant charged with having committed an act which requires a particular intent to make it a crime, is entitled to present any evidence, not amounting to proof of legal insanity, which tends to disprove the specific mental state.

[3, 4] Section 288 of the Penal Code provides: "Any person who shall wilfully and lewdly commit any lewd or lascivious act * * * upon or with the body * * of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony * * *." Unquestionably the statute defines a crime requiring the proof of the stated intent. People v. Booth, 111 Cal.App.2d 106, 108, 243 P.2d 872; People v. Hamey, 23 Cal. App.2d 689, 73 P.2d 1254. Here such intent was clearly established by the circumstances connected with the offenses. See Penal Code, § 21; People v. Booth, supra, 111 Cal.App.2d at page 109, 243 P.2d 872; People v. Hobbs, 109 Cal.App.2d 189, 192, 240 P.2d 411.

However, Jones did not base his defense upon the lack of specific intent and for that reason the decisions he relies upon are inapplicable. His sole purpose in offering in evidence the doctor's opinion, as is shown by his agreement with the trial court's statement of his position, was to prove that he did not engage in the acts for which he was on trial. Necessarily the required specific intent must have been present if his conduct was such as described by Carol.

Jones claims that the rejected evidence had probative value for the purpose of determining whether or not he is a "sexual deviate" and was admissible for such purpose. As support for his position, he cites the provisions of the Welfare and Institutions Code relating to sexual psychopaths, §§ 5500–5521.

[5–8] In the determination of probabilities of guilt, evidence of character is relevant. Michelson v. United States, 335 U.S. 469, 476, 69 S.Ct. 213, 93 L.Ed. 168; 1 Wigmore on Evidence, supra, § 55, p. 449. "The purpose of the evidence as to the character of the accused is to show his disposition, and to base thereon a probable presumption that he would not be likely to commit, and, therefore, did not commit, the crime with which he is charged." State v. Lee, 22 Minn. 407, 409. Proof of the good character of the defendant may be considered as a fact tending to rebut the truth of testimony of an incriminatory character which is sufficient to establish the truth of the charge against him. People v. Green, 217 Cal. 176, 183, 17 P.2d 730; People v. Ashe, 44 Cal. 288, 291–294; 1 Wigmore on Evidence, supra, § 56, pp. 450–451. Character is proved by evidence of the accused's general reputation in the community for the traits which are in issue. People v. Gordan, 103 Cal. 568, 573–574, 37 P. 534; People v. Neal, 85 Cal.App.2d 765, 771, 194 P.2d 57; People v. McMillan, 59 Cal.App. 785, 787, 212 P. 38. Such evidence is sufficient to create a reasonable doubt of guilt. People v. Bell, 49 Cal. 485, 489.

[9, 10] Under the Welfare and Institutions Code, a sexual psychopath may be dealt with as a person who is a menace to the health or safety of others. When one is convicted of a sex offense involving a child under 14 years of age and the crime is a felony, there shall be a subsequent proceeding to determine whether the person is a sexual psychopath, § 5501(c); and cf., also, Welf. & Inst. Code § 5501(b), providing for a similar procedure where a second offender is convicted of a misdemeanor. The Legislature has concluded that a person who engaged in such conduct upon one occasion has given probable cause for believing that he is a sexual psychopath. Even if there be a judicial finding that the offender is not a sexual psychopath, he is not completely exonerated in that regard. Upon release from imprisonment he must register with the sheriff or chief of police in the area in which he resides and give notice of changes of residence. Penal Code, § 290. Also, a first offender convicted of a sex offense involving a child under 14 years of age may not be placed on probation until the court obtains a report from a reputable psychiatrist as to the mental condition of such person. Penal Code, § 288.1.

[11–13] These statutory provisions concerning those who commit sex offenses clearly state a legislative determination that such a person is more likely to violate section 288 than one who has no such propensity; to some extent there is a cause and effect relationship. Evidence that a person has no such disposition is analogous to that in regard to character, for it bears upon the probability of the innocence of the accused. From evidence which tends to prove that a person is not a sexual psychopath, an inference reasonably may be drawn that he did not commit the act denounced by section 288. See Code Civ.Proc. § 1960. The competency of expert opinion in this field of evidence is established by the statutory procedure for the determination of sexual psychopathy. Welf. & Inst. Code, §§ 5504–5506. Accordingly, the evidence here excluded was relevant to the general issue before the jury and should have been admitted.

The People rely upon People v. Sellers, 103 Cal.App.2d 830, 230 P.2d 398. Sellers, a male, was convicted of a violation of section 288a of the Penal Code committed with a male. He assigned as error the refusal of the court "to permit a physician specializing in neurology and psychiatry to express an opinion as to whether, after having made a complete psychiatric examination, defendant was to any extent a homosexual." In upholding the rejection of such evidence the court said, "The law does not make a distinction as to the type of person who may commit the act charged. It is a punishable offense whether the person is normal or abnormal. The proffered evidence is not * * * a type of circumstantial evidence admissible for the purpose of proving the performance or nonperformance of a criminal act." 103 Cal.App.2d at pages 831–832, 230 P.2d at page 399. The reasoning of that case overlooks the accepted fact that homosexual acts of the nature there considered constitute abnormal conduct indulged in by persons with a propensity for it; normal individuals ordinarily do not resort to such acts, hence a showing of sexual normality in that respect has relevancy to the nonperformance of homosexual acts. Accordingly, insofar as People v. Sellers, supra, is inconsistent with these conclusions, it is disapproved.

[14, 15] The People's objection that the testimony to be given by the psychiatrist was inadmissible because it was inextricably interwoven with the use of the drug sodium pentathol has no merit. Although the attorney general properly points out that it is questionable whether the results of examinations made while a person is subject to the "truth drugs" are admissible in evidence, People v. McCracken, 39 Cal.2d 336, 350, 246 P.2d 913; People v. Cullen, 37 Cal.2d 614, 626, 234 P.2d 1, that conclusion is correct only if the statements are offered for the purpose of proving the truth of the matter asserted. Cf. People v. McCracken, supra, 39 Cal.2d at page 350, 246 P.2d 913; People v. Cullen, supra, 37 Cal.2d at page 626, 234 P.2d 1.

Here, the proffered evidence was not the answers of Jones to certain questions, but the interrogator's expert analysis of those answers for the purpose of determining whether Jones was a sexual deviate, that is, a sexual psychopath. The inference that Jones did not commit the offenses charged was to be drawn, if at all, from the psychiatrist's opinion in regard to the sexual propensities of Jones and not from any answers given by him while under the influence of the drug. Jones' responses were the means to an end, the end being proof of the fact that Jones was not a sexual deviate.

[16, 17] A fundamental principle of criminal law is that where the offense charged "is of itself sufficient to inflame the minds of the average person, it is required that there be rigorous insistence upon observance of the rules of the admission of evidence". People v. Evans, 39 Cal.2d 242, 251, 246 P.2d 636, 642. The rationale of that rule applies whether the question presented concerns objectionable and prejudicial matter introduced by the prosecution, or the improper rejection of evidence tendered by the defense. Moreover, it is often said in referring to prosecutions for offenses against children, that "no charge can be more easily made, and none more difficult to disprove". For that reason, any procedural error must be carefully considered to determine whether the rights of the defendant were prejudiced by it. See People v. Adams, 14 Cal.2d 154, 164, 93 P.2d 146; People v. Neal, supra, 85 Cal.App.2d at page 771, 194 P.2d 57.

[18] In the present case, the only direct evidence is the charges made by Carol and the denials of Jones. He presented evidence tending to prove a good reputation for morality; the prosecution introduced no evidence to the contrary. To some extent, Carol's testimony was impeached, and there is evidence that her reputation for truth and veracity was bad. From those circumstances, considered in connection with a reading of the entire record, it appears that the exclusion of the psychiatrist's testimony was prejudicially erroneous. For that reason there has been a miscarriage of justice. Cal.Const. art. VI, § 4½.

The order denying the motion for a new trial is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

123 Cal.App.2d 66

GRAHAM v. BRYANT et al.

Civ. No. 15736.

District Court of Appeal, First District, Division 2, California.

Feb. 4, 1954.

Petition for peremptory writ of mandate directing State Department of Employment and director thereof to assign petitioner to duties of position of senior referee in the department and pay him the emoluments of such position. The Superior Court for the City and County of San Francisco, William T. Sweigert, J., rendered judgment denying the writ, and petitioner appealed. The District Court of Appeal, Nourse, P. J., held that, though petitioner had passed the examination and been placed on eligible list for equivalent position of regional referee in respondent department, and had been appointed from such list to position of hearing officer, he was not entitled to hold position of senior referee, regardless of whether he possessed the qualifications for such position, in absence of certification for or appointment to position of senior or regional referee, or showing that his seniority was such that he should at any time have been so certified or appointed.

Judgment affirmed.

1. Mandamus ⚷1

Orders of state personnel board denying appeal from refusal of state department of employment to appoint appellant to position of senior referee in the department could not be disregarded or held invalid without direct attack, where no lack of jurisdiction of board was involved, and hence petition for peremptory writ of mandate directing department of employment to assign petitioner to duties of such position would be considered as a petition for review of orders of personnel board, though petition did not expressly attack validity of board's decision. Code Civ.Proc. § 1094.5; Government Code, § 18500 et seq.

2. Mandamus ⚷154(5)

Where petition for peremptory writ of mandate directing state department of employment and state personnel board to assign petitioner to duties of position of senior referee in employment department alleged facts which in petitioner's opinion entitled him to hold the position claimed, that such position had been denied him, and that personnel board had denied his appeal, petition by implication alleged a deprivation of substantive rights and a violation of substantive law by board which must be reviewable by court, even if no findings of fact were made by board and it could not be said that findings did not support its decision. Code Civ.Proc. § 1094.5; Government Code, § 18500 et seq.

3. Administrative Law and Procedure ⚷725

Abuse of discretion within meaning of statutory provision for judicial review of decisions of administrative tribunals need not be alleged in so many words. Code Civ. Proc. § 1094.5.

4. Administrative Law and Procedure ⚷513
Officers ⚷11

Cause of action for appointment to position of senior referee in state department of employment did not accrue until, as alleged in petition, such position became available in 1946, though petitioner had passed examination for position in 1939, and hence appeal filed in October, 1946, to state personnel board from refusal of department to appoint petitioner to specified position was not barred by statute requiring civil service actions to be brought within one year after cause of action accrues. Government Code, §§ 18500 et seq., 19630.

5. Administrative Law and Procedure ⚷229

A litigant need not apply administrative remedies in the most effective manner in order to meet requirements as to exhaustion of administrative remedies as a prerequisite to judicial review.

6. Administrative Law and Procedure ⚷229
Mandamus ⚷13

Failure to fully state and support case at hearing before state personnel board on appeal from refusal to appoint petitioner to position of senior referee in state department of employment did not preclude judicial review of board's denial of appeal on ground that petitioner had not exhausted his administrative remedies. Government

Code, § 18500 et seq.; Code Civ.Proc. § 1094.5.

7. Mandamus ⚷168(3)

Where it was expressly agreed at hearing before state personnel board on appeal from refusal to appoint petitioner to position as senior referee in state department of employment that the facts were in the records of board which were available as part of the hearing without need for petitioner to go over them, records relating to petitioner on file with board were admissible in evidence in superior court on petition for peremptory writ of mandate directing department and board to assign petitioner to duties of position of senior referee. Government Code, § 18500 et seq.; Code Civ.Proc. § 1094.5.

8. Mandamus ⚷168(2)

Petitioner was not entitled to peremptory writ of mandate directing state department of employment to assign him to duties of position of senior referee in the department and pay him the emoluments of such position, in absence of showing that petitioner was entitled to hold position of senior referee. Government Code, § 18500 et seq.; Code Civ.Proc. § 1094.5.

9. Officers ⚷11.4

That petitioner had passed examination for equivalent position of regional referee in state department of employment, had been placed on eligible list for such position and from such list appointed to lesser position of hearing officer did not entitle petitioner to hold position of senior referee in the department, in absence of showing that petitioner had ever been certified for or appointed to position of regional or senior referee, or that his seniority was such that he should at any time have been so certified or appointed. Gen.Laws, Act 1404, § 64; Government Code, § 18500 et seq.

10. Constitutional Law ⚷102(1)

Officers ⚷11.4

Being placed on eligible list for a particular position in classified service does not give applicant any vested right in such position or any civil service status.

11. Officers ⚷11.4

Statute giving right of re-employment in a comparable position to a person holding a position at time when it is reclassified downward so as to result in loss of salary did not entitle one who had been placed on eligible list for position of regional referee in state department of employment and appointed from such list to lesser position of hearing officer to appointment to position of senior referee in department upon abolition of equivalent position of regional referee. Gen.Laws, Act 1404, § 64; Government Code, § 18500 et seq.

◆

Fabian D. Brown, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., William M. Bennett, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

This is an appeal from a judgment denying a peremptory writ of mandate. The amended petition for writ of mandate alleged in substance that in 1939 petitioner passed the examination for Regional Referee, Department of Employment, the name of which office was later changed to Senior Referee, Department of Employment; that he was thereafter certified to said position and entitled to hold said office and to perform its duties; that no positions in said classification were available until September, 1946, and that petitioner was therefore in 1939 assigned to the duties of the lesser office of Hearing Officer, Department of Employment; that when on or about September 14, 1948 (read 1946) positions as Senior Referee were available petitioner had sufficient seniority over other employees of said department to entitle him to be appointed to one of said positions and that on October 14, 1946, he demanded of respondents that they assign him to the duties of such position; that respondents failed to conform to said demand, that petitioner on October 14, 1946, appealed to the respondent California State Personnel Board, herein further called the Board, which on October 10, 1949, denied his appeal and that his petition for a rehearing was denied on October 25, 1949; that although petitioner has all essential qualifications, has been duly certified and positions are available, respondents consistently refuse to assign him to the duties thereof and fail to pay him the emoluments of said office, with prayer for a writ of mandate directing respondents to assign petitioner to the duties of said office and pay him the emoluments thereof or show cause why they should not do so.

Respondents' return objected to the sufficiency of the petition to state a cause of action for relief, and to the jurisdiction of the court over the subject matter and denied the allegations of the amended petition stated, except that petitioner took the alleged examination, that on October 14, 1946, he applied for a hearing to respondent Board, which hearing was duly granted and held and the appeal denied; that the court is without jurisdiction to act on any evidence not contained in the record because no offered evidence was excluded by the Board, no objection was made by petitioner to any ruling on evidence and no evidence was available to petitioner which could not have been introduced before respondent Board, and that the introductory letter of October 14, 1946, was not filed within the statutory time and that therefore the petition is barred by the statute of limitations.

At the trial in the superior court the records of petitioner on file with the State Personnel Board were received in evidence over objection of respondents after petitioner's attorney had testified that it was agreed that the Board would consider said records which were available to it. It appeared at said hearing that pending the proceedings appellant had reached the retirement age and the action remained of importance only with respect to possible back pay and retirement benefits.

The superior court found, in substance, that appellant passed the examination for the office of Regional Referee, Department of Employment, the name of which office was then changed to Senior Referee, Department of Employment, but was and is not entitled to hold that office or to be appointed to it, not by virtue of seniority as a state employee or otherwise, that he does not have the essential qualifications for the position of Senior Referee nor has he been duly certified for the same; that petitioner has not stated grounds for relief and is not entitled to it; that petitioner's appeal was correctly heard and denied by the Board.

On appeal appellant sets out his contentions without any relation to his allegations in his amended petition or to the findings of the superior court. They are in substance that because he was, after passing the examination, placed on the eligible list for Regional Referee (a position with supervisory duties), and from that list appointed to the lower position of Hearing Officer (without supervisory duties) he was entitled under section 64 of the State Civil Service Act, Stats.1937, Chapter 753; Deering Act 1404, to be assigned to the position of Senior Referee when such positions, which differed only in name from the position of Regional Referee, were available in 1946. Abolishing of the eligible list for Regional Referee in 1944 was ineffective as to him because he had not been notified of the intention to do so as was then required by Rule 5, Section 3 of the California State Personnel Board.

Respondents do not treat the substantive questions raised by appellant but rely only on the defenses that the allegations of the amended petition do not state any matter reviewable under section 1094.5(b), Code of Civil Procedure; that appellant's original petition of October 14, 1946, was barred by section 19630, Gov.Code (section 52 of the State Civil Service Act) which requires civil service actions to be brought within a year after the cause of action arose; that appellant did not exhaust his administrative remedies by not fully stating and supporting his case at the hearing before the Board, but presenting only a "skeleton case" and that the records of the Board relating to appellant were improperly received in evidence in the superior court.

[1-7] Appellant does not defend his pleading and it certainly is not perfect. Nevertheless we are disinclined to decide the case on the asserted formal defects, especially where the superior court has re-

viewed the matter on the merits. Although the amended petition does not expressly attack the validity of the decisions of the Board of October 10 and October 25, 1949, we will consider the petition as one under section 1094.5, Code of Civil Procedure, for the review of said orders as the orders can evidently not be disregarded or held invalid without direct attack where no lack of jurisdiction of the Board is involved. Stockton v. Department of Employment, 25 Cal.2d 264, 268, 153 P.2d 741. It is true that none of the matters mentioned as reviewable in such proceedings in subdivision (b) of section 1094.5 has expressly been spelled out, but appellant, in his petition for the writ, has alleged facts which in his opinion entitle him to hold the position claimed, that this position was denied him and that the Board denied his appeal. This by implication alleges a deprivation of substantive right and a violation of substantive law by the Board. Such violation of law must be reviewable in the procedure under section 1094.5, Code of Civil Procedure, even if no findings of fact are made by the Board so that it can not be said that the findings do not support the decision. It is not required that abuse of discretion in the meaning of section 1094.5 is alleged in so many words, Boren v. State Personnel Board of California, 37 Cal.2d 634, 640, 234 P.2d 981. It can not be said that appellant's action is barred by section 19630, Gov.Code (section 52 of the State Civil Service Act), because appellant's cause of action to be assigned to the duties of Senior Referee according to his allegations arose in 1946 only, when such position became available. Neither can it be said that he did not exhaust his administrative remedies; no authority holds that as a prerequisite for access to the courts it is not only required that the litigant has first availed himself of all administrative remedies, but moreover that he has applied them in the most effective manner. The contention that the records relating to petitioner on file with the Board were erroneously received in evidence in the superior court is without merit as it was expressly agreed at the hearing before the Board that the facts were in the records of the Board which were available as part of the hearing without need for appellant to go over them. (See clerk's transcript, page 12, lines 8–12.)

[8–11] However there can be no doubt that the writ prayed for was correctly denied. Appellant has failed to show that he was entitled to hold the office of Senior Referee. His only title to such office was that in 1939 he passed the examination for the similar office of Regional Referee, was then placed on the eligible list for that office and was from that list appointed to the lesser office of Hearing Officer. There is nothing in the record showing that he has ever been certified for or appointed to the office of Senior or Regional Referee, or that his seniority was such that he should at any time have been so certified or appointed. The only fact appearing with respect to his standing as compared to others is that in the examination for Regional Referee his position on the list was eleventh. The fact that appellant was placed on the eligible list did not give him any vested right in such office or any civil service status. Smith v. City of Long Beach, 105 Cal.App.2d 618, 621, 234 P.2d 191; Jones v. O'Toole, 190 Cal. 252, 256, 212 P. 9. Neither can the fact that from said eligible list he was appointed to the lesser office of Hearing Officer give him any status as to the office of Regional Referee or Senior Referee to which he was not appointed. Section 64 of the State Civil Service Act, supra, cited by appellant in this respect, does not support his contention. This section gave a right of re-employment in a comparable position to a person *holding* a position at the time when that position was reclassified downward so as to lead to loss of salary, but appellant, when appointed to the position of Hearing Officer, did not *hold* the position of Regional Referee but was only on the eligible list for it. Appellant's basic misconception, stated in so many words in his introductory letter of October 14, 1946, and also orally before the Board, is that the appointment to the position of Hearing Officer was an appointment to the position of Regional Referee so that no further appointment whatever was necessary to have him hold the equivalent position of Senior Referee and he could enter on the duties and receive the salary of said office without such appointment. This explains the absence of all evidence as to seniority before the Board. Evidently the rejection of this position in all instances was correct. It is unnecessary to decide whether in 1946 appellant possessed the qualifications for the position of Senior Referee, because, even if he possessed the qualifications to be eligible to said position that would not in itself entitle him to hold said office. The finding as to lack of qualifications is therefore not necessary to the decision.

Judgment affirmed.

DOOLING, J., and O'DONNELL, J. pro tem., concur.

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123 Cal.App.2d 145

WAXMAN

v.

CITIZENS NAT. TRUST & SAVINGS BANK OF LOS ANGELES.

Civ. 19839.

District Court of Appeal, Second District, Division 3, California.

Feb. 11, 1954.

Daughter of testator brought action against executor under will of testator to recover $5,000 for breach by testator of property settlement agreement of testator and divorced wife to make daughter beneficiary of two $5,000 policies on life of testator. The Superior Court of Los Angeles County, Kenneth C. Newell, J., entered judgment adverse to executor, and executor appealed. The District Court of Appeal, Vallée, J., held that daughter was entitled to recover amount of life policy, in which daughter had been named as beneficiary, and which testator had permitted to lapse by nonpayment of premiums.

Affirmed.

1. Husband and Wife 🔑278(1)

Husband and wife, in settling their property interests, have right to provide for their children and give property to children as part of settlement.

2. Insurance 🔑104

Where divorced husband agreed as part of property settlement with divorced wife to make daughter beneficiary of two life policies in amount of $5,000 each, and he took out the policies, but one of the policies lapsed because of failure of divorced husband to pay premiums, daughter's right to have the policies kept in force derived from the property settlement agreement.

3. Insurance 🔑586, 587

An insured by contract may waive right to change a beneficiary and may convert what is usually the contingent interest of the beneficiary of a life policy into a vested equitable interest.

4. Insurance 🔑586

An agreement by an insured, in consideration of settlement of property rights, whereby he covenanted to make his daughter the sole irrevocable beneficiary of a life policy, vested her with an equitable interest therein which could not be defeated without her consent.

5. Insurance 🔑104

An insured cannot defeat equitable right of beneficiary under property settlement agreement requiring him to make beneficiary the beneficiary of a life policy, by failing to act.

6. Executors and Administrators 🔑202(1)

Where divorced husband agreed as part of property settlement with divorced wife to make daughter beneficiary of two life policies in amount of $5,000 each, and he took out the policies, but one of the policies lapsed because of failure of divorced husband to pay premiums, and divorced husband died without reinstating the lapsed policy, daughter was entitled to recover $5,000 in action against executor under will of the divorced husband. Civ.Code, §§ 1559, 3300, 3302.

7. Limitation of Actions 🔑43

A cause of action invariably accrues when there is a remedy available, and statute of limitations then begins to run.

8. Limitation of Actions ⚷46(6)

Ordinarily, a cause of action for breach of contract accrues on failure of promisor to do thing contracted for and in manner contracted, and statute of limitations begins to run at such time.

9. Limitation of Actions ⚷46(5)

Where divorced husband agreed as part of property settlement with divorced wife to make daughter beneficiary of two life policies in amount of $5,000 each, and he took out the policies, but one of the policies lapsed because of failure of divorced husband to pay premiums, and divorced husband died without having lapsed policy reinstated, daughter's cause of action to recover $5,000 for breach of contract accrued on death of divorced husband, and statute of limitations began running at time of his death. Civ.Code, §§ 1559, 3300, 3302; Code Civ.Proc. § 337, subd. 1.

* * *

Carter & Potruch and Findlay A. Carter, Los Angeles, for appellant.

Garber & Garber and Wilbur D. Garber, Monrovia, for respondent.

VALLÉE, Justice.

Appeal by defendant, as executor of the will of James W. Henderson, from an adverse judgment in an action for damages for the failure of decedent to have a policy of life insurance in force on his life at the time of his death.

On August 15, 1932, decedent and his then wife, Thelma, entered into a property settlement agreement. Plaintiff Wilma is the daughter of decedent and Thelma. In the agreement, decedent promised that he would assign and transfer an insurance policy "now upon his life in an established 'Old Line Insurance Company' in favor of said Wilma" as beneficiary, to be irrevocable as to her, and that he would pay the premiums on the policy and would cause it to be delivered to Thelma, in trust, for the use and benefit of Wilma. On September 7, 1932, decedent and Thelma were divorced. The interlocutory decree approved the property settlement agreement.

On January 12, 1933, decedent and Thelma entered into a written modification of the property settlement agreement. The modification said that in relation to the change of beneficiary of a $10,000 policy as provided in the property settlement agreement, decedent stated that while this change had not been made he then had a policy in that amount paid up and in good standing in which Thelma was named as beneficiary, and that the change had been directed and would be effected within a few days. Decedent did not change the beneficiary as he promised to do in the modification agreement. In 1937, he secured two policies on his life, each in the amount of $5,000, with Wilma named as beneficiary in each. He delivered these policies to Thelma. He did not pay the premium on one of the $5,000 policies after June 18, 1939. On December 6, 1942, that policy lapsed. It was not reinstated. Decedent died on October 1, 1951. At the time of his death, only one policy for $5,000 was in force with Wilma named as beneficiary. She collected the face of that policy; filed a claim against the estate of decedent for $5,000, which was rejected; and brought this action against the executor of the will of decedent for $5,000 damages. Judgment was for Wilma for $5,000 and interest from October 1, 1951. Defendant appeals.

Defendant's assignments of error are: 1. The intent of the property settlement agreement was fully complied with and so acknowledged by mutual consent of the parties. 2. The cause of action is barred by section 337(1) of the Code of Civil Procedure.

Wilma married on April 15, 1939. Decedent stopped paying the premiums on one of the $5,000 policies on June 18, 1939. Defendant argues from these facts that Wilma became emancipated on marriage; decedent had no further liability for her support, that responsibility having vested in her husband; by discontinuing premium payments, decedent evidenced his understanding of the import of the agreement. These facts have no relation to decedent's agreement. The agreement is definite, certain, and unequivocal. The insurance was not to be kept in force until some condition occurred or contingency happened. It was to be irrevocable. Decedent specifically agreed that he would maintain life insurance in the amount of $10,000 in force until his death with Wilma named as beneficiary.

Thelma remarried on June 16, 1948. On August 28, 1948, she wrote a letter to decedent in which she told him she was returning the last check he had sent her and that "I am now married again and our contract closed." Defendant says these facts indicate that the parties to the agreement, Thelma and decedent, considered their agreement fully executed and completed; and that if they did not so consider it, it is evident they abandoned it and the effect so far as the third person, Wilma, is the same. Decedent, in the property settlement agreement, also promised to pay alimony to Thelma until she remarried. This obligation was separate and distinct from his obligation to maintain the insurance in force until his death. We think it manifest that the only obligation Thelma referred to was decedent's obligation to her. Cf. Jenkins v. Jenkins, 112 Cal.App. 402, 406–408, 297 P. 56.

[1, 2] The right of parties, in settling their property interests, to provide for their children and give property to the children as a part of the settlement, cannot be questioned. Chilwell v. Chilwell, 40 Cal.App.2d 550, 555, 105 P.2d 122. Wilma's right to have the policy kept in force derived from the property settlement agreement between decedent and Thelma. Mutual Life Ins. Co. v. Henes, 8 Cal.App.2d 306, 311, 47 P.2d 513.

[3–6] An insured by contract may waive the right to change a beneficiary and may convert what is usually the contingent interest of a beneficiary of a policy of life insurance into a vested equitable interest. Mutual Life Ins. Co. v. Franck, 9 Cal.App.2d 528, 534, 50 P.2d 480; Mahony v. Crocker, 58 Cal.App.2d 196, 202, 136 P.2d 810. An agreement by an insured, in consideration of the settlement of property rights by which he covenants to make his daughter the sole irrevocable beneficiary of a policy of life insurance, vests her with an equitable interest therein which may not be defeated without her consent. Shoudy v. Shoudy, 55 Cal.App. 344, 351, 203 P. 433; Mutual Life Ins. Co. v. Franck, supra, 9 Cal.App.2d 534, 50 P.2d 482, 483; In re Thienhaus, 175 Wis. 526, 185 N.W. 531; Reilly v. Henry, 187 Ark. 420, 60 S.W.2d 1023, 1026; Chrysler Corporation v. Disich, 295 Mich. 261, 294 N.W. 673, 674. An insured cannot defeat the equitable right of a beneficiary by failing to act. He could not, in equity, be allowed to take advantage of his own wrong in breaching the property settlement agreement, and his estate is in no better position. Chilwell v. Chilwell, 40 Cal.App.2d 550, 553–555, 105 P.2d 122.

"A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." Civ.Code, § 1559. Plaintiff is entitled to recover the amount of the policy which decedent agreed to maintain in force. Civ.Code, §§ 3300, 3302.

[7–9] Section 337(1) of the Code of Civil Procedure provides that an action on a liability founded upon a written instrument shall be commenced within four years. Defendant argues that plaintiff had a cause of action on June 18, 1939, the date on which decedent ceased paying the premiums on the policy; that the action was not commenced until March 21, 1952; therefore, it is barred. The argument is fallacious. The statute did not begin to run until the cause of action accrued. Toney v. Security First Nat. Bank, 108 Cal.App.2d 161, 166, 238 P.2d 645. A cause of action invariably accrues when there is a remedy available. Irvine v. Bossen, 25 Cal.2d 652, 658, 155 P.2d 9; Maguire v. Hibernia Savings & Loan Soc., 23 Cal.2d 719, 733, 146 P.2d 673, 151 A.L.R. 1062. Ordinarily, a cause of action for breach of contract accrues on the failure of the promisor to do the thing contracted for at the time and in the manner contracted. Decedent, at any time prior to his death, could have complied with his obligation. The breach of the obligation did not accrue until he died without the policy for $5,000 in force. Wilma had no right to sue until the agreement had been breached by his failure to have in force, at death, a policy for $5,-

000 for her benefit. The statute was not set in motion until the date of the obligation's promised performance—the date of decedent's death. Chilwell v. Chilwell, 40 Cal.App.2d 550, 556, 105 P.2d 122; Mutual Life Ins. Co. v. Franck, 9 Cal.App.2d 528, 541–542, 50 P.2d 480; In re Lineaweaver's Estate, 284 Pa. 384, 131 A. 378; Cf. Sowers v. Archer, 148 Okl. 292, 298 P. 595.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

123 Cal.App.2d 134

MOORE et al. v. DAY.

Civ. 8306.

District Court of Appeal, Third District, California.

Feb. 10, 1954.

Sellers of beans brought action against buyer to recover damages for breach of oral contract for purchase of beans. The Superior Court, Stanislaus County, Maushart, J., entered judgment adverse to buyer, and buyer appealed. The District Court of Appeal, Schottky, J., held that buyer was estopped to rely on the Statute of Frauds as a defense.

Judgment affirmed.

1. Frauds, Statute of 🔑144

In a proper case, one may be estopped from setting up the statute of frauds as a defense.

2. Appeal and Error 🔑989

In considering contention of appellant that evidence did not support judgment, District Court of Appeal on appeal was required to disregard all conflicts in the evidence.

3. Frauds, Statute of 🔑144

Where buyer made offer to buy beans and knew that sellers had accepted the offer, and sellers continued to rely on buyer's renewed assurances that buyer would complete transaction, for about six months, and sellers, in relying on such assurances, refrained from selling the beans to others and altered their position to their damage and loss, buyer was estopped to avail himself of statute of frauds in action against him for damages for breach of contract.

4. Principal and Agent 🔑120(2)

In action by sellers of beans against buyer to recover damages for breach of oral contract, which buyer's agent had made for purchase of beans, wherein sellers contended that buyer was estopped from relying on statute of frauds, court properly permitted oral evidence to be received to prove that buyer's agent was the duly authorized agent of buyer to contract for the purchase of the beans, though agent was not authorized in writing to act for buyer. Civ.Code, § 2309.

5. Trial 🔑397(2)

Where amended complaint of sellers of beans in action to recover damages for breach of contract, conceded that contract was an oral contract, and sellers then stated facts which they alleged estopped buyer from asserting the unenforceability of the oral contract, and buyer answered, setting up a general denial and the statute of frauds as a defense, and court found that all allegations were true and specifically found that buyer was estopped to avail himself of the Statute of Frauds as a defense, court did not err in failing to make findings of fact on affirmative defense of statute of frauds.

6. Trial 🔑397(2)

It is not necessary for trial court to make specific findings as to each of several material issues, where findings, taken as a whole, or construed together, clearly show that they include court's conclusion on material issues.

7. Trial 🔑395(1)

If findings made necessarily negative allegations of defendants' answer as to which specific findings are not made, findings are sufficient.

W. Coburn Cook and H. E. Gleason, Turlock, for appellant.

William Zeff and E. Dean Price (of Zeff & Halley), Modesto, for respondents.

SCHOTTKY, Justice.

Respondents commenced an action against appellant to recover damages for breach of contract. Their amended complaint alleged in substance that on or about March 1, 1948, the parties entered into an oral contract whereby appellant agreed to purchase 83,670 pounds of beans from respondents at 17½¢ per pound; that on numerous occasions thereafter appellant stated that he would take the beans at such price but that he wished to defer delivery; that on August 17, 1948 appellant specifically told respondents that he would accept the beans and pay 17½¢ per pound therefor on September 10, 1948; that respondents delivered the beans to appellant on August 17, 1948 by giving written authorization therefor to the warehouse in which they were stored; that on September 10, 1948 appellant stated to respondents that he would take the beans but would pay no more than 9¢ per pound; that from March 1 to September 10, 1948 appellant repeatedly sent word to respondents through one Jack Gilligan, who acted as a broker in the transaction, that they need not worry about his delay in taking the beans and could rely on his agreement to take them at 17½¢ per pound; that as a result of said representations and their reliance thereon, respondents, to their damage, made no effort to sell the beans elsewhere prior to September 10, 1948, at which date and at all times thereafter the market price of the beans did not exceed 6¢ per pound; and that respondents were further damaged by having to pay $356.50 for fumigation and warehousing charges.

Appellant's answer put in issue the material allegations of the amended complaint and interposed the affirmative defense of the statute of frauds on the ground that the alleged contract for a sale of goods of a value of more than $500 was not in writing. At the trial the issues raised by the pleadings were enlarged so as to include the further defense that if any contract were made by Jack Gilligan as agent of appellant, it was void as it was not authorized in writing as required by section 2309 of the Civil Code.

The trial court found generally that the allegations of the amended complaint were true; that Jack Gilligan was the duly authorized agent of appellant; that all his acts in connection with the purchase and delivery of the beans were within the scope of his agency and authorized by appellant; and that appellant was estopped to avail himself of the defense of the statute of frauds. Judgment was rendered in favor of respondents, awarding them $356.50 for fumigation and warehouse charges and damages of $8,676.89, the amount of the admitted difference between the contract price and sums realized from subsequent sales of a portion of the beans.

Disregarding conflicts in the evidence, which the trial court has resolved in favor of respondents, the facts are that in 1948 and for many years prior thereto appellant had been a broker and merchant and had previously purchased beans on a commission basis through one Jack Gilligan. The custom was that appellant would advise Gilligan of how much he would pay for a certain quantity of beans and if the terms were satisfactory to the producer, Gilligan would obtain a written contract of sale and purchase. It was the understanding and custom in the trade that such offers were not continuing and if not accepted immediately the broker would refuse to buy the beans if it would be disadvantageous to him due to a fluctuation in market prices. Respondents had raised and sold beans for a number of years and were fully familiar with the practice of executing a written contract covering transactions entered into with a broker through his agent. In 1946 or 1947, when Gilligan was purchasing exclusively on the account of appellant, respondents sold some of their beans to him. In the fall of 1947 Gilligan brought a sample of respondents' crop to appellant and thereafter discussed his possible purchase of same. In late February, 1948 appellant advised Gilligan that he would pay respondents 17½¢ per pound for 83,670 pounds of their beans. That evening or the next day Gilligan communicated appellant's offer to respondents who accepted it on the following day and Gilligan so advised appellant. On numerous occasions thereafter appellant stated to Gilligan that he intended to take respondents' beans at 17½¢ per pound but that he wished to defer delivery due to an overload and shipping difficulties. These reassurances were relayed to respondents by Gilligan. However, in June or July when Gilligan again made inquiry as to the matter, appellant stated: "I never did want those Moore beans, your salesmanship sold those beans to me." Whereupon, Gilligan informed respondents that he thought appellant was backing out. Respondents then began to fear the deal was "shaky" and endeavored to personally contact the appellant. The respondents and appellant met for the first time in the early part of August at which time appellant assured them that he would take the beans at 17½¢ per pound, and when pressed for a written contract said he would send one by Gilligan as he had been handling the matter. Respondents admit they had not theretofore requested a written contract as they considered they did not need one as the beans had been sold to appellant as of March 1, 1948. On September 10th appellant refused to pay more than 9¢ per pound, which respondents refused to accept. Thereafter they were able to sell only a portion of the beans and at less than 9¢ per pound, and incurred storage and warehouse charges in the amount of $356.50.

Appellant urges a number of contentions for a reversal of the judgment, the principal of which is that the evidence does not support the judgment. It is appellant's position that the transaction was within the statute of frauds, and that there was no competent evidence either that Gilligan was an authorized agent of appellant or that any enforceable contract for the purchase of the beans was ever entered into. Respondents concede here, as they did at the trial, that there was no written agreement for the purchase of the beans, but it is respondents' contention that the conduct of appellant was such that he is estopped from setting up the statute of frauds. The trial court agreed with this contention of respondents and stated in its memorandum opinion:

> "A complete review of the evidence discloses that the circumstances surrounding this entire transaction clearly indicates that the words and the conduct of the defendant amounted to an inducement that a written contract would be waived, and that to assert the invalidity of the contract, would constitute a fraud upon the plaintiff. The acts and the conduct of the defendant clearly indicate that he did not intend to avail himself of the statute. To permit him now to set up the Statute of Frauds as a defense would allow him to use the Statute as a sword and not as a shield."

[1] There can be no doubt that in a proper case a person may be estopped from setting up the statute of frauds as a defense. In one of the leading California cases upon this question, Seymour v. Oelrichs, 156 Cal. 782 at pages 794–795, 106 P. 88 at page 94, it is said:

> "The right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud, cannot be disputed. It is based upon the principle 'thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme.' 2 Pom.Eq.Jur., § 921. It was said in Glass v. Hulbert, 102 Mass. 24, 35, 3 Am.Rep. 418: 'The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assump-

tion of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds.' This statement has been accepted as setting forth a plain and satisfactory ground for equitable jurisdiction, together with a clear indication of the proper limitation of its exercise. See [5] Browne on Statute of Frauds, § 457a. In the section last cited, Mr. Browne says: 'A plaintiff * * * must be able to show clearly * * * not only the terms of the contract, but also such acts and conduct of the defendant as the court would hold to amount to a representation that he proposed to stand by his agreement and not avail himself of the statute to escape its performance; and also that the plaintiff, in reliance on this representation, has proceeded, either in performance or pursuance of his contract, to so far alter his position as to incur an unjust and unconscientious injury and loss, in case the defendant is permitted after all to rely upon the statutory defense. After proof of this, the court may well be justified in using its undoubted power, in cases of equitable estoppel, to refuse to listen to a defendant seeking to deny the truth of his own representations previously made.'

"We can see no good reason for limiting the operation of this equitable doctrine to any particular class of contracts included within the statute of frauds, provided always the essential elements of an estoppel are present, or for saying otherwise than as is intimated by Mr. Pomeroy in the words already quoted, viz., that it applies 'in every transaction where the statute is invoked.' It is a general equitable principle, a part of the broader equitable doctrine stated in Dickerson v. Colgrove, 100 U.S. [578] 580, 25 L.Ed. 618, and quoted therefrom in Carpy v. Dowdell, 115 Cal. [677] 687, 47 P. [695] 697, as follows: 'The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both.'"

[2] Disregarding, as we must, all conflicts in the evidence, it appears from the evidence and the inferences that may reasonably be drawn therefrom that Gilligan was a buyer who had been buying beans for appellant; that late in February he had made an offer of 17½¢ per pound for respondents' beans on behalf of appellant; that respondents accepted the offer which acceptance was communicated to respondent by Gilligan; that appellant was to take delivery of the beans in two weeks, but from time to time sent word to respondents through Gilligan postponing the acceptance of the beans but assuring respondents that he would complete the purchase; that about July 1st, Gilligan urged appellant to complete the transaction and that appellant then for the first time indicated that he did not want the beans; that Gilligan then told respondents what appellant had said and one of respondents endeavored to see appellant and did see him about August 1st at which time appellant assured respondents he would keep his agreement to buy the beans for 17½¢ and would send a written contract by Gilligan; that one of respondents saw appellant about August 17th and asked him to set a date for the delivery of the beans and the completion of the sale, and appellant set the date of September 10th; that on September 10th appellant for the first time told respondents that he would not go through with the purchase at 17½¢ but would pay only 9¢ per pound, which offer was refused by respondents; that at all times since Gilligan first communicated to appellant the acceptance by respondents of appellant's offer of 17½¢ per pound for the beans respondents con-

sidered the beans sold to appellant and relied upon appellant's continued assurances that he would complete the transaction at the agreed price, and made no effort to market said beans; that the market broke sharply not long before appellant definitely informed respondents that he would only pay 9¢ per pound for the beans; that the beans were thereafter disposed of by respondents at the best prices they could obtain but at considerably less than 17½¢ per pound.

[3] Applying the well settled principles hereinbefore set forth to the factual situation in the instant case we believe that the court's finding that appellant was estopped from availing himself of the statute of frauds is supported by the evidence and the law. The court was fully justified in concluding that appellant had made the offer for the beans and knew that respondents had accepted it, that respondents continued to rely on appellant's renewed assurances that he would complete the transaction from about March 1st to September 10th; that relying upon appellant's assurances respondents refrained from selling the beans to others and altered their position to their damage and loss. Under such circumstances the court had a right to believe that appellant was attempting to use the statute of frauds as a sword and not as a shield.

[4] Appellant contends that the court erred in permitting oral evidence to be received tending to prove that Jack Gilligan was an agent of appellant and also that the finding that Gilligan was the duly authorized agent of appellant and that all of his acts with reference to the purchaser of the beans were within the scope of his agency are not supported by the evidence. If the only issue in the case was whether or not the statute of frauds had been complied with there would be considerable merit in these contentions of appellant. However, upon the issue of estoppel, which was clearly in the case, the evidence was admissible as bearing upon the connection and relationship between Gilligan and appellant. The court determined the case upon the issue of estoppel and, as related to such an issue, the finding is supported by the evidence. There can be no question as to the fact that Gilligan was sent by appellant to buy respondents' beans and that he carried messages back and forth between appellant and respondents, and in that sense he was an agent so far as the issue of estoppel is concerned.

[5] Appellant contends, also, that the trial court erred in not making findings of fact upon appellant's affirmative defense of the statute of frauds. This contention is without merit. Respondents' amended complaint conceded that the contract in question was an oral contract. Respondents then stated facts which they alleged estopped the appellant to assert the unenforceability of the oral contract. Appellant answered, setting up a general denial and the statute of frauds as a defense. The trial court found that all of the allegations contained in these paragraphs were true and further specifically found that the "defendant, Roy M. Day, is estopped to avail himself of the Statute of Frauds as a defense to the plaintiffs' action herein."

[6, 7] It is well settled in California that "it is not necessary to make specific findings as to each of several material issues where the findings, taken as a whole, or construed together, clearly show that they include the court's conclusion upon the material issues. Bowers v. Union Trust Co., 117 Cal.App. 259, 264, 265, 3 P.2d 614." Petersen v. Murphy, 59 Cal.App.2d 528, 139 P.2d 49, 52. And further, that: "If the findings made necessarily negative the allegations of defendants' answer as to which specific findings are not made, the findings are sufficient." Petersen v. Murphy, supra, 59 Cal.App.2d at pages 533, 534, 139 P.2d at page 52.

The remaining contentions of appellant relate mainly to the sufficiency of the evidence, and are to a large extent an argument which only emphasizes the conflict in the evidence. We have studied the record carefully and are satisfied that the findings of the court as to damages and other issues are fully supported by the evidence. The record shows that following appellant's final refusal to buy the beans at the agreed price respondents endeavored to and did sell them at the best price obtainable. We are not impressed with appellant's argument that respondents should have accepted appellant's offer of 9¢ per pound on September 10th and have thus reduced the amount of damages, for respondents could hardly have accepted this offer of appellant without waiving what they considered their rights under their prior agreement with appellant.

No other points raised require discussion.

The judgment is affirmed.

PEEK, J., and PAULSEN, Justice pro tem., concur.

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123 Cal.App.2d 91

LILIENTHAL

v.

HASTINGS CLOTHING CO. et al.

No. 15625.

District Court of Appeal, First District, Division 1, California.

Feb. 5, 1954.

Rehearing Denied March 5, 1954.

Hearing Denied March 31, 1954.

Action for personal injuries. The Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., after judgment for defendants, granted plaintiff's motion to set aside and vacate judgment and for new trial, and defendants appealed. The District Court of Appeal, Bray, J., held that where plaintiff, after filing notice of appeal, was informed that reporter's notes for one day of the 12 day trial could not be found, and plaintiff sought new trial on ground that it was impossible to obtain transcript due to such loss of notes, but made no attempt to obviate necessity for new trial and arbitrarily refused every offer of defendants to help work out a statement or stipulation, and where plaintiff's rights would be fully protected on appeal by concessions made by defendants, granting of new trial was abuse of discretion.

Order reversed.

1. Appeal and Error 🔑977(1)
New Trial 🔑93

Trial court has wide discretion in passing on motion for new trial, made under statute authorizing court to order new trial where reporter's transcript becomes unavailable, and its action must not be disturbed unless it is clearly shown that court abused its discretion. Code Civ.Proc. § 953e.

2. New Trial 🔑93

In resolving merits of motion for new trial made under statute authorizing court to order new trial where reporter's transcript becomes unavailable, trial court must consider the rights of both parties. Code Civ.Proc. § 953e.

3. New Trial 🔑93

Under statute authorizing court to order new trial where reporter's transcript becomes unavailable because of loss or destruction, in whole or in substantial part, of notes of reporter, a reasonable test of substantiality would be whether questions which appellant desired to raise on appeal could be properly considered without the lost portion of transcript, and if they could, loss would not be substantial and hence granting of new trial because of loss would be abuse of discretion. Code Civ.Proc. § 953e.

4. Appeal and Error 🔑930(1)

Every presumption is in favor of fairness, impartiality, and regularity of proceedings in trial court leading to judgment, and verdict or judgment is presumptively right until it is shown to be wrong.

5. New Trial 🔑93

Where plaintiff, appealing from adverse judgment, was informed that reporter's notes for one day of the 12 day trial could not be found, and plaintiff sought new trial on ground that it was impossible to obtain transcript due to loss of notes, but made no attempt to obviate necessity for new trial and arbitrarily refused every offer of defendants to help work out a statement or stipulation, and where plaintiff's rights would be fully protected on appeal by concessions made by defendants, granting of new trial was abuse of discretion. Code Civ.Proc. § 953e.

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Bronson, Bronson & McKinnon, San Francisco, for Hastings Clothing Co.

Dana, Bledsoe & Smith, San Francisco, for American Bldg. Maintenance Co., American Bldg. Maintenance Co. of California, and Theodore Rosenberg.

BRAY, Justice.

Defendants appeal from an order under section 953e, Code of Civil Procedure, granting plaintiff a new trial and vacating the judgment.

Question Presented.

Under the circumstances here, did the court abuse its discretion?

Record.

The action is one for personal injuries claimed to have been sustained by plaintiff in slipping on the floor of defendant Hastings' store. After a protracted trial (the transcript contains 1152 pages), the jury verdict was in favor of all defendants. Plaintiff moved for a new trial, which was denied. August 3, 1951, plaintiff filed notice of appeal from the judgment. August 9, plaintiff filed request for reporter's and clerk's transcripts. According to the affidavit of attorney Sloss, one of plaintiff's attorneys, on October 10th he phoned the reporter inquiring why he had not been sent the estimate of the cost of the transcript. He was told that other matters had intervened and the estimate would be forthcoming as soon as possible. November 28th, the clerk mailed the estimate. December 5th, plaintiff deposited the estimated amount with the clerk. On January 4, 1952, February 20th or 26th, March 3rd, March 4th, and March 21st, plaintiff was informed by the reporter that pressure of other business had held back the transcript's preparation but that it would be prepared at once. A copy of plaintiff's letter of protest of March 4th was sent the trial judge. Finally on May 5th plaintiff was informed by the latter that the reporter's notes for one trial day—June 25th—could not be found. May 20th, plaintiff filed a notice of motion to set aside and vacate the judgment and for new trial on the ground that it was impossible to obtain a transcript of the testimony due to the loss of the reporter's notes of one day. The trial court granted the motion.

Abuse of Discretion.

[1, 2] "When it shall be impossible to have a phonographic report of the trial transcribed by a stenographic reporter as provided by law or by rule * * * because of the loss or destruction, in whole or in *substantial part*, of the notes of such reporter, the court or a judge thereof shall have power to set aside and vacate the judgment * * * from which an appeal has been taken * * * and to order a new trial of the action * * *." Code Civ.Proc. § 953e. Emphasis added. The trial court has a wide discretion in passing on a motion for new trial under this section. Its action must not be disturbed unless it is clearly shown that it abused its discretion. Although this discretion is a wide one, it is not unlimited, arbitrary or unrestricted. Caminetti v. Edward Brown & Sons, 23 Cal.2d 511, 514, 144 P.2d 570. In resolving the merits of such a motion the trial court must consider the rights of both the appellant and the respondent. Duarte v. Rivers, 90 Cal.App.2d 152, 202 P.2d 612. "* * * each case must be decided upon its own facts." Id., 90 Cal.App.2d at page 155, 202 P.2d at page 615.

[3] Section 953e contemplates that the lost notes must constitute at least a *substantial* part of the transcript. It would seem that a reasonable test of substantiality would be whether the questions which an appellant desired to raise on appeal could be properly considered without them. If they could, the loss would not be substantial and hence there would be an abuse of discretion in granting a new trial because of their loss.

Here the trial consumed 12 days. The presentation of defendants' case commenced on the afternoon of the 10th day. It is the notes for the 11th day or the second day of defendants' case that are missing. According to the affidavit of one of defendants' attorneys, not denied by plaintiff, said attorney when notified by plaintiff's attorney of the loss of the day's notes stated that defendants' counsel had taken accurate notes of the testimony of the witnesses of that day and offered to collaborate in an effort to work out a statement of that testimony. The offer was refused, plaintiff's attorney stating he intended to move for a new trial under section 953e.

In his affidavit accompanying the notice of that motion and on the hearing plaintiff's attorney stated that the lost record was necessary to support two contentions that plaintiff had made on the original motion for new trial and which he intended to make on appeal, (1) that the court in instructing the jury on the doctrine of assumption of risk committed error as there was no evidence to make the doctrine applicable, and (2) that the court erronously admitted testimony to show the absence of other accidents either upon the floor in question or upon other store floors waxed with the same substance. In the affidavit in opposition to the motion, one of defendants' attorneys set forth in some detail his notes concerning the testimony of the witnesses on the day in question, showing that there was no testimony given on assumption of risk and that there was testimony to lack of complaints as to the floor in question and other similarly waxed floors, and pointed out that plaintiff in no way had attempted to get defendants to agree on what occurred that day.

After the motion was submitted but before decision defendants served and filed a "Proposed Settled Statement of Testimony Given June 25, 1951" which set forth defendants' version of the testimony of that day including testimony of the kind claimed by plaintiff of lack of complaints, admitted over plaintiff's objections. The proposed statement conceded that no testimony was given on June 25 that in any way tended to establish the defense of assumption of risk by plaintiff. Plaintiff ignored the statement, and refused to discuss whether it was correct, or to propose any modification of it. Throughout the entire proceeding as well as in this court it has been plaintiff's position that the fact of the loss of the day's notes entitled her to a new trial, and that she is not required in any way to attempt to provide or join in providing any substitute therefor. At the hearing defendants offered to stipulate that on that day there was no testimony as to assumption of risk and that there was testimony to lack of complaint as to any floors waxed with the same substance admitted over plaintiff's objection. Plaintiff refused to accept the stipulation or to require any modification or amplification of it. On this appeal, defendants in their briefs continued to offer such a stipulation and at oral argument agreed that if the order granting the new trial is reversed defendants shall be bound by their offered stipulation.

It is obvious by the conduct of plaintiff from the moment of the discovery of the lost notes that plaintiff has refused to do anything that would obviate the necessity of a new trial, but considered she had a technical point which would require a new trial of an action that has already taken 12 days. In answer to the proposed stipulation she has stood on ingenious but unsound grounds of objection. For example, she has contended that this court could not consider a stipulation of the parties as to what occurred on the lost day, but would be required to assume that there was testimony on that day on the subject of assumption of risk, in spite of the stipulation that there was not. The absurdity of such contention is shown by such cases as Palmer v. City of Long Beach, 33 Cal.2d 134, 199 P.2d 952.

In Diamond v. Superior Court, 189 Cal. 732, 210 P. 36, in discussing the old system of presenting an appeal on a bill of exceptions, the court emphasized that the fact that the reporter's notes were unavailable did not excuse the appellant from making a diligent effort to prepare a bill of exceptions from memory and such notes and data as he had, giving the other party an opportunity to present such amendments as he saw fit, even though this procedure "might have been vexatious and inexpedient * * *." 189 Cal. at page 738, 210 P. at page 39. The statement in Conlin v. Coyne, 19 Cal.App.2d 78, at page 82, 64 P.2d 1123, at page 1125, concerning the failure to attempt to obtain a bill of exceptions, is applicable to plaintiff's failure here to join in a stipulation: "Counsel merely assumed that it could not be done, but aside from the expressions of their belief in the matter, they made no showing that it was impossible or impracticable to do it." As said in Potter v. Entler, 71 Cal.App.2d 710, 712, 163 P.2d 490, 491: "* * * there is no showing that any attempt was ever made to secure an adequate record through an agreed statement of facts, or otherwise."

There are a number of cases in California sustaining a denial of a new trial under section 953e. In most of them the failure of the appellant to make an effort to find a substitute for the lost notes, and that such a substitute would have been fully effective for the purposes of the appeal, were the basis for the denial of a new trial.

In only two cases were denials of new trials by the trial court reversed. In Weisbecker v. Weisbecker, 71 Cal.App.2d 41, 161 P.2d 990, the reporter died before transcribing any testimony. The appellant contended that the judgment was contrary to the evidence. The trial had consumed three days and the court found that an adequate statement of the evidence intelligently presenting appellant's contention could not be prepared without a transcript of the evidence. In Fickett v. Rauch, 31 Cal.2d 110, 187 P.2d 402, after two days the trial was postponed from time to time for over 15 months. The reporter died in the meantime. The trial was concluded approximately two years after the testimony in question was taken. In preparing for appeal both parties made an effort to prepare a bill of exceptions. "This was unsuccessful due to lack of existing data showing the witnesses' testimony other than pretrial statements of what was expected to be proved." 31 Cal.2d at page 114, 187 P.2d at page 405. "The respondent does not contend that existing data is sufficient." 31 Cal.2d at page 116, 187 P.2d at page 406. Obviously the facts in our case are quite divergent from those in the two last mentioned cases.

[4] Plaintiff is entitled to have her appeal heard upon the merits. If the loss of the reporter's notes would prevent the appeal from being so heard, she would be entitled to a new trial. On the other hand, if by reasonable use of stipulations or agreed statements the merits of her appeal can be fully presented, then she would not be entitled to a new trial. Courts are too busy these days to repeat a 12 day trial unless it is necessary to do so in the interests of justice. Neither plaintiff nor the trial court made any effort to avoid the necessity of a new trial by joining with defendants in an agreed statement or stipulation, or at least attempting to do so. As said in Caminetti v. Edward Brown & Sons, supra, 23 Cal.2d 511, 521–522, 144 P.2d 570, 575: "Every presumption is in favor of the fairness, impartiality, and regularity of the proceedings in the trial court leading to judgment. A verdict or judgment is presumptively right until it is shown to be wrong. Thus to deprive a party of his judgment and the intendments in its support, and to force him to re-establish his claim in every case where there is a mere showing of incapacity or death of the reporter, without any consideration of the facts, * * * of the possibility of agreeing on a bill of exceptions or statement of facts * * * would be just as unfair as to automatically deny a new trial to every appellant who has been deprived of his appeal because of the impossibility of securing a record."

[5] Nor has plaintiff pointed out how the concession offered by defendants in the trial court, in their briefs and in open court here, does not fully meet the situation or fully permit the consideration of her appeal on the merits. We are satisfied that it does and on her appeal such concession will be considered by us. Reviewing courts are reluctant to interfere with the discretion of trial courts, but where, as here, no attempt was made by plaintiff to obviate the necessity of a new trial, where every offer of defendants to help work out a statement or stipulation was arbitrarily refused, where plaintiff's rights are fully pro-

tected on appeal by the concessions made by defendants, we have no alternative.

The order is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; SHENK and CARTER, JJ., dissenting.

122 Cal.App.2d 852

HOVER v. MacKENZIE et al.

Civ. 19910.

District Court of Appeal, Second District,
Division 3, California.
Jan. 26, 1954.

Rehearing Denied Feb. 2, 1954.
Hearing Denied March 25, 1954.

Action in which plaintiff filed notice of motion to reconsider order denying plaintiff's motion to set aside judgment for defendants-cross-complainants rendered upon plaintiff's default. The Superior Court, Los Angeles County, John J. Ford, J., entered order setting aside and vacating default of plaintiff and the judgment for cross-complainants, and cross-complainants appealed. The District Court of Appeal, Vallée, J., held that evidence supported action of court in vacating default.

Orders affirmed.

1. Judgment 🔑363

Code of Civil Procedure provision that a trial court may relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect is remedial in its nature and is to be liberally construed. Code Civ.Proc. § 473.

2. Judgment 🔑363

The policy of the law is to have every litigated cause tried on its merits, and the law looks with disfavor on a party who, regardless of the merits of his cause, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary. Code Civ.Proc. § 473.

3. Appeal and Error 🔑935(2), 948, 957(1)

Reviewing courts look with favor on orders excusing defaults and permitting controversies to be heard on their merits and such orders will rarely be reversed, and never unless it clearly appears that there has been a plain abuse of discretion, and burden is on appellant to show such an abuse of discretion. Code Civ.Proc. § 473.

4. Judgment 🔑163

Even in a case where the showing, under statute permitting trial court to relieve party from judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, is not strong, or there is doubt as to setting aside of a default, such doubt should be resolved in favor of the application. Code Civ.Proc. § 473.

5. Judgment 🔑143(3)

In action in which cross-defendant filed notice of motion to reconsider order denying motion to set aside judgment for cross-complainants rendered upon cross-defendant's default, court was warranted in concluding that default of cross-defendant was taken as result of his inadvertence and that his neglect was such as might have been omission of reasonably prudent person under circumstances and that it was therefore excusable. Code Civ.Proc. § 473.

6. Judgment 🔑304

There is no impropriety or error in a judge reversing himself if he later concludes he was wrong.

7. Judgment 🔑173

Where court entered order denying motion to set aside default judgment, plaintiff's subsequent motion to reconsider was in effect a renewal of motion to vacate and set aside default and court had power to enter order granting motion for reconsideration of denial of motion to vacate and set aside judgment, order setting aside and vacating order denying motion of plaintiff to vacate and set aside judgment, and order setting aside and vacating default of plaintiff and the judgment for defendants. Code Civ.Proc. § 473.

George Boshae, Los Angeles, for appellants.

Paul Shapiro, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendants and cross-complainants from: 1) an order granting plaintiff and cross-defendant's motion for reconsideration of the denial of a motion to vacate and set aside a judgment; 2) an order setting aside and vacating an order denying a motion of plaintiff and cross-defendant to vacate and set aside a judgment; 3) an order setting aside and vacating the default of plaintiff and cross-defendant and a judgment.

Plaintiff filed the action, apparently to quiet title. The complaint is not a part of the record. Defendants filed a cross-complaint naming plaintiff as cross-defendant in which they sought a decree quieting their title to a parcel of realty. Plaintiff answered the cross-complaint. The cause was set for trial. Notice of trial was given by the attorney for plaintiff to the attorney for defendants. Neither plaintiff nor his attorney appeared on the day of trial. The cause was then tried on the cross-complaint as a default; and on December 29, 1952, a judgment was rendered and entered quieting defendants' title to the realty.

On March 12, 1953, plaintiff filed a notice of motion, supported by affidavits, to vacate and set aside the judgment of December 29, 1952, on the grounds of mistake, inadvertence, excusable neglect, and that no findings of fact or conclusions of law had been served or filed. This motion was denied on March 25, 1953.

On March 31, 1953, plaintiff filed a notice of motion, supported by the affidavits previously filed and additional affidavits, to reconsider the order of March 25, 1953. On April 22, 1953, this motion was granted; an order was made vacating and setting aside the order of March 25, 1953; and an order was made vacating and setting aside the default of plaintiff and the judgment of December 29, 1952.

Defendants appeal from the orders made on April 22, 1953. They claim the court abused its discretion in making them. The claim is without merit.

The affidavits made by plaintiff stated: At the time the complaint was filed, William Stein was his attorney, Stein wrote a letter notifying him of the date of trial. He lost or mislaid the letter, did not remember the date of trial, and was under the impression the case would be tried in the spring of 1953. He does not remember when he lost or mislaid the letter for the reason that he did not have any occasion to again look at the date of trial. He became dissatisfied with Stein and about March 6, 1953, retained Paul Shapiro as his attorney in the action. He did not remember Stein's first name, and did not ascertain it until about March 9, 1953. He asked Shapiro to call Stein. Shapiro called one Louis Stein and was informed he had not represented plaintiff. Shapiro then called William Stein and was informed that the case had been set for trial for December 29, 1952, and that he did not know what had happened to it. Shapiro telephoned the county clerk, verified the date of trial, and learned that judgment had been rendered against plaintiff for the reason he was not present at the trial. Thereupon he instructed Shapiro to procure a substitution of attorneys and file a motion to set aside the judgment. Stein told Shapiro he had written plaintiff informing him of the date of trial and had telephoned plaintiff's niece asking her to inform plaintiff of the date of trial. His niece did not notify him of the date of trial. His failure to appear at the time of trial was due to his excusable neglect, oversight, inadvertence, mistake, and surprise. He stated all the facts in the case to Shapiro and was informed by him that he has a meritorious cause of action against defendants. About August 3, 1949, being 60 years of age, unmarried, lonesome, and without friends, upon the urging of defendants he conveyed to them his only piece of real estate upon the promise that they would give him shelter for the remainder of his life, would support him, and pay his medical and hospital bills. He also transferred some furniture to defendants. At the time he made the conveyance he had no other real or personal property except a vacant lot in Ohio worth $100. As soon as he conveyed the property to defendants they did not want him around. He thereupon moved from defendants' residence. On November 15, 1951, he requested defendants to be permitted to move in and live with them. They refused. There was no consideration for the conveyance. The promises made to him were not made in good faith.

An affidavit of plaintiff's niece stated: Stein called her on the telephone and asked her to call plaintiff and notify him of the date of trial; she forgot to inform him.

An affidavit of plaintiff's present attorney stated: Plaintiff retained him about March 6, 1953, and told him that a Mr. Stein who had offices on Spring Street had represented him. He looked through the Attorneys' Directory and found a number of Steins. William Stein told him the matters related in the affidavits of plaintiff.

Affidavits of defendant Kathleen MacKenzie and defendants' attorney were filed in opposition to the motion. As far as material, they stated: Defendants' attorney subpoenaed five witnesses for the trial. It was extremely difficult to locate three of them, and the other two were reluctant to attend the trial because of loss of employment. The whereabouts of these witnesses "are doubtful," and the possibility of serving a subpoena on all of them is highly questionable. Stein did not, between the time the cause was set for trial and the date of trial, contact him (defendants' attorney) about a continuance. He and defendants were ready for trial on the date set. Stein did not appear. The presiding judge asked him (defendants' attorney) to telephone Stein. He did. He asked Stein what he was going to do. Stein replied, "Nothing"; he was not going to appear. He told Stein he was going ahead "on the cross-complaint, as a default." Stein replied, "Go ahead and do what you want."

[1-4] Code of Civil Procedure section 473, providing that a trial court may relieve a party from "a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect", is remedial in its nature and is to be liberally construed. Friedrich v. Roland, 95 Cal.App.2d 543, 552, 213 P.2d 423. The policy of the law is to have every litigated cause tried on its merits; and it looks with disfavor on a party who, regardless of the merits of his cause, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary. 14 Cal. Jur. 1075, § 116. Reviewing courts have always looked with favor on orders excusing defaults and permitting controversies to be heard on their merits. Such orders are rarely reversed, and never unless it clearly appears that there has been a plain abuse of discretion. Jones v. Title Guaranty & Trust Co., 178 Cal. 375, 376–7, 178 P. 586. Even in a case where the showing under section 473 of the Code of Civil Procedure is not strong, or where there is any doubt as to the setting aside of a default, such doubt should be resolved in favor of the application. Garcia v. Garcia, 105 Cal.App.2d 289, 291, 233 P.2d 23. All presumptions will be indulged in favor of the correctness of the order, and the burden is on the appellant to show that the court's discretion was abused. Estate of McCarthy, 23 Cal.App.2d 398, 400, 73 P.2d 914.

In Baratti v. Baratti, 109 Cal.App.2d 917, at page 921, 242 P.2d 22, at page 24, we said: "Inadvertence is defined as lack of heedfulness or attentiveness, inattention, fault from negligence. Webster's New Inter. Dict., 2d Ed.; Greene v. Montana Brewing Co., 32 Mont. 102, 79 P. 693, 694. * * * The 'excusable neglect' referred to in the section [Code Civ.Proc., § 473] is that neglect which might have been the act of a reasonably prudent person under the same circumstances. Elms v. Elms, 72 Cal. App.2d 508, 513, 164 P.2d 936."

[5] The court was warranted in concluding from the record before it that the default of plaintiff was taken as a result of his inadvertence, that his neglect was such as might have been the omission of a reasonably prudent person under the same circumstances, and that it was therefore excusable.

[6, 7] Defendants argue that the court having once denied the motion to vacate the

default and the judgment should not have thereafter granted it. There is no impropriety or error in a judge reversing himself if he later concludes he was wrong the first time. He would stultify himself if he did otherwise. The motion to reconsider was in effect a renewal of the motion to vacate and set aside the default and the judgment. The court had the power to make the orders appealed from. Harth v. Ten Eyck, 16 Cal.2d 829, 108 P.2d 675.

The orders appealed from are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

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123 Cal.App.2d 81

DICKOW et al. v. COOKINHAM et al.

Civ. 15372.

District Court of Appeal, First District, Division 1, California.

Feb. 5, 1954.

Hearing Denied March 31, 1954.

Action by patient and her husband against doctors for alleged malpractice in negligently failing to examine patient's back and refusing to adjust cast thereon with result that ulcer developed, causing scar and permanent injury. The Superior Court, City and County of San Francisco, Franklin A. Griffin, J., directed verdict for doctors, and plaintiffs appealed. The District Court of Appeal, Bray, J., held that question of doctors' negligence was for jury.

Judgment reversed.

1. Appeal and Error 🔑997(3)

In reviewing a directed verdict, the District Court of Appeal is required to determine if there is any substantial evidence or any reasonable inferences therefrom which would support a verdict for plaintiffs.

2. Physicians and Surgeons 🔑18(9)

In action by patient against doctors for alleged malpractice in negligently failing to examine patient's back and refusing to adjust cast thereon with result that ulcer developed, causing scar and permanent injury, question of doctors' negligence was for jury.

3. Appeal and Error 🔑854(5)

Where, in action for doctors' alleged malpractice, fact that trial court had expressly granted directed verdict on sole ground of failure to prove negligence as alleged, would not prevent the district court of appeal from considering effect of release executed by plaintiffs in view of fact that alleged bar of the release was a ground of motion for directed verdict and, if doctors' contention concerning effect of release was correct, release would be a complete bar to the action.

4. Evidence 🔑461(1)

Where release given by patient to tort-feasor who allegedly was liable for original injuries, released such alleged tort-feasor from all claims for injuries caused by doctors who treated patient but did not purport by its language to release doctors, parol evidence should have been admitted to determine intention of parties in giving and accepting release.

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Ernest I. Spiegl and Elliot M. Epsteen, San Francisco, for appellants.

Robert L. Lamb, Harry Gottesfeld and Cooley, Crowley & Gaither, San Francisco, for respondents.

BRAY, Justice.

In a malpractice action plaintiffs appeal from a judgment entered on a directed verdict in favor of defendants.

Questions Presented.

1. Sufficiency of the evidence.

2. Is this court limited to the ground given by the trial court for its action?

3. Should evidence have been admitted to show that release of one tort-feasor was not intended to release other tort-feasors?

Record.

Plaintiffs' complaint charged defendants with malpractice in negligently failing to examine plaintiff[1] Carrie Dickow's back and failing and refusing negligently to adjust or correct her cast, as a result of which a sore or ulcer developed and remained untreated, and plaintiff's flesh was eaten away, causing great pain, a scar and permanent injury. At the end of plaintiffs' case the court granted a directed verdict solely upon the ground that plaintiffs failed "to prove negligence as alleged * * *."

1. Sufficiency of Evidence.

[1] It is so well settled as to no longer require citation of authorities that in reviewing a directed verdict, this court is required to determine if there is any substantial evidence or any reasonable inferences therefrom which would support a verdict for plaintiffs.

September 11, 1947, plaintiff was struck by a falling plank. She was taken to the hospital and defendants, licensed physicians, undertook to treat her. X-rays disclosed, and her injury was diagnosed as a compression fracture of the twelfth thoracic vertebra. There was a swelling which defendants contend extended below for a distance of about two vertebrae, although records made by defendants indicate that the swelling was limited to the area of the twelfth vertebra. On September 13th a cast was applied which covered plaintiff's entire trunk, from the base of the neck to and over the buttocks. September 14th a piece of the cast covering plaintiff's chest broke off and was replaced by defendants. There was no attempt made to clean out any of the debris or crumbs of plaster that may have remained from the break or mending process. Four or five days later a "window" was cut in the front of the cast and again no attempt to clean the debris was made. September 16th plaintiff complained of a pain in the lower part of her back, below the area of the twelfth thoracic vertebra. Defendants told her it was "referred pain," that it would last for ten days, then disappear. By the 22nd or 23rd the pain in the region of the twelfth thoracic vertebra had stopped but the pain in the lower back continued. Plaintiff complained to defendants that the pain in that region was getting worse and was told that she would have to expect a lot of pain. From time to time she complained to defendants of this pain, but they did nothing about it. September 26th, plaintiff asked defendant Cookinham to look under the cast, that "I was sticking to something." He refused. She told him that the pain was so bad that the nurses could not rub the upper part of her thighs because the pulling of the skin in the pain area was so painful she could not stand it. About September 27th she again asked defendant Cookinham why the lower back could be so painful when the fracture was in the upper back. He again stated it was because of referred pain. She complained to defendant Cookinham each day thereafter including October 1st, and asked for an examination under the cast. He placed his hand under the cast. This caused the pain to be excruciating and plaintiff cried out. Defendant Cookinham then stated that she had "a pinched nerve there." He did nothing further. Later that same day plaintiff requested the nurse to look under the cast. She did and then told plaintiff, "You have a big ulcerated sore here." The nurse applied medication with a swab stick, which on removal was covered with pus. Defendant Cookinham was called and for the first time looked under the cast. He stated that "it was a pressure sore" and that the cast would come off the next day. The next day a portion of the cast was cut as hereafter set forth. The cast was not removed for several months. No contention is made that after discovery of the ulcer defendants improperly treated it.

The malpractice charged is the failure of defendants to discover and treat the ulcer during its development period. The ulcer left a scar about two inches long which attached to the spine. It is for this scar plus the pain suffered by plaintiff that damages are sought. Defendants denied plaintiff's complaints of pain prior to October 1st, and testified that the cause of the ulcer was disturbed circulation and internal pressure and not pressure of the cast. Plaintiffs introduced no medical testimony on this subject, relying entirely upon the circumstances and the statements and actions of defendants. Significant upon the question of whether the cast caused the pressure which caused the ulcer is the fact that the opening cut in the cast on October 2d apparently was to relieve pressure and could not be used for treatment, and that both defendants at first claimed that it was for the latter purpose. In his deposition defendant Cookinham, and at the trial both defendants, testified that on October 2d they cut a "window" in the cast over the ulcer area to treat it, and that through that window they both saw and treated the ulcer. However, the cast had been preserved and upon being confronted with it and seeing that while they had cut the plaster away, they had not cut the lining, they admitted that their testimony as to seeing and treating through this hole was incorrect. Moreover, prior to the production of the cast they had testified that the swelling was at the twelfth thoracic vertebra and that the ulcer was near it. After its production, they contended that the swelling had started at the twelfth thoracic and extended down to the area over which the window was located. Plaintiff Henry Dickow testified that when he asked defendant Cookinham what caused the sore the latter pointed his finger to where the hole in the back of the cast had been cut and said, "You see how thick that plaster is there? * * * There was tremendous pressure on her body from that cast, and that is a pressure sore." Defendant Cookinham on cross-examination stated that in the exercise of the skill and learning possessed by physicians and surgeons in his position in the community the required precautionary measures would include periodic examination under the cast to ascertain if ulcers were developing. The nurse, plaintiff Henry, and two other witnesses testified that the ulcer could easily be seen by looking under the cast from below.

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[1] Unless otherwise appearing, "plaintiff" will refer to plaintiff Carrie E. Dickow.

[2] Although defendants' evidence was contradictory of most of plaintiff's evidence, it is clear that from the foregoing evidence the jury could have found that defendants in disregarding plaintiff's complaints and making no examination to ascertain the cause thereof, were negligent in not exercising the skill usual in the vicinity; that as a result the pressure of the cast caused the ulcer to develop, or at least, that the negligent failure to treat the developing ulcer, caused plaintiff's ultimate injury. Defendants cite Huffman v. Lindquist, 37 Cal.2d 465, 466, 234 P.2d 34, 29 A.L.R.2d 485, to the effect that generally whether a doctor possesses or exercises the requisite skill is a question for experts and then contend there is no expert testimony in favor of plaintiffs in this case. It might be pointed out that in the Huffman case the court said; 37 Cal.2d at page 474, 234 P.2d at page 40: "While in a restricted class of malpractice cases the courts have applied the doctrine of res ipsa loquitur, that has been only where 'negligence on the part of a doctor is demonstrated by facts which can be evaluated by resort to common knowledge (and) expert testimony is not required since scientific enlightenment is not essential for the determination of an obvious fact.'" It is not necessary for us to determine whether the fact that pressure of a cast on a swelling in the body will cause trouble is a matter of general knowledge,[2] for there is medical evidence through the statement of defendant Cookinham to plaintiff Henry Dickow that such pressure did cause this particular sore and the same defendant's testimony that ordinary care required that a doctor examine to prevent the very thing that occurred here, namely, the development of an ulcer. "The negligence of the doctor may be established by his own testimony elicited under section 2055 of the Code of Civil Procedure. Lashley v. Koerber [M.D.], supra [26 Cal.2d 83, 156 P.2d 441]; Lawless v. Calaway, supra [24 Cal. 2d 81, 147 P.2d 604]. Although the defendant here did not expressly refer to the practice followed by other doctors in the community, he did testify as to what was proper practice, and it is reasonable to infer that his testimony was based on the standard of care used by physicians in the locality. If he failed to conform to the proper practice as set forth in his testimony, he did not act as a reasonable physician

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[2] See interesting discussion of common knowledge as to surgery in Thomsen v. Burgeson, 26 Cal.App.2d 235, 79 P.2d 136.

should under the circumstances." McCurdy v. Hatfield, 30 Cal.2d 492, 495, 183 P.2d 269, 271.

Dr. Cookinham testified that originally there were no bruises or lacerations or marks upon plaintiff's body. After placing herself in defendants' care plaintiff finds herself with a serious scar, the ulcer causing which defendants failed to discover through failure to use ordinary care. This, at least, made out a prima facie case, requiring defendants to explain how it was caused and that it was not caused by their negligence. Their explanation that the swelling was in a different location and caused by internal pressure is contradicted by the location of the ulcer and defendant Cookinham's admission that it was caused by the cast. This evidence, in spite of evidence to the contrary, was sufficient to require that the jury determine the true facts.

2. Other Ground.

[3] Defendants pleaded and introduced in evidence a certain release executed by plaintiffs. They contend that this bars any recovery by plaintiffs. Plaintiffs contend that this court may not consider the effect of the release to support the trial court in granting the directed verdict for the reason that the court expressly granted it "on the sole ground of failure to prove negligence as alleged, otherwise denied." In Lawless v. Calaway, 24 Cal.2d 81, 92, 147 P.2d 604, the court pointed out the conflict of authority in this state between the cases holding that the court on an appeal from a judgment on an order granting nonsuit or on a directed verdict will ordinarily consider only the grounds specified in the motion at the trial, and the cases holding that the reviewing court may consider any ground that appears in the record, whether made a ground of the motion or not. It then holds that the correct rule is that grounds not specified in a motion for nonsuit will be considered by an appellate court only if it is clear that the defect is one which could not have been remedied had it been called to the attention of plaintiff by motion. In our case the alleged bar of the release was made a ground of the motion for directed verdict. In addition, if defendants' contention as to the effect of the release is correct, it would be a complete bar to the action. It therefore becomes necessary for us to determine whether the release is a bar to this action.

3. Release.

It is executed by both plaintiffs, and acknowledges receipt of $10,750 in full settlement, release and discharge of "all actions, claims and demands whatsoever, that may now or hereafter exist against Robert P. Kelly on account of injuries to the person of, and damage to the property of, the undersigned, *and the treatment thereof and the consequences flowing therefrom* * * for which the undersigned claims the above named persons or parties are legally liable" as a result of the accident suffered by plaintiff. (Emphasis added.) It warrants that it "is executed without reliance upon any statement or representation by the person or parties released or their representatives of physicians concerning the nature and extent of the injuries and damage and liability therefor;" that it applies to "all unknown injuries and damage resulting from said accident, casualty, or event as well as to those now known." It is dated September 30, 1948, almost a year after the discovery of plaintiff's ulcer. It was given to one Domke, a claims adjuster for the insurance company which insured Kelly, the person responsible for plaintiff's initial injury, and the $10,750 was paid by that company. Defendants contend that as Kelly, under the law, was liable not only for the original injury but also for any additional injury caused by malpractice in the treatment of the original injury, see Ash v. Mortensen, 24 Cal.2d 654, 150 P.2d 876, a release of Kelly operated to release defendants also. They contend, further, that the very terms of the release—among others "the treatment thereof and the consequences flowing therefrom"—included any claim of plaintiffs against defendants. At the time of the making of the release plaintiff had two actions pending, one against Kelly alone and this action against defendants. Plaintiffs contend that neither by its terms nor in fact did the release apply to defendants. Plaintiffs offered evidence to prove that it was not intended to do so, but this offer was rejected by the trial court.

The relationship between an original wrongdoer and a physician negligently magnifying the original injury and the effect of a release of the former has been decided in California. In Ash v. Mortensen, supra, 24 Cal.2d 654, 150 P.2d 876, a woman injured in an automobile accident sued the negligent motorist and recovered judgment for her injuries. She accepted a reduced sum in settlement of the judgment, which she satisfied of record. She also released the motorist from further liability. Later she brought an action for malpractice against the doctors who treated her injuries. The doctors set up the defense of the judgment, its satisfaction and the release, contending that since the woman could have recovered damages resulting from the alleged malpractice from the motorist, the release and satisfaction were a complete defense to the action against them. The court held that under the law "It is settled that where one who has suffered personal injuries by reason of the tortious act of another exercises due care in securing the services of a doctor and his injuries are aggravated by the negligence of such doctor, the law regards the act of the original wrongdoer as a proximate cause of the damages flowing from the subsequent negligent medical treatment and holds him liable therefor." 24 Cal.2d at page 657, 150 P.2d at page 877. It then stated that the fact that the woman in the action brought against the original wrongdoer could have obtained full compensation for all damages does not establish that she was so compensated. The independent and successive acts of the motorist and the doctors produced two separate injuries and gave rise to two distinct causes of action. The woman was at liberty to sue in separate actions the original wrongdoer for damages resulting from the original injury alone and to sue the doctors for damages resulting from the additional injury or aggravation. Therefore, the plea of former recovery involves a consideration of what the injured party did in fact recover in her action against the original wrongdoer rather than what she could have recovered therein. The court then referred to a contention of the doctors, similar to that of defendants here, that the release operated to discharge them, regardless of the evidence in the original case or of the nature and extent of the recovery. The court pointed out that in a number of jurisdictions it is the rule that, regardless of whether the consideration for the release covered both injuries, a release of the original wrongdoer would release the doctors. The court then said, 24 Cal. 2d at pages 658–659, 150 P.2d at page 878:

> "But the conclusion that the release of the original wrongdoer releases the attending doctor from liability for malpractice has been reached by treating the independent wrongdoers as joint tort feasors or applying, by analogy, the common-law rule of unity of discharge affecting joint tort feasors. The common-law rule of unity of discharge is based on the concept of the unity of a cause of action against joint tort feasors, and its application to the facts of the present case would give the independent tort feasors herein an advantage wholly inconsistent with the nature of their liability. * * *
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> "A release of a cause of action against a wrongdoer is not a release of a separate or distinct cause of action against another independent wrongdoer. * * * We are of the opinion that a release of the original wrongdoer should release an attending doctor from liability for aggravation of the injury 'if there has been full compensation for both injuries, but not otherwise.' "

The court stated that there are cases holding that the payment of any sum in consideration of the release of one of several joint or independent concurrent tortfeasors will be presumed to have been made and accepted as full compensation or satisfaction for the alleged injury and said, 24 Cal.2d at page 660, 150 P.2d at page 879: "But whatever may be the rule with regard to a settlement with joint or independent tort feasors whose acts concur to produce a single injury, it does not follow that such presumption should be indulged where, as here, the injured person's claim embraces separate injuries caused by independent successive tort feasors and is liquidated by a judgment against the original tort feasor.

The presumption of full compensation or satisfaction found in the cited cases must be based on the fact that there is but a single indivisible injury and that the claim arising therefrom is unliquidated. Under the circumstances of this case, it would be more logical to presume that part payment of the Wubben judgment represented merely the best obtainable compromise for the liability of the judgment debtor." The court then went on to point out that the damages from the original injury and from the malpractice were divisible and that the doctors had the right in the action against them to have the damages restricted to the difference between such damages and the sum already received by the injured person.

[4] Defendants in our case were permitted to prove the circumstances under which the release was executed, but not the conversations of the parties concerning it. Plaintiffs offered to prove the statements of Domke and other circumstances tending to show that the release was given and accepted on the express understanding that while it would release Kelly from any liability for the malpractice injuries, it was not to release defendants and that the amount paid did not cover these injuries. The court should have permitted this testimony and also the cross-examination of Domke on the subject. Cases like Hawber v. Raley, 92 Cal.App. 701, 268 P. 943; Cowles v. Independent Elevator Co., 22 Cal.App.2d 109, 70 P.2d 711; Sunset Scavenger Corp. v. Oddou, 11 Cal.App.2d 92, 53 P.2d 188; Bee v. Cooper, 217 Cal. 96, 17 P.2d 740, and others cited by defendants, deal with *joint* tort-feasors, and therefore are not in point. In Ash v. Mortensen, supra, 24 Cal.2d 654, 150 P.2d 876, the court pointed out that there is a difference between joint tort-feasors and independent tort-feasors. In Alexander v. Hammarberg, 103 Cal.App.2d 872, 230 P.2d 399, this court discussed at some length the difference between the two and held that the release of one independent tort-feasor did not necessarily release the other. In Gerald v. San Francisco Unified School District, 121 Cal.App.2d 761, 264 P.2d 90, 92, we again discussed the question of joint and independent tort-feasors, and held that the tort-feasors there were independent ones and that the release of one of them did not release the others unless it should appear that "full compensation was made for plaintiff's injuries", that the question of whether it was made was one of fact, and that to withdraw that issue from the jury was error. While the release by its terms releases Kelly from all claims for the injuries caused by defendants, its language does not purport to release defendants. Therefore, parol evidence would be admissible to determine the intention of the parties in giving and accepting the release. Therefore, to not permit the facts as to whether the moneys paid plaintiffs by Kelly's insurance carrier compensated for both injuries or was intended to do so, to be shown and the jury to pass upon them, was error. The release may be a bar to the present action, but its mere production does not constitute it such.

As the case will have to be retried, we deem it unnecessary to consider the many other assignments of error made by plaintiffs.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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123 Cal.App.2d 1

PEOPLE v. QUARLES.

Cr. 2902.

District Court of Appeal, First District,
Division 2, California.
Feb. 2, 1954.

Defendant was convicted of involuntary manslaughter and of committing an unlawful or negligent act while driving under the influence of liquor. The Superior Court, Alameda County, Donald K. Quayle, J., entered judgment and defendant appealed. The District Court of Appeal, Nourse, P. J., held, inter alia, that stipulation at trial that blood sample was taken with defendant's consent precluded defendant from objecting to court's admission of results of blood test.

Judgment affirmed.

1. Automobiles ⚷355(6, 13)

In prosecution for involuntary manslaughter as result of automobile accident and for committing an unlawful or negligent act while driving under influence of liquor, evidence was sufficient to show that defendant was operator of automobile at time of accident. Pen.Code, § 192; Vehicle Code, § 501.

2. Criminal Law ⚷260(11)

Where case was not being tried by jury and trial court found that defendant was in fact driver of automobile involved in accident, testimony by witness at trial referring to defendant as driver of automobile involved in accident was not prejudicial.

3. Stipulations ⚷14(7)

Where sample of accused's blood was taken for analysis of alcoholic content, after automobile accident, and evidence thereby obtained was used in obtaining conviction for manslaughter and driving while intoxicated, stipulation at trial that blood sample was taken with defendant's consent, precluded defendant from objecting that admission of results of blood test forced him to give self-incriminating evidence, and deprived him of due process. Pen.Code, § 192; Vehicle Code, § 501; U.S.C.A.Const.Amend. 14.

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Marvin J. Colangelo, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., of Cal., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Dep. Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Defendant, Doyle Lee Quarles, was tried without a jury and convicted on two counts of an information charging him with violation of sec. 192, Penal Code (involuntary manslaughter) and of sec. 501 of the Vehicle Code (committing an unlawful or negligent act while driving under the influence of liquor). He appeals from the judgment and from an order denying defendant's motion for a new trial. However the record does not show any motion for a new trial was made or any order denying one. Probation was denied.

The accident occurred on September 5, 1952, at approximately 11:15 p. m. on the Eastshore Highway in Emeryville, California. Defendant's car, a 1941 Buick, was proceeding north on a divided highway when it crossed into the southbound lane, sideswiped a southbound car and then hit a Pontiac, overturning it. An infant riding in the Pontiac died as a result of the injuries and other passengers were hurt.

Two men who had witnessed the accident stopped immediately, going first to the overturned Pontiac to give what assistance they could but observing shortly thereafter that defendant was lying on the roadway to the left of the Buick. A Highway Patrol Officer, arriving soon after the accident happened, found the appellant lying in the roadway at the left of the Buick, his feet practically under the edge of the car, his head away from it. No one else was seen in or near the Buick. Witnesses testified that immediately prior to the accident they had observed an unidentified man driving the Buick, had seen no one else in the car but that as the convertible top was up they did not have a clear view of the rear seat.

Defendant and the passengers in the Pontiac were taken to a hospital. There defendant was asked by Officer Sabo if he would permit a blood sample to be taken for analysis of alcoholic content. He agreed. The doctor asked and defendant again agreed. The blood taken contained .286% alcohol; .150% is sufficient for intoxication.

Counsel for appellant, who at appellant's request was appointed by this court to represent him on this appeal, sets forth the following arguments:

I. The evidence was insufficient to support the verdict and the judgment.

II. The court made two incorrect rulings, each of which constitutes reversible error.

I. Evidence insufficient to support the verdict.

[1] Appellant claims there was no proof that he was the driver of the car, pointing out as evidence to the contrary that he was found outside the car on a cushion with all the doors of the automobile closed, that if he had fallen from the driver's seat he would have been on the bare ground or roadway and the car door would have remained open. Appellant did not know whether he was driving or not and had no recollection of the accident, but testified that earlier in the evening he was accompanied by several companions and that two of them had driven the car during that evening. Two hats and a half-filled bottle of wine were found in the back seat which appellant deems significant to show others were in the car at the time of the accident, that it could be inferred one of the others was driving and that appellant was in the back seat with the bottle of wine. The fact that witnesses had seen only the driver in the Buick when the car passed them was not conclusive evidence that there had been only one man in the car due to the fact that when the top of a 1941 Buick convertible is up an outside observer can not determine whether or not a person is in the rear of the car. In arguing for a reversal on the lack of evidence to support the conviction, appellant cites People v. Flores, 58 Cal.App.2d 764, at page 769, 137 P.2d 767, at page 769, from which he quotes: "Ordinarily, the deduction to be drawn from the circumstances shown in evidence is for the trier of facts, but in this instance it is manifest that every fact proven is consistent with the reasonable conclusion that the appellant did not participate in the theft of the automobile. There is, therefore, a failure of proof in particulars necessary to conviction of the crime of grand theft, and the question is one of law for the court." People v. Kessler, 62 Cal.App.2d 817, 821, 145 P.2d 656, 658, is quoted as giving the correct rule for rendering a decision on circumstantial evidence: "* * * there could be no conviction unless the facts or circumstances proved were not only entirely consistent with the theory of guilt but irreconcilable with any other rational conclusion." In summary appellant states that examining all the facts together, there are uncontradicted facts which point to the reasonable conclusion that appellant could not have been driving the car at the time of the accident, and for this reason the appellate court can examine the insufficiency of the evidence as a matter of law, and is not bound by the findings of the trial court.

Respondent answers that the rule is that even though the appellate tribunal might believe the circumstances reasonably pointed to the innocence of the defendant, it would not be justified in interfering with the determination of the trier of fact as long as the circumstances reasonably justify the verdict, citing cases and furthermore on the evidence the only reasonable conclusion is that defendant was driving the Buick at the time of the collision.

Here the three witnesses, who appeared at the scene immediately following the collision, testified that they saw no other person in or about the Buick. Hence the trial court reasonably concluded that the defendant, and he alone, was the operator of the Buick at the time of the accident.

II. Erroneous rulings of the Court.

[2] Appellant contends the court erred in overruling an objection to testimony given by one witness in which he referred to the appellant as the driver of the car. He asserts this was an unsolicited conclusion and the court erred in permitting the statement to be included as probative evidence. Respondent contends that whether the witness's statement was an observed fact or merely his conclusion could have been brought out on cross-examination. But in any event it was not prejudicial in view of the fact that the case was not being tried by a jury and the trial court found that the defendant was in fact the driver of the car.

[3] Appellant argues that the trial court erred in permitting evidence of the blood test of sobriety to stand, and in denying counsel the opportunity to show the mental condition of defendant at the time he gave his permission to have the blood

test taken. This is predicated on his volunteer statement that at that time appellant was in a very confused mental state and was not mentally able to give his consent. The court sustained the objection to counsel's attempt to elicit from the police officer a statement as to defendant's mental condition at the time he gave his consent, the court saying, "I only think that you could go into that if the blood test were offered, right now I think it is immaterial." Appellant contends that in view of the fact that the blood test was introduced in evidence, the mental condition of defendant was material, and the objection should have been overruled. He claims that his privilege not to be forced to give self-incriminating evidence was grossly violated, and the Due Process Clause of the Fourteenth Amendment was similarly abused. Appellant cites the United States Supreme Court as specifically condemning this practice in Rochin v. People of California, 342 U.S. 165, at page 179, 72 S.Ct. 205, at page 213, 96 L.Ed. 183, stating that "blood taken from his veins" without one's consent is inadmissible. However the Rochin case differs materially on its facts from the case before us. In that case officers illegally entered defendant's place of residence. The defendant, upon being questioned concerning two capsules which were on a table beside him, grabbed the capsules and swallowed them. A struggle ensued, the officers forcibly attempting to extract the capsules and failing handcuffed defendant and forcibly took him to the hospital where his stomach was pumped and the two capsules recovered, which proved to contain morphine. The District Court of Appeal, Second District, of the State of California, held that the evidence though illegally obtained was admissible, and the Supreme Court of California denied a hearing. The United States Supreme Court reversed the conviction because it was obtained by methods violative of the Due Process Clause of the Fourteenth Amendment. The only reference to the taking of blood from the veins was made in a concurring opinion by Justice Douglas in which he states, 342 U.S. at page 179, 72 S.Ct. at page 213: "But I think that words taken from his lips, capsules taken from his stomach, blood taken from his veins are all inadmissible provided they are taken from him without his consent. They are inadmissible because of the command of the Fifth Amendment."

Respondent answers that at the trial defense counsel expressly stipulated that the blood sample was withdrawn with defendant's consent. The stipulation read in part: "* * * the defendant was taken to the Permanente Hospital following the accident, and that there Dr. Toohe withdrew a sample of defendant's blood after asking the defendant if he would agree to this. The defendant agreed." At the close of the stipulation counsel for the State asked, "Is that stipulation acceptable? Mr. Sperbeck [counsel for defendant]: That is acceptable, and I will so stipulate." Thus defendant is precluded from objecting to the court's admission of the results of the blood tests. In further answer to appellant's argument, respondent cites People v. Haeussler, 41 Cal.2d 252, 260 P.2d 8. In this case a woman was convicted of manslaughter in the driving of a vehicle and of committing an unlawful act while driving a vehicle under the influence of intoxicating liquor. Blood was taken from her veins while she was unconscious, part of which was analyzed to ascertain the alcoholic content. The case cited by appellant, Rochin v. California, was discussed at great length and distinguished from the Haeussler case. In the latter case the court said, 41 Cal.2d at page 258, 260 P.2d at page 12: "Without deviation, this court has held that competent evidence, although improperly obtained, is admissible in a criminal prosecution against the person from whom the evidence is taken. [citing cases.]" That case merely followed the well settled doctrine in California, dating from People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383 decided February 21, 1922, in which our courts have rejected the doctrine of the federal courts relating to the admission of evidence in a criminal case taken from a defendant without his consent.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

123 Cal.App.2d 72

PEOPLE v. GAYNOR.

Cr. 2887.

District Court of Appeal, First District, Division 2, California.

Feb. 4, 1954.

Prosecution for theft. The Superior Court, Alameda County, Donald K. Quayle, J., entered judgment on verdict and defendant appealed. The District Court of Appeal, Nourse, P. J., held that conviction was sustained by the evidence.

Affirmed.

1. Larceny ⚷55

In prosecution for theft, testimony of complaining witness, who was manager of grocery store where theft occurred, and against whom theft was committed, was sufficient to support a verdict of guilty.

2. Criminal Law ⚷722½

In prosecution for theft, district attorney, who cross-examined defendant as to his prior convictions, which had been properly pleaded, and who made repeated references to such prior convictions, was not guilty of misconduct.

◆

John F. Porter, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Defendant and appellant was tried and convicted on a charge of grand theft.

The appeal is based almost entirely on the sufficiency of the evidence. The only witnesses were appellant and the complaining witness who managed a market or grocery store in the city of Oakland. Appellant entered this market for the purpose of buying groceries and after picking up a number of different articles he got in line near the cashier's desk for the purpose of making payment. There were two lines of customers and the store manager testified that when he was near those lines: "I felt a bump in my back right here, and at the same time I felt my wallet pulled out of my pocket, yanked out, very distinctly felt it." He then grasped appellant by the collar, causing him to drop his groceries and his own wallet which he had in his hand for the purpose of making payment. The store manager further testified: "I could just see the edge of the brown wallet under the coat. * * * As I stepped toward him and he stepped back, he dropped the wallet onto the floor. I reached for him at the same time stooping down and swooping up the wallet as I went by." A scuffle ensued after which appellant was taken to a room in the rear of the establishment and charged for the first time with having stolen the wallet out of the manager's pocket.

No other witness was called and the manager made no complaint before the numerous customers who stood in two lines near the cashier's desk.

[1] There was no specific denial of this testimony—the appellant relies on the probable unreasonableness of the manager's testimony because he was standing behind the appellant when the wallet was taken. But the manager testified that defendant was standing behind him when the wallet was taken and that he saw the wallet in defendant's possession, held under his coat. The evidence is sufficient to support the verdict.

[2] Because the appellant took the stand on his own behalf, he was cross-examined as to prior convictions which he admitted. It is now claimed that the district attorney was guilty of misconduct in his repeated efforts and unusual emphasis on these prior convictions. The question is more one of ethics than one of law. Certainly the prior convictions were properly pleaded and proved. The repeated references to them by the district attorney cannot be held as misconduct.

Judgment affirmed.

DOOLING, J., and O'DONNELL, J. pro tem., concur.

PEOPLE v. ROBINSON.*

Cr. 5060.

District Court of Appeal, Second District, Division 1, California.

Jan. 27, 1954.

Hearing Granted Feb. 24, 1954.

Defendant was convicted of conspiracy with another to engage in pool selling and bookmaking and to receive, hold and forward bets on the results of horse races. The Superior Court of Los Angeles County, Fred Miller, J., rendered judgment on the jury's verdict, and defendant appealed. The District Court of Appeal, White, P. J., held that the verdict, rendered on a count of the information in which the only overt act charged in furtherance of the conspiracy was that defendant received, held and forwarded bets or memoranda thereof on horse races, was improper as in irreconcilable conflict with the jury's verdict of acquittal on another count charging such overt act as a substantive offense.

Judgment reversed, and cause remanded with directions.

See also Cal.App., 266 P.2d 78.

1. Criminal Law 🔑1144(13)

On appeal from judgment on jury's verdict of guilty, District Court of Appeal must view evidence in light most favorable to the prosecution.

2. Conspiracy 🔑47, 48

Existence of criminal conspiracy being fact question, proof of circumstances satisfying jury of alleged conspirators' unlawful combination or agreement is sufficient to warrant conviction of conspiracy; weight and sufficiency of evidence being for triers of fact questions.

3. Criminal Law 🔑1160

The District Court of Appeal cannot set aside jury's verdict of guilty, approved by trial judge in denying defendant's motion for new trial, in absence of clear showing that there was no substantial evidence sufficient to support verdict and trial judge's conclusions on any hypothesis.

4. Conspiracy 🔑47

In prosecution for conspiracy to engage in pool selling and bookmaking and to receive, hold and forward bets on results of horse races, evidence was sufficient to establish a corpus delicti as to defendant and connect him with conspiracy. Pen.Code, § 337a.

5. Criminal Law 🔑423(2)

Where there was prima facie proof of existence of alleged criminal conspiracy between defendant and another, who died before trial, testimony as to such co-conspirator's statements outside defendant's presence in furtherance of conspiracy was properly admitted.

6. Criminal Law 🔑741(3), 742(1)

In prosecution for conspiracy, credibility of police officer, testifying as to statements made to him in furtherance of conspiracy by defendant's co-conspirator, who died before trial, and intrinsic value of such statements as evidence, were questions for jury as arbiters of facts.

7. Conspiracy 🔑43(5)
Criminal Law 🔑878(3)

The statute providing that pleading in criminal case may charge two or more different offenses connected together in their commission or contain different statements of two or more offenses of same class and that acquittal on one or more counts of pleading shall not be deemed acquittal on any other count does not mean that indictment or information charging conspiracy, without alleging overt act, is sufficient or furnishes basis for judgment of conviction when defendant is acquitted of every overt act alleged. Pen.Code, § 954.

8. Criminal Law 🔑878(4)

A jury's verdict of guilty on count of information charging conspiracy between defendant and another to engage in pool selling and bookmaking and to receive, hold and forward bets on results of horse races, which was only overt act charged, was improper as in irreconcilable conflict with verdict of acquittal on another count charging such overt act as substantive offense. Pen.Code, § 337a and subd. 3.

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* Subsequent opinion 271 P.2d 865.

9. Criminal Law ⊙⇒1189

On reversal of judgment on jury's verdict of guilty on count of information charging conspiracy on ground of its inconsistency with verdict of acquittal on another count, charging as substantive offense only overt act alleged in conspiracy count, defendant will not be granted new trial, as such verdict of acquittal will furnish conclusive proof of former acquittal of charge in conspiracy count.

◆

Samuelson & Buck, and Clarence Hengel, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County defendant was charged, in Count I, jointly with Leon Wayne Schaefer, with the crime of conspiracy to violate section 337a of the Penal Code, and in Count II with violation of subdivision 3 of section 337a of the Penal Code. The jury brought in verdicts of guilty as to Count I and not guilty as to Count II. From the judgment of conviction and the order denying his motion for a new trial, defendant prosecutes this appeal. The defendant Schaefer, charged as a co-conspirator, died before the trial. Reversal is sought upon the grounds that the evidence is insufficient to support the verdict of guilty of the charge of conspiracy; that the court erred in admitting evidence of the declarations of the deceased co-conspirator made to a police officer; that the verdict of guilty on Count I is inconsistent with the verdict of not guilty on Count II; and that the court erred in failing to give an instruction on its own motion as to the necessity for corroboration of the testimony of an accomplice, Pen.Code, § 1111.

[1] Following a guilty verdict we are required to view the evidence in a light most favorable to the prosecution. The testimony adduced on behalf of the People consisted of that given by officers Jacobsen and Hermansen, of the Long Beach Police Department. Jacobsen met the defendant Schaefer on American Avenue in Long Beach and told Schaefer that his name was "Rod"; that he was operating a "little book"; that his business was getting too large, and he was looking for a place to "lay off" some bets. Schaefer said that he could handle the bets through a "big bookmaker." They agreed to meet the next day, October 23. On that day at 2:30 Jacobsen met Schaefer, gave him $15 and a slip of paper containing the names of three horses running at Bay Meadows. Jacobsen told Schaefer he wanted $5 to win on each of the three horses. Schaefer and Jacobsen agreed they would meet again the next day if Jacobsen had a "pay off". On October 24, the two met and Schaefer gave Jacobsen $20, the proceeds of his bets of the day before. Jacobsen at this time gave Schaefer $20, consisting of one ten-dollar bill and ten one-dollar bills, and a slip of paper containing the names of four horses running that day. Jacobsen had recorded the serial numbers of the bills and had treated the bills with a fluorescent powder, which would rub off on the hands of any one handling the bills and which would be visible under ultra-violet light.

After leaving Schaefer, Jacobsen went to the cafe in Long Beach where appellant, Robinson, was employed as a bartender. When he arrived he saw officer Hermansen with Robinson and Schaefer, and saw money in the hands of Robinson. The latter was thereupon arrested, and there was found on his person a paper described as an "O" sheet, on which were recorded the names of persons who had bet on horses, the amounts to be paid to such persons and the amounts to be collected, together with the amount that the "book" had made that day.

Detective Inspector Hermansen testified that he had been working with officer Jacobsen on October 24 and that the two of them had made up the list of horses which was given to Schaefer. He observed Jacobsen handing the money to Schaefer on October 24. He followed Schaefer to the cafe and saw him in conversation with

Robinson. He saw Schaefer put his hand in his left rear hip pocket, where he had put the money and paper given him by Jacobsen, and withdraw what appeared to be the same money with a white paper wrapped around it and give it to Robinson, who took the paper and money and thumbed through it. Hermansen recognized the paper in Robinson's hand as the paper which Officer Jacobsen had torn from his notebook. Hermansen then moved to arrest Robinson, but due to the presence of several patrons at the bar and the fact that Hermansen also paused to detain a person leaving the phone booth, Robinson was out of Hermansen's sight for several seconds. Search of Robinson disclosed a roll of bills, but not the marked bills, and the slip of paper could not be found. Hermansen went out to get the ultra-violet machine, and when he returned there was some money in a glass before Robinson, who was sitting at a cocktail table. Officer Jacobsen testified that he saw Robinson place the money in the glass. The money, in part, was fluorescent and had the serial numbers previously noted by the officers. Traces of the fluorescent powder were found on the hands of both Schaefer and Robinson and on the material near Schaefer's left rear pocket. The slip of paper, or betting marker, which Jacobsen had given Schaefer, was never found.

The "O" sheet had the name "Leo" written on it, and defendant Schaefer's first name was "Leon".

Defendant, Robinson, testifying in his own behalf, admitted receiving money from his co-defendant Schaefer on the day in question. He explained his possession of the "O" sheet by stating that he had picked it up from the floor. He further testified he did not know what an "O" sheet was, notwithstanding his admitted prior conviction of bookmaking, and that formerly he had been a bookmaker for some years. Defendant, Robinson, further testified that he had no conversation with his co-defendant Schaefer with reference to the four horses upon which bets had been placed, or regarding horse racing. In coversation with the officers, as well as at the trial, defendant Robinson claimed there was no marker or slip of paper around the money when Schaefer gave it to him.

Defendant Robinson's employer, Willis Skipworth, owner of the cafe, testified that on the morning in question he gave Robinson about $300, and that later on the same day, the former returned the money less the amount expended for purchases, which was about $175.

The first count of the information charged appellant and Schaefer with conspiracy "to engage in pool selling and bookmaking, and to receive, hold and forward bets and wagers upon the result and purported result of contests of skill, speed and power of endurance of men and beasts, to wit, horse races." The first four overt acts set forth in this count related to the activities of Schaefer in (1) accepting a bet from Officer Jacobsen, on October 23; (2) meeting Jacobsen by prearrangement; (3) accepting four bets from Jacobsen on October 24; and (4) taking the money received from Jacobsen, together with a betting marker, to "a bar on Elm Avenue". Overt Act No. 5 is pleaded as follows: "That pursuant to said conspiracy and to accomplish its objects and purposes, the said defendant, Leon Wayne Schaefer, on or about the 24th day of October 1952, in the County of Los Angeles, handed said bet and betting marker to the said defendant, William Clyde Robinson, who accepted said money and betting marker and had a conversation with the said Leon Wayne Schaefer."

Count II of the information charged, as a "different offense of the same class of crimes and offenses as the charge set forth in Count I", that Robinson and Schaefer violated subdivision 3 of section 337a of the Penal Code, in that on October 24, 1952, they did "* * * receive, hold and forward, and purport and pretend to receive, hold and forward certain moneys, lawful money of the United States, and the equivalent and memorandum thereof in writing, staked, pledged, bet and wagered, * * *" upon the outcome of a horse race.

[2] Appellant first contends that the unlawful combination, the gist of the conspiracy count, is not established by competent or sufficient evidence. It is not often that the direct fact of an unlawful agreement, which is the essence of a conspiracy, can be proved otherwise than by establishing independent facts bearing upon the common design, and the question as to the existence of the conspiracy being one of fact, it is sufficient if the circumstances proved satisfy the jury, leaving the weight and sufficiency of the evidence to the triers of the questions of fact, People v. Sampsell, 104 Cal.App. 431, 439, 286 P. 434.

[3] No citation of authority is needed for the statement that before this court can set aside the verdict of the jury, which has been approved by the trial judge in the denial of a motion for a new trial, it must be made clearly to appear that upon no hypothesis whatever is there substantial evidence sufficient to support the verdict of the jury and the conclusions of the trial judge.

[4] We concede the soundness of appellant's claim, as a principle of law, that mere association is not sufficient to show a conspiracy. However, in the case now engaging our attention, there was more than mere association between appellant and his co-defendant, Schaefer. After the latter had accepted the $20 on October 24th, from Officer Jacobsen, he went directly to the Old Mexico Cafe, where he delivered the money to appellant (which money was, unknown to either Schaefer or appellant, marked with a fluorescent powder). There is evidence that at the time of such delivery, the money was wrapped in a white slip of paper which was the marker and contained the names of horses upon which the bets were placed for that day.

When appellant was arrested and his hands examined, they were found to contain the powder which had been placed upon the marked bills. Appellant attempted to dispose of these bills but was prevented by the officers. The marker was disposed of although it was seen in Robinson's hands after it had been given to him by Schaefer. The other persons in the establishment did not have the iridescent powder on their hands. When questioned concerning the money Robinson gave conflicting and ambiguous answers and when told that he had given conflicting answers merely stated, "Neither one is right, it doesn't matter anyway." On appellant's person was the "O" sheet on which were recorded the names of the persons who had bet on horses, the amounts to be paid such persons, the amounts collected and the amount the "book" made that day.

This evidence we regard as ample to establish a *corpus delicti* as to appellant, and to connect him with the conspiracy charged against him.

[5] Appellant next contends it was error to admit into evidence the declarations and statements of the co-conspirator Schaefer, made outside the presence of the former. Since there was *prima facie* proof of the existence of a conspiracy, it follows that testimony of such statements, made by Schaefer, in furtherance of the conspiracy, outside the presence of appellant, was properly admitted, People v. Curtis, 106 Cal.App.2d 321, 325, 326, 235 P.2d 51; People v. Collier, 111 Cal.App. 215, 240, 295 P. 898. Appellant recognizes that the trial court can regulate the order of proof in this regard.

[6] It is true that the co-conspirator Schaefer died before the trial and that the statements allegedly made by him to the police officer were related to the jury by the latter. While such evidence is said, " 'to be in its nature the weakest and most unsatisfactory' ", Smellie v. Southern Pacific Co., 212 Cal. 540, 560, 299 P. 529, 537, and that " 'no weaker kind of testimony could be produced' ", Belletich v. Pollock, 75 Cal.App.2d 142, 147, 171 P.2d 57, 61, nevertheless, the credibility of the witness narrating such statements and the intrinsic value of such statements as evidence were questions addressed to the duly constituted arbiters of the facts.

It is appellant's further contention that inasmuch as the jury found him not guilty on Count II which alleged the violation of subdivision 3, § 337a of the Penal Code, that the verdict finding him guilty of conspiracy to violate said Penal Code section was inconsistent.

Respondent agrees that in a case where the sole overt act alleged in charging the crime of conspiracy is charged in a separate count as a separate offense and the jury finds the defendant not guilty of the crime charged in the separate count, such a verdict finds, in effect, that the overt act set forth in the charge of conspiracy was not committed and in the face of such a finding a conviction under the conspiracy count cannot stand, but urges that such is not the instant case because four other overt acts were charged in the information.

Relying strongly on the case of People v. Yant, 26 Cal.App.2d 725, 731, 732, 80 P.2d 506, respondent urges that where other overt acts were charged than those upon which the accused was convicted, the conviction under the conspiracy count is good. However, in the cited case, the defendant was accused of overt acts in addition to those which formed the basis of substantive offenses upon which he was found not guilty, while in the case at bar, appellant was charged in the conspiracy count with conspiring to "Receive, Hold and Forward bets and wagers upon * * * horse races". The only overt act charged against him in furtherance of the conspiracy was that on or about October 24, 1952, the codefendant Schaefer "handed said bet and betting marker to the said defendant, William Clyde Robinson, who accepted said money and betting marker and had a conversation with the said Leon Wayne Schaefer".

In Count II, appellant was charged with the substantive offense of violating section 337a, subdivision 3 of the Penal Code, in that he did, "Receive, Hold and Forward * * * certain monies * * * and memorandum thereof in writing * * * pledged, bet and wagered * * * upon the purported result" of certain horse races.

By their verdict the jury found appellant not guilty of having received, held or forwarded bets or memorandum thereof in writing upon horse races.

[7] We are not unmindful of section 954 of the Penal Code which provides that a pleading in criminal cases may charge two or more different offenses connected together in their commission, or different statements of the offenses or two or more offenses of the same class, and that the section concludes, "An acquittal of one or more counts shall not be deemed an acquittal of any other count." But, as was said of this code provision in In re Johnston, 3 Cal.2d 32, 36, 43 P.2d 541, 543: "But we cannot construe it to mean that an indictment or information charging conspiracy is sufficient without the allegation of an overt act, nor that such an indictment or information furnishes the basis for a judgment of conviction when the defendant has in fact been acquitted of every overt act alleged."

[8] In the instant case the jury found by their verdict that appellant did not commit the sole and only overt act charged against him. It seems clear and inescapable that since appellant was deliberately acquitted by the jury of receiving, holding or forwarding the bets or memorandum thereof in writing, on horse races, which was the only overt act charged against him in Count I, it would have been impossible for him to have joined a conspiracy to commit that crime. It must, therefore, be held that the verdict which was rendered against appellant on Count I, is in irreconcilable conflict with the verdict rendered on Count II, and must be set aside. People v. Chambers, 22 Cal.App.2d 687, 723, 724, 72 P.2d 746.

In view of the foregoing conclusions at which we have arrived, it becomes unnecessary to discuss appellant's final contention that the court failed to give an instruction that the testimony of certain witnesses must be corroborated, although such instruction was not requested by appellant at the trial.

[9] We are persuaded that the verdict of acquittal which was rendered by the jury on Count II will furnish conclusive proof of a former acquittal of the charge contained in Count I, and therefore, no good will be subserved by a second trial.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each is reversed, and the cause remanded with directions to the court below to dismiss the information.

DORAN and DRAPEAU, JJ., concur.

PEOPLE v. ROBINSON.*

Cr. 5059.

District Court of Appeal, Second District,
Division 1, California.
Jan. 27, 1954.

Hearing Granted Feb. 24, 1954.

Defendant pleaded guilty of receiving, holding and forwarding moneys to be bet on results of horse races, and from an order of the Superior Court of Los Angeles County, Fred Miller, J., revoking probation granted defendant, he appealed. The District Court of Appeal, White, P. J., held that defendant's conviction of conspiracy, on which the order revoking probation was predicated, having been reversed by the District Court of Appeal, the order must be set aside, in view of the Superior Court's statement that there would be no statutory violation, of which defendant was convicted, if the upper court decided that the conviction was improper.

Order revoking probation and sentencing defendant to the county jail for three months reversed.

1. Criminal Law 🔑1023(12)

An order granting probation to one pleading guilty of crime being a final judgment, a subsequent order revoking probation was an order made after final judgment and affecting defendant's substantial rights and hence appealable. Pen.Code, § 1237, subd. 3.

2. Criminal Law 🔑982

The trial court's discretion in revoking probation granted to one convicted or pleading guilty of crime is very broad, and probation may be revoked on showing of defendant's violation of terms thereof.

3. Criminal Law 🔑982

Probation is an act of grace and clemency, which may be granted by court to a seemingly deserving defendant, convicted or pleading guilty of crime, to enable him to escape extreme rigors of penalty imposed by law for such crime.

4. Criminal Law 🔑982

Probation granted a defendant convicted or pleading guilty of crime may be revoked on basis of facts presented in informal charge from which court has reason to believe that defendant has violated probation or is unfit to be at large.

5. Criminal Law 🔑982

Where superior court, in revoking probation granted defendant pleading guilty of crime, stated that if upper court decided that defendant's subsequent conviction of conspiracy, on which revocation order was predicated, was improper, there would be no violation of statute defining such crime, and judgment of conviction was subsequently reversed by District Court of Appeal, order revoking probation must be set aside.

Andrew H. McConnell, Samuelson & Buck and Clarence Hengel, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

On September 6, 1951, defendant pleaded guilty to a charge of violating subdivision 3, § 337a of the Penal Code, in that he received, held and forwarded certain moneys to be bet and wagered upon the result of horse races. Defendant's request to file an application for probation was granted.

On November 5, 1951, when defendant was arraigned for judgment, proceedings were suspended and conditional probation granted.

On May 7, 1953, the court found that defendant had violated the terms of his probation, which was thereupon revoked, and judgment was pronounced whereby defendant was sentenced to the county jail for the term of three months.

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* Subsequent opinion 271 P.2d 872.

This appeal was taken by defendant from the "Order" revoking probation.

Respondent has moved to dismiss the appeal on the ground that an appeal from the order revoking probation in the instant case, made prior to judgment, is not authorized by law.

At the time probation was granted in this case on November 5, 1951, Penal Code section 1237 provided that:

"An appeal may be taken by the defendant:

"1. From a final judgment of conviction; an order granting probation shall be deemed to be a final judgment within the meaning of this section;

"2. From an order denying a motion for a new trial;

"3. From any order made after judgment, affecting the substantial rights of the party."

The foregoing section was also in effect at the time probation was revoked and sentence pronounced.

[1] We are satisfied that since the order granting probation is deemed to be, "a final judgment within the meaning of" section 1237 of the Penal Code, it necessarily follows that the subsequent order of May 7, 1953, was one made after judgment, and affecting the substantial rights of appellant, and therefore appealable under subdivision 3 of section 1237 of the Penal Code, People v. Martin, 58 Cal.App.2d 677, 137 P.2d 468.

The notice of appeal was so considered by the trial judge who ordered the clerk's and reporter's transcripts prepared and the same are now before us. In the interest of justice, we shall therefore give consideration to the appeal upon its merits, as being taken from an appealable order made after judgment.

Coming now to a consideration of the appeal on its merits, the clerk's transcript reveals that on May 7, 1953, the order made by the court reads in part as follows: "The court finds that the defendant has violated the terms of his probation. Probation heretofore granted is revoked and no legal cause appearing why judgment should not be pronounced, the court pronounces judgment and sentence as to Count I of the information as follows: Defendant is sentenced to the County Jail of the County of Los Angeles for the term of three months, with good time allowed, if earned. County Road Camp is recommended."

[2-4] Appellant contends that in revoking his probation the court abused its discretion. It is well established that the discretion vested in the trial court in the matter of revocation of probation is very broad, and where it appears that the defendant has violated the terms of his probation, it may be revoked. Characterized as "* * * an act of grace and clemency, which may be granted by the court to a seemingly deserving defendant, whereby he may escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted", People v. Hainline, 219 Cal. 532, 534, 28 P.2d 16, 17, probation may be revoked based upon facts presented in an informal charge from which the court has reason to believe that the defendant has violated his probation or is unfit to be at large.

However, in the instant case the transcript of proceedings had at the time probation was revoked reflects the following:

"The Court: We also have the matter of his violation on the other case. (Referring to the case of People v. Robinson, No. 5060, [266 P.2d 73], this day decided). Of course it is the conviction of this conspiracy that amounts to the violation, if there was one.

"Mr. Buck: May I say this as to that violation matter, your Honor, that it is our intention to take an appeal on this matter.

"The Court: I understood that was so.

"Mr. Buck: Whatever your Honor's judgment and sentence is as to this principal case there is also the violation to consider. If we do take an appeal from this instant case, I suggest if your Honor feels it is proper, the matter of the violation of probation be held in abeyance if there was going to be a recommendation of violation.

"The Court: Why would you do that? If I sentence him and he appeals and puts up his bond, he can still be free.

"Mr. Buck: Yes, your Honor.

"The Court: *As I understand it, if the upper court should decide that the conviction was improper, there would be no violation.*

"Mr. Buck: Yes, I am sorry. I was not putting it very well. That is it exactly." (Emphasis added.)

Later, the following transpired:

"The Court: First on the violation. *The conviction itself, if it stands, would be a violation. Do you make any argument on that?*

"Mr. Buck: I make no argument." (Emphasis added.)

Thereafter, following a discussion between court and counsel as to whether the hearing on the matter of revocation of probation should proceed at that time or be deferred to a future date, the court decided to proceed forthwith. Thereupon, the court advised the accused of his plea of guilty entered in the previous case, that he was "placed on probation for two years and as a condition of your probation you were ordered to serve 30 days in the County Jail. It was ordered that you not engage in gambling activities of any kind and you were to obey all rules and regulations of the Probation Department. * * * Since that time in this other case (No. 5060, [266 P.2d 73], conviction reversed this day) you have, that is, Case (Superior Court) No. 152349, upon which I will arraign you for judgment in a few moments, you were charged in two counts, one with conspiracy and one with violating Section 337a of the Penal Code. You were convicted, I believe, of Count 1, which was a conspiracy and you were found not guilty on Count 2.

"I find that to be a violation of your probation in 140088 and your probation is revoked for that violation. You are sentenced to the County Jail for a period of three months, good time to be allowed if earned, in the road camp or the Honor Farm, which is recommended."

[5] As heretofore noted, no formal procedure is provided for presenting charges of violation of probation. The court may make an order revoking probation based upon facts presented in an informal charge from which the court has reason to believe that the probationer has violated his probation or is unfit to be at large. However, in the case at bar, the court definitely decided upon revocation of probation granted in the first case because of appellant's conviction on Count I of a subsequently filed information. Such a conclusion is inescapable in the light of the court's statement, "As I understand it, if the upper court should decide that the conviction was improper, there would be no violation.", and again, "First on the violation. The conviction itself, if it stands, would be a violation. * * *"

Since the judgment of conviction upon which alone the court predicated its order revoking probation, has this day been reversed, People v. Robinson, 266 P.2d 73, and it is manifest that the court intended that the order of revocation should not be effective, "if the upper court should decide that the conviction was improper," it follows that the order revoking probation must be set aside.

For the foregoing reasons, the order of May 7, 1953, revoking probation and sentencing defendant to the county jail for three months is reversed.

DORAN and DRAPEAU, JJ., concur.

122 Cal.App.2d 920

STATE COMPENSATION INS. FUND et al.
v.
MALONEY, Insurance Com'r.
Civ. 19704.

District Court of Appeal, Second District, Division 3, California.
Jan. 29, 1954.
Rehearing Denied Feb. 19, 1954.
Hearing Denied March 25, 1954.

Suit against insurance commissioner, challenging his order respecting rates and classification of risks. The Superior Court, Los Angeles County, Roy L. Herndon, J., entered order granting defendant's motion for change of venue from county of Los Angeles to city and county of San Francisco, and plaintiffs appealed. The District Court of Appeal, Vallée, J., held that the convenience of witnesses and the ends of justice would be promoted by the change.

Affirmed.

1. Appeal and Error ⟹854(1)

Where order granting motion for change of venue did not specify the ground on which it was granted, such order would be affirmed if sustainable on either ground on which the motion was made.

2. Appeal and Error ⟹912

On appeal from order granting defendant's motion for change of venue, District Court of Appeal would assume that facts stated in affidavit of defendant in support of his motion were true.

3. Appeal and Error ⟹965

Venue ⟹51, 52(1)

Motion for change of venue on ground that convenience of witnesses and ends of justice would be promoted by the change is committed to sound discretion of trial court, and its determination will not be disturbed on review unless it clearly appears as matter of law that there has been abuse of such discretion. Code Civ.Proc. § 397, subd. 3.

4. Venue ⟹51, 52(1)

In suit against insurance commissioner challenging his order respecting rates and classification of risks, where it appeared that all original records were in commissioner's principal office in San Francisco, that entire staff and records of Division of Rate Regulation of Department of Insurance were assigned to and located at such principal office, that the principal offices of four of seven plaintiffs were located in San Francisco, and that records of commissioner were necessary evidence both in support of commissioner's case and that of plaintiffs, convenience of witnesses and ends of justice would be promoted by change of venue from Los Angeles county to city and county of San Francisco. Code Civ.Proc. § 397, subd. 3.

◆

Edward R. Young & John F. O'Hara, McFarland, Laumeister & Ferdon; F. Britton McConnell, Los Angeles, Donald Gallagher; and John P. McFarland, San Francisco, for appellants.

Edmund G. Brown, Atty. Gen., and Harold B. Haas, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Appeal by plaintiffs from an order granting defendant's motion for a change of venue from the County of Los Angeles to the City and County of San Francisco.

The suit is for an injunction to restrain the Insurance Commissioner from enforcing the provisions of an order dated June 19, 1952, identified as Ruling No. 67; for a declaration of the rights and duties of the parties with respect to the order, including a determination of its validity and the proper construction and enforceability thereof; and for a writ of mandate commanding the defendant to vacate the order. Ruling No. 67 consisted of classifications of risks, minimum premium rates, and optional retrospective rating plans for workmen's compensation insurance.

Under section 11730 et seq. of the Insurance Code, defendant as insurance commissioner is empowered and required to determine and promulgate a classification of risks and minimum premium rates relating to workmen's compensation insurance. The rates approved and issued by defendant are the minimum to be charged by every insurer.

It appears from the record that the California Inspection Rating Bureau is a voluntary organization composed of all insurers authorized to write workmen's compensation insurance in California. It was organized for the purpose of collecting and tabulating rating information and statistics for the making of minimum rates. On December 28, 1951, defendant licensed the Bureau and designated it as his statistical agent. Ins.Code, § 11750 et seq.

The allegations of the complaint are stated at length in our opinion affirming an order granting a preliminary injunction restraining enforcement of Ruling No. 67 pendente lite, State Comp. Ins. Fund v. Maloney, 121 Cal.App.2d 33, 262 P.2d 662, and they need not be restated. Defendant filed an answer to the complaint with his notice of motion. The issues made by the pleadings, stated generally, are whether Ruling 67 is a valid order; whether it is supported by substantial evidence; whether defendant received evidence ex parte and not at the hearings; whether the order was complete when it was executed and promulgated, and particularly, whether it included "Appendix B" containing rating plans; whether the rating plans were available on July 1, 1952, the effective date of the order; whether the order discriminates against California workmen's compensation insurance carriers in favor of a few large insurers operating nationwide; whether the order is unfair, injurious, prejudicial, and unlawful to the State Compensation Insurance Fund; whether plans contained in the order are uniform as to all insurers affected; and whether by the order defendant relinquished his power and duty to determine what are adequate minimum rates in California.

The motion was made on the grounds: 1. Defendant at all times has been a resident of San Francisco. The superior court of the City and County of San Francisco is the proper court for the trial of the action. 2. The acts of defendant complained of were done by him as a public officer by virtue of his office, and were done in San Francisco. 3. The convenience of witnesses and the ends of justice would be promoted by changing the place of trial to the City and County of San Francisco.

In support of the motion defendant filed his affidavit,[1] which states: 1. He at all

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[1] The affidavit reads: "John R. Maloney, being first duly sworn, deposes and says: "1. That he is the defendant in the above-entitled cause; that he now resides, and, for over thirty years last past, has continuously resided in the City and County of San Francisco, State of California; that ever since January 8, 1951, he has been and now is the duly appointed and acting Insurance Commissioner of the State of California, and that section 12905, Insurance Code, reads:

" 'The Commissioner shall keep his office in the city of San Francisco and shall also keep an office in the city of Sacramento and the city of Los Angeles.';

"that, pursuant to said section, his principal office as Insurance Commissioner is the principal office of the State Department of Insurance and is located in the City and County of San Francisco, State of California;

"2. That he has fully and fairly stated the case in this cause, and all the facts and circumstances connected therewith, to his counsel, Harold B. Haas, Deputy Attorney General of the State of California, who is an attorney at law duly admitted to practice in all courts of the State of California and who is duly assigned to his defense in the above cause by the Attorney General of the State of California; and that, after such statement, he was advised and is now advised by his said counsel, and he verily believes, that he has a good, substantial and valid defense on the merits to each and every alleged cause of action and every ground set forth in the petition and complaint on file in the above-entitled action.

"3. That the execution and promulgation of his certain Order entitled 'Ruling Number 67', the operation of which plaintiffs in the above cause pray therein to restrain, enjoin or annul and have brought said cause for that purpose, occurred at his principal office as Insurance Commissioner in the City and County of San Francisco, State of California; that all his original records made in the proceeding comprising the notice and hearing pre-requisite to the issuance of said ruling are, and since original filing or making thereof, have, continuously, been on file and a public record at said principal office except that a few exhibits may have been first introduced at a session of the hearing thereof which affiant held at the City of Los Angeles for the convenience of the persons located in the times has resided in San Francisco. The law requires him as Insurance Commissioner to keep an office in San Francisco, Sacramento, and Los Angeles. His principal office is in San Francisco. 2. He has fully and fairly stated the case to the Attorney General and has been advised he has a good, substantial, and valid defense to the action. 3. The execution and promulgation of Ruling No. 67 occurred at his principal office. All the original records in the proceeding leading up to the making of Ruling No. 67 are in his principal office. The entire staff and records of the "Division of Rate Regulation of the Department of Insurance" which assisted him in the proceeding are assigned to and located in his principal office. 4. He intends to call Richard O'Brien as his witness at the trial of the action. O'Brien will testify, and he expects to prove by him that: (a) O'Brien resides in San Francisco or within 30 miles thereof; (b) O'Brien for many years has been manager of the California Inspection Rating Bureau; (c) for many years the method of notifying workmen's compensa-

> southern part of the State and who might have desired to testify or introduce evidence in proceeding, but such exhibits were promptly transmitted to and made a part of the said public file and record in his said principal office; and that the entire staff and records of the Division of Rate Regulation of the Department of Insurance which was charged with the duty of assisting and did assist, him in said proceeding are, and, ever since the establishment of said Division in the year 1948, have been, assigned to and located at his said principal office.
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> "4. That, at the trial in the above cause, defendant intends to call Richard O'Brien as his witness in said cause and that said witness will testify and he expects to prove by said witness
>
> "(a) That said Richard O'Brien resides in the City and County of San Francisco or within thirty miles thereof and over three hundred miles from the County of Los Angeles;
>
> "(b) That said O'Brien is now manager of California Inspection Rating Bureau and has for many years been employed as a full-time executive of that Bureau and is familiar with the custom and procedure in hearing and approval or issuance by the Insurance Commissioner of changes in the classification of rates and premiums relating to workmen's compensation insurance and the system of merit rating relating thereto;
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> "(c) That for many years last past the method of notifying workmen's compensation insurance companies of such changes has been by transmitting to said Bureau a complete copy of the Insurance Commissioner's order making such changes and said Bureau thereupon notified its members thereof;
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> "(d) That, on the 19th day of June, 1952, a complete and true copy of said Ruling Number 67 was received by said Bureau, at its office in the City and County of San Francisco, from the Insurance Commissioner; that said copy included a copy of 'Appendix B' to said ruling; that affiant has been advised by his said attorney, and verily believes, that said witness is a material and necessary witness for the proper proof of the material allegations of defendant's answer and the defense of defendant in this case, and that without the testimony of said witness defendant cannot safely proceed with the trial of said cause.
>
> "5. That, at the trial in the above cause, defendant intends to call Rollo E. Fay as his witness in said cause and that said witness will testify, and he expects to prove by said witness:
>
> "(a) That said witness mailed or caused to be mailed to persons duly representing plaintiffs State Compensation Insurance Fund, Guarantee Insurance Company, California Compensation Insurance Company, California Casualty Indemnity Exchange, and Pacific Employers' Insurance Company, true copies of each and every amendment to the petition requesting adoption of the 'rating plans', which plans with modifications, were approved by Ruling Number 67 of the Insurance Commissioner; that no requests for said copies were made, at the hearings thereon, to the Insurance Commissioner or to the persons who filed the petition, by plaintiffs Allied Insurance Company or Argonaut Insurance Company, although offer to supply such copies was made at said hearing by said persons.
>
> "(b) That said witness resides within twenty miles of the City and County of San Francisco and more than three hundred miles from the County of Los Angeles; that affiant has been advised by his said attorney, and verily believes, that said witness is a material and necessary witness for the proper proof of the material allegations of defendant's answer and the defense of defendant in this case and that without the testimony of said witness defendant cannot safely proceed with the trial of said cause."

tion insurance companies of changes in the classification of rates and premiums relating to workmen's compensation insurance and the system of merit rating relating thereto, has been by transmitting to the Bureau a complete copy of the Insurance Commissioner's order making such changes and the Bureau thereupon notifying its members thereof; (d) on June 19, 1952, a true and complete copy of Ruling No. 67 was received by the Bureau at its office in San Francisco from the Insurance Commissioner. The copy included a copy of "Appendix B" to the Ruling. 5. Defendant has been advised that he cannot safely proceed to trial without the testimony of O'Brien. 6. Defendant intends to call Rollo E. Fay as his witness at the trial. Fay will testify, and he expects to prove by him that: (a) Fay mailed or caused to be mailed to persons representing five of the plaintiffs true copies of each amendment to the petition requesting adoption of the "rating plans," which, with modifications, were approved by Ruling No. 67; no requests for copies were made to the Insurance Commissioner or to the persons who filed the petition at the hearings by the other two plaintiffs; (b) Fay resides within 30 miles of San Francisco. 7. Defendant has been advised by his attorney that he cannot safely proceed to trial without the testimony of Fay. No counter-affidavit was filed.

Plaintiffs contend that the County of Los Angeles is the proper county for the trial of the action. They say the cause of action, or a part thereof, arose in the County of Los Angeles and, therefore, it is the proper county for trial of the action under section 393(b) of the Code of Civil Procedure; the law requires that Ruling No. 67 be filed with the Secretary of State in Sacramento, and under section 401 of the Code of Civil Procedure a suit attacking the Ruling is triable in any county in which the Attorney General maintains his office, which includes the County of Los Angeles; and that the showing was insufficient to establish that the convenience of witnesses and the ends of justice would be promoted by the change.

[1] The order granting the motion did not specify the ground on which it was granted. If it is sustainable on either ground on which the motion was made, it must be affirmed. Gilman v. Nordin, 112 Cal.App.2d 788, 793, 247 P.2d 394. We have concluded it is sustainable on the ground that the convenience of witnesses and the ends of justice would be promoted by the change.

[2, 3] We must, of course, assume that the facts stated in the affidavit of defendant are true. The court may, on motion, change the place of trial "When the convenience of witnesses and the ends of justice would be promoted by the change". Code Civ.Proc. § 397, subd. 3. A motion for a change of venue on the ground that the convenience of witnesses and the ends of justice would be promoted by the change is committed to the sound discretion of the trial court and its determination will not be disturbed on review unless it clearly appears as a matter of law that there has been abuse of such discretion. Rice v. Schubert, 101 Cal.App.2d 638, 642, 226 P.2d 50; Wood v. Silvers, 35 Cal.App.2d 604, 607, 96 P.2d 366, 97 P.2d 265; Sowers v. Sowers, 127 Cal.App. 579, 582, 16 P.2d 176.

The facts in Barclay v. Supreme Lodge of Fraternal Brotherhood, 34 Cal.App. 426, 167 P. 701, were substantially the same as in the case at bar. Barclay was an appeal from an order changing the place of trial from the City and County of San Francisco to the County of Los Angeles. The suit was by beneficiary members of the defendant corporation seeking a decree enjoining the collection of certain assessments which had been levied against the plaintiffs and other members of the defendant pursuant to an amended bylaw revising and raising the rate of assessment which the plaintiffs and other members were originally subjected to, and which the plaintiffs alleged was illegally adopted by the defendant and without the consent of the plaintiffs. The court held that the order granting the motion for a change of the place of trial to the County of Los Angeles, in which the defendant had its home office, on the ground of the convenience of witnesses and the promotion of the ends of justice, was a proper exercise of discretion where it was shown that all of the records of the defendant were kept in its home office.

[4] It appears from the affidavit of defendant that all of the original records, including the exhibits, made and used in the proceeding comprising the notice and hearing prerequisite to the issuance of Ruling 67, were in his principal office in San Francisco; and that the entire staff and records of the Division of Rate Regulation of the Department of Insurance, which was charged with the duty of assisting, and which did assist him in the proceeding, are assigned to and located at his principal office. It appears from the answer that such Division is charged with the duty of assisting defendant in his rate regulatory duties and that it assisted him in the preparation of Ruling 67. The principal offices of four of the seven plaintiffs are located in San Francisco. The pleadings disclose that the records of defendant are necessary evidence both in support of defendant's case and that of plaintiffs'. The trial court was warranted in inferring from the pleadings and the affidavit of defendant that the evidence to be produced by both plaintiffs and defendants was more readily accessible in San Francisco where the principal office of the Department of Insurance is located, and could not be produced conveniently in Los Angeles. See, People v. Plumas Eureka Mining Co., 51 Cal. 566. The trial court was justified, therefore, in concluding that the convenience of witnesses and the ends of justice would be promoted by the change.

Plaintiffs argue vigorously that the affidavit of defendant does not state any facts showing that either O'Brien or Fay would be inconvenienced by appearing as witnesses in the County of Los Angeles. The affidavit being sufficient in the particulars we have indicated, the question of whether it is sufficient with respect to the convenience of O'Brien and Fay is not material.

Since we have concluded that the order is sustainable on the ground that the convenience of witnesses and the ends of justice would be promoted by the change, we need not consider plaintiffs' further contentions that the County of Los Angeles is the proper place of trial under sections 393 (b) and 401 of the Code of Civil Procedure.

We are not prepared to say as a matter of law that the trial court abused its discretion in granting the motion.

Affirmed.

WOOD, J., concurs.

SHINN, P. J., did not participate.

Hearing denied; SCHAUER, J., dissenting.

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122 Cal.App.2d 731

TEVIS v. BLANCHARD et al.

No. 15531.

District Court of Appeal, First District,
Division 1, California.

Jan. 25, 1954.

Rehearing Denied Feb. 24, 1954.

Hearing Denied March 25, 1954.

Suit against corporation and guarantor on note in sum of $5,000. The Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., entered judgment for plaintiff, and guarantor appealed. The District Court of Appeal, Fred B. Wood, J., held, inter alia, that where there was evidence that note was given as integral part of an illegal stock sale transaction, issue of illegality of note was for jury, notwithstanding that amendment presenting such issue was not requested until two years and eight months after original answer was filed.

Judgment reversed and cause remanded for new trial; order denying motion for judgment notwithstanding verdict affirmed.

1. Contracts 🔑138(6)

A contract proscribed by law is against public policy and is of public interest and concern, and where defendant does not set up defense of illegality, but case made by plaintiff or defendant shows illegality, it becomes duty of court sua sponte to refuse to entertain the action.

2. Contracts 🔑138(6)

If case presents one of illegality of contract, it must be considered by the court, whether pleaded or not.

3. Contracts 🔑138(6)

The pleading of fraud against the public is not a condition precedent to a court taking cognizance of that fraud.

4. Appeal and Error 🔑171(3)

In action on note, where guarantor on first day of trial asked leave to amend answer to present issue of invalidity of note, and, although request was denied, case was consistently tried upon theory that note was void as part of illegal stock sale transaction and guarantor requested instructions on such theory and urged illegality later in support of motion for new trial, issue of illegality was available to guarantor on appeal, although issue was allegedly not presented until two years and eight months after defendants had filed pleadings.

5. Licenses 🔑39.16

Where contract of guarantee of note was thoroughly enmeshed with allegedly illegal stock sale transaction, guarantor of note would not be precluded from urging consequences of illegality, in suit on note, on theory that such defense accrued only to principal obligor.

6. Licenses 🔑18½(33)

A corporation actively participates in an illegal sale of security of its own issue without a permit when it accepts the proceeds or a portion of the proceeds of the sale. Corporations Code, §§ 25008, 25009, 25500, 26103, 26104.

7. Licenses 🔑39.20

Unless the buyer of security sold by corporation without permit participates in such fashion, with such degree of culpability, as to put him in pari delicto with corporation and its representatives, such buyer may under appropriate circumstances rescind, tendering return of whatever of value he has received, or if he has received nothing of value, he may without such tender sue in damages for money or the property, or its value, which he paid or delivered or he may sue for money had and received. Corporations Code, §§ 25008, 25009, 25500, 26103, 26104.

8. Licenses 🔑39.26

In buyer's action against a participant in illegal sale of corporate security for money had and received, the buyer's right to recover is limited to the value of that which the participant received, but buyer's right is not so limited if his action is one for damages. Corporations Code, §§ 25008, 25009, 25500, 26103, 26104.

9. Licenses 🔑39.24

In suit against corporation and guarantor on note in sum of $5,000, where there was evidence that note was given as integral part of illegal stock sale transaction, issue of illegality of note was for jury, notwithstanding that amendment to answer to present such issue was not requested until two years and eight months after original answer was filed. Corporations Code, §§ 25008, 25009, 25500, 26103, 26104.

10. Appeal and Error 🔑1177(6)

In suit against corporation and guarantor on note in sum of $5,000, where, although amendment of answer to present issue of illegality of note was refused, evidence was introduced that note was integral part of illegal stock sale transaction, but issue of illegality was not submitted to jury, new trial would not be precluded because all counts of complaint allegedly sounded in contract, rather than in damages or for money had and received, since pleadings could be amended to conform to proof and there was possibility of proof of a legal contract. Corporations Code, §§ 25008, 25009, 25500, 26103, 26104.

11. Pleading 🔑237(1)

The form of pleadings under appropriate circumstances may be amended to conform to proof.

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Henry C. Clausen, Richard G. Burns, San Francisco, for appellant.

Cooper, White & Cooper, Sheldon G. Cooper, George A. Helmer, Robert M. Raymer, San Francisco, for respondent.

FRED B. WOOD, Justice.

Plaintiff Lansing K. Tevis recovered judgment upon a promissory note in the principal sum of $5,000 against defendants Brunner Blanchard Manufacturing Co., Inc., a corporation, as maker, and G. Arthur Blanchard as guarantor. Blanchard has appealed from the judgment and from an order denying his motion for judgment notwithstanding the verdict. He claims the note is void either as a security illegally issued or as representing an illegal advance upon the purchase of stock of the defendant corporation in the absence of a permit therefor.

The facts developed at the trial present that issue. Some of the evidence of illegality was adduced by Tevis and some by Blanchard. Tevis erroneously claims that illegality was not in issue because not specifically presented by the pleadings and that Blanchard, by tendering this issue upon appeal, is shifting from the theory upon which the case was properly tried.

[1–3] Tevis directs attention to the fact that defendants' pleadings, filed over 2½ years prior to trial, did not present such an issue. He claims that defendants' request to amend their answer to present this issue, made at the outset of the trial, was properly denied by the trial court, as not having been promptly tendered, and that the case was not tried on the theory that any such issue was involved. That might be a correct view of the situation if it were a mere dilatory plea, or one personal to the pleader as distinguished from one which is a matter of public interest and concern. A contract proscribed by law is against public policy, is of public interest and concern. "The law is very well settled that, where the defendant does not set up the defense of illegality, but the case made by the plaintiff or the defendant shows illegality, it becomes the duty of the court *sua sponte* to refuse to entertain the action." Dean v. McNerney, 91 Cal.App. 206, 208, 266 P. 975, 976; approved in Endicott v. Rosenthal, 216 Cal 721, 728, 16 P.2d 673. Accordingly, "if the case presents one of illegality of the contract, it must be considered by the court, whether pleaded or unpleaded." Page 210 of 91 Cal.App., page 976 of 266 P. See also Morey v. Paladini, 187 Cal. 727, 733, 203 P. 760; Force v. Hart, 209 Cal. 600, 604–605, 289 P. 828; Fewel & Dawes, Inc. v. Pratt, 17 Cal.2d 85, 91–92, 109 P.2d 650, defendant in his answer denied liability under the contract, introduced evidence showing illegality, and moved to vacate the judgment and for judgment in his favor on the ground of illegality; Loving & Evans v. Blick, 33 Cal.2d 603, 607, 204 P.2d 23; Grimes v. Nicholson, 71 Cal.App.2d 538, 542–543, 162 P.2d 934, principle recognized but found inapplicable when issue raised for first time on appeal, and entirely new theory from that on which tried; Dealey v. East San Mateo Land Co., 21 Cal.App. 39, 42, 43, 130 P. 1066, the pleading of a fraud against the public is not a condition precedent to a court taking cognizance of that fraud. In Dean v. McNerney, supra, after some testimony had been given tending to show that defendant had received the money in suit as a part of an illegal transaction, defendant asked leave to amend her answer to present that issue. That request was denied. But there was evidence of facts which would support a finding of illegality, which made illegality an issue in the case without any pleading on the subject. Hence, the refusal of the trial court to permit the amendment was deemed nonprejudicial. It happened that the trial court later did entertain the issue. It found that decedent Peter W. Dean had delivered to the defendant " 'in trust for safe-keeping, and for no other purpose, the sum of $8,000.66, and that said defendant Nell McNerney promised to repay said sum to the said Peter W. Dean, deceased, upon his request or demand' ". Pages 208–209 of 91 Cal.App., at page 976 of 266 P. "This finding," said the appellate court, "is to the effect that the money in question was delivered by the deceased to the appellant for safe-keeping, and for no other purpose, and therefore was not delivered in accordance with the claim of the appellant that it was for the purpose of protecting her as a house owner consenting to the use of the premises belonging to her, for illegal purposes." Page 209 of 91

Cal.App., at page 976 of 266 P. The appellate court then reviewed the record, decided that it contained evidence sufficient to support the finding, and accordingly affirmed the judgment. Its concluding observations are especially significant: "Had the court found in accordance with the testimony of the appellant as it appears in the record, it may be admitted that the testimony is sufficient to support a gift, and also sufficient to show illegality of the whole transaction; but, as the finding of the trial court to the contrary is sufficiently supported, the judgment must be affirmed, and it is so ordered." 91 Cal.App. at page 212, 266 P. at page 977. That is quite like our case save that in our case the existence of the issue of illegality was not recognized and the issue was not given to the jury.

[4] There has been no shifting by Blanchard of the theory of his case since the very first day of the trial when he asked leave to amend. His counsel consistently tried the case throughout upon the theory that the note in suit was void as part of an illegal transaction. He requested instructions on that theory, which were refused by the court. Illegality was later urged by him in support of his motion for new trial. In the light of that history, the issue of illegality is clearly available to Blanchard upon this appeal.

[5] Tevis further claims that even if the defendant corporation could under these circumstances urge the illegality of the transaction, Blanchard can not do so because such a defense accrues only to the principal obligor, not to a guarantor. The cases he cites are neither apt nor persuasive. In Santa Ana Sugar Co. v. Smith, 116 Cal.App. 422, 2 P.2d 866, the running of the statute of limitations was involved and the guarantor, for a valuable consideration, had waived that as a defense. In Nielsen v. Davidson, 66 Cal.App. 442, 226 P. 835, there was no issue involving a defense by the principal obligor. Nor was Blanchard's contract of guaranty "'collaterally and remotely'", connected with the asserted illegal transaction as was the contract of sale involved in Boloyan v. Contente, 113 Cal.App.2d 439, 442, 248 P.2d 96, 98. The contract of guaranty here involved is too thoroughly enmeshed with the questioned transaction to escape the consequences of the illegality, if any, which attached to that transaction.

The question is whether the asserted illegality clearly appears as a matter of law or whether significant facts remain to be determined in the trial court. A brief summary of the pertinent evidence is desirable.

The defendant corporation (authorized capital, $100,000) was formed by defendant Blanchard and A. M. Brunner to develop and exploit a patented cow milking stanchion which Brunner had invented. May 6, 1947, a state permit was obtained which authorized the corporation to issue not exceeding 33,333 of its shares to Brunner, 33,333 to Blanchard, and 10,000 to one Howard Freeman, all shares issued to be deposited and held in escrow pending written order of the Commissioner of Corporations. The permit prohibited the owners or persons entitled to said shares from consummating a sale or transfer thereof or any interest therein or from receiving any consideration therefor without first obtaining the written consent of the commissioner therefor. No further order or consent and no other or additional permit was obtained from the commissioner.

Tevis was the first witness. He proved the execution of the note and its nonpayment. He said Blanchard told him he needed $5,000 to go ahead with the cow stanchion device and asked Tevis to advance it, which he did, and that the note was delivered in connection with that advance. Tevis said nothing about a stock transaction.

There is evidence that Blanchard, president of the corporation, in need of money for development work, interested Tevis in the stanchion and its exploitation and in the corporation and its financing; and that after several meetings and some investigation Tevis began advancing money to the corporation. Blanchard testified that Tevis advanced $5,000 as a part of $15,000 which Tevis was to pay for a 20% interest in the corporation; that various payments totalling $5,000 were made in payment on stock which was to be issued to Tevis, the payments for which the note in suit was subsequently given for the temporary protection of Tevis; after the note was executed no further payments were made by Tevis.

One of plaintiff's attorneys, Sheldon G. Cooper, testified that Tevis consulted him June 1, 1948, about a business matter he had with Blanchard; that on June 2, Tevis, Blanchard and the witness discussed the matter. Concerning that meeting, Cooper testified, as plaintiff's witness, on direct examination: "Q. Was there any other discussion regarding finances? A. Yes. My concern, obviously, as a lawyer, was for Mr. Tevis being protected in connection with the advances. That's why I was there. I discussed the matter with Mr. Blanchard and I suggested that a promissory note for the $5,000 which had then been fully advanced or substantially advanced, there may have been one payment a few days later, and Mr. Blanchard said the corporation would give a note and I pointed out to him that this corporate note would be of no value. The corporation had no money and it would be necessary for Mr. Blanchard to endorse the note. My recollection is that Mr. Blanchard consented to guarantee the corporate note. There was then some discussion as to the consideration that Mr. Tevis was to get for these advances, and to my best recollection, there were so many conferences, my best recollection is at that time at least it was discussed, if not agreed, that Tevis would get 20 percent of the stock of the company. Q. I show you a document submitted in evidence as Plaintiff's No. 1 and ask you if that was the promissory note that was ultimately executed as a result of that conversation? A. Yes, that is the one."

Later, Tevis informed Cooper that a Mr. Merrill, a contractor who could do the contract work and would be a great advantage to this enterprise, was coming into the "deal." Further meetings ensued, commencing June 8th, looking toward the acquisition by Merrill and Tevis of a one-third interest each in the corporation. This involved the acquisition of Brunner's one-third interest. This plan was not consummated. Cooper prepared several drafts of an agreement therefor but none was executed.

The note in suit was executed June 9, 1948. It was ratified by the board of directors of the corporation on July 26th of that year.

On August 31, 1948, Cooper wrote a letter to the defendant corporation in which he said in part: "As you are aware an agreement was entered into between the Brunner-Blanchard Corporation and Lansing Tevis whereby Mr. Tevis was to advance to the corporation the sum of $15,000.00 from time to time as call was made upon him by the corporation. In return the corporation was to issue 20% of its total authorized stock to Mr. Tevis. Mr. Tevis has already advanced the sum of $5,000.00 and stands ready to complete his performance under the contract. You have indicated that the corporation intends to repudiate its obligation under the agreement. We are authorized by Mr. Tevis to make demand upon you that the corporation take appropriate action immediately to perform its agreement and issue to him the proper number of shares." Cooper testified upon cross-examination that the first two sentences of this letter incorporated the original agreement between the parties and that the $5,000 advance mentioned in the letter was the only $5,000 which Tevis advanced.

Cooper also testified "Yes, we met on a number of occasions, but we met in connection with the promissory note. Mr. Tevis had advanced funds and had no evidence of liability of either Mr. Blanchard or the corporation and I was disturbed about it and I had called him a couple of times and he came to my office and the note was prepared and he signed on behalf of the company and also as the guarantor."

There is evidence that Tevis took an active part in the management of the corporation, looking after its San Francisco office and cosigning all checks issued by it. Tevis testified that the reason for his signing those checks was that Blanchard needed two signatures; he presumed that he signed the signature card that went to the bank; he signed those checks at the request of Blanchard; presumably those checks were part of the $5,000 he had advanced.

[6] Here is evidence of an illegal transaction, an agreement by the corporation to issue and sell shares of its capital stock without a permit therefor, and the acceptance by it of a part of the purchase price. Every corporation is prohibited from selling a security of its own issue without a permit. Corporate Securities Law, Corporations Code, § 25500. A corporation which directly or indirectly offers or negotiates for sale of a security contrary to the provisions of the Act or in nonconformity with a permit or which applies any portion of the proceeds of sale to any purpose not specified in a permit is guilty of a public offense punishable by a fine. Corporations Code, § 26103. Penalties are imposed upon any officer or employee of a corporation, and every other person, who aids or assists in the sale of such a security in nonconformity with a permit. Corporations Code, § 26104. "Security" includes any stock, including treasury stock. Corporations Code, § 25008. "Sale" includes disposition or attempt to dispose of a security for value, also includes offer to sell, attempt to sell, solicitation of a sale, and the taking of a subscription. Corporations Code, § 25009. A corporation actively participates in such a sale when it accepts the proceeds or a portion of the proceeds of the sale. See Randall v. Beber, 107 Cal.App.2d 692, 700, 237 P.2d 994; People v. Beber, 104 Cal.App.2d 359, 369, 231 P.2d 516, and cases cited. It is the act of selling that is primarily placed under the examination of the Corporation Commissioner. People v. Sidwell, 27 Cal.2d 121, 127, 162 P.2d 913. "The imposition by statute of a penalty implies a prohibition of the act to which the penalty is attached, and a contract founded upon such act is void." Smith v. Bach, 183 Cal. 259, 262–263, 191 P. 14, 15. See also, Duntley v. Kagarise, 10 Cal.App.2d 394, 397, 52 P.2d 560, and cases there cited.

There is evidence that the note to Tevis was given as an integral part of the stock sale transaction. A finding of fact to that effect would warrant the legal conclusion that the element of illegality infects the note and renders it void. See People v. Sidwell, supra, 27 Cal.2d 121, 129, 162 P.2d 913; People v. Woodson, 78 Cal.App.2d 132, 177 P.2d 586; Duntley v. Kagarise, supra, 10 Cal.App.2d 394, 52 P.2d 560. Also, a "promissory note may not depend upon a consideration which is a violation of an express statutory inhibition." Ludwig v. Steger, 99 Cal.App. 235, 237, 278 P. 494, 495. There is evidence that the contract of guaranty was an integral part of the transaction and as such equally infected with illegality.

[7, 8] Illegality would attach, as we have noted, because the Corporate Securities Act prohibits the making of such a sale or the acceptance of any of the purchase price and imposes penalties upon the corporation, its officers, agents, and other persons aiding in the sale. The statute does not expressly impose penalties upon the buyer. Unless he participates in such a fashion, with such a degree of culpability, as to put him in *pari delicto* with the corporation and its representatives, he is not without remedy. Under appropriate circumstances he may rescind, tendering the return of whatever of value he has received; if he has received nothing of value, he may without such a tender sue in damages for money or the property, or its value, which he paid or delivered or he may sue for money had and received. See Randall v. California Land Buyers Syndicate, 217 Cal. 594, 598–599, 20 P.2d 331; Bourke v. Frisk, 92 Cal.App.2d 23, 206 P.2d 407; Randall v. Beber, supra, 107 Cal.App.2d 692, 701, 237 P.2d 994. In an action for money had and received against a participant in the sale, such as an officer of the corporation making the sale, the buyer's right to recover is limited to the value of that which that participant received; not so limited if the buyer's action is for damages. See Randall v. Beber, supra, 107 Cal.App.2d 692, 701, 237 P.2d 994, and authorities there cited.

The difficulty with this case is that none of the questions of fact involved under the issue of illegality were given to the jury. We do not see that a reviewing court could make findings of fact from this record. Some consideration must be given to Tevis' testimony. He spoke solely of a loan, not of a stock transaction. Cooper spoke both of a loan and of a stock transaction. What really happened when the note was executed? Did the note represent a withdrawal by the parties from their original "agreement" and the making of an entirely new start? At that time, if Tevis was not in *pari delicto*, could not the parties have cancelled their "deal"? If they did, may not Tevis have been entitled to the return of his money, or a promissory note if the corporation had no money? The very fact that negotiations continued and the drafting of a written agreement upon a new basis was undertaken, may be some indication that such was the fact. The statements appearing in counsel's letter of August 31, 1948, would not necessarily preclude Tevis from making such a showing if that is what really occurred. It is the function of the trier of the facts, not the function of the reviewing court, to evaluate the testimony, draw inferences from the evidence and find the material and ultimate facts.

[9] Neither party is entirely without fault for the situation which now obtains. At the beginning of the trial (two years and eight months after answer filed) the defendants presented and asked leave to file an amendment to their answer, presenting the issue of illegality. Plaintiff resisted upon the ground that it came too late. The court denied the request, observing that the defendants had not acted promptly. The amendment should have been allowed but its denial was not prejudicial because the issue of illegality later did arise, through the evidence introduced. Throughout the trial counsel for defendants insisted that illegality was an issue. Plaintiff's counsel with equal insistence contended it was not. Defendants requested two instructions on this issue which were not given the jury. One was proper; the other not, for it amounted to a direction to find for the defendants. Counsel for plaintiff could not have been unaware of the likelihood that illegality would become an issue, from their familiarity with the dealings between the parties, commencing as early as June 1, 1948, plus the fact that in plaintiff's answer (filed 2½ years before the trial) to one of the counts of the cross-complaint, they alleged that Blanchard agreed to transfer one-third of the outstanding stock of the corporation as additional consideration for the advancing of "the sum alleged" ($15,000 for purchase of an interest in the stanchions, as averred in the cross-complaint) but that Blanchard refused to effect a transfer. The judgment should be reversed and the cause remanded for new trial. The order denying the motion for judgment notwithstanding the verdict should be affirmed.

[10, 11] Blanchard contends there is no occasion for a new trial because all counts of the complaint sound in contract, none in damages or for money had and received. That puts undue emphasis upon the form of pleadings which under appropriate circumstances may be amended to conform to proof. Also, it leaves out of account the possibility of proof of a legal contract.

Tevis contends there is no occasion for a new trial because, as he asserts, the order of nonsuit on the cross-complaint determined that there was no agreement for purchase of an interest in the corporation. That is not correct. One count of the cross-complaint pleaded a debt owing from Tevis to Blanchard for services rendered by Blanchard. The other count pleaded an undertaking by Tevis to advance $15,000 "to pay certain expenses of promoting cow milking stanchions, in consideration of an interest therein to plaintiff when he paid said sum in full." Neither count of the cross-complaint pleaded an agreement to acquire an interest in the corporation. The order of nonsuit at the very most determined that there was no express or implied agreement in respect to services of Blanchard and no agreement to advance moneys for an interest in the cow milking machines.

The trial court will, of course, allow such amendments to the pleadings as either party may request and the court may find appropriate and in futherance of justice, if such amendments are promptly tendered.

The judgment is reversed and the cause remanded for new trial. The order denying the motion for judgment notwithstanding the verdict is affirmed.

Appellant to recover costs on appeal.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER, J., dissenting.

BLACK et al.

v.

CUTTER LABORATORIES.*

Civ. 15223.

District Court of Appeal, First District,
Division 1, California.

Jan. 28, 1954.

Hearing Granted March 25, 1954.

Proceeding in the matter of the petition of union representatives for an order confirming an award in arbitration against employer. The Superior Court of the State of California in and for the City and County of San Francisco, Edward Molkenbuhr, J., entered judgment adverse to employer, and employer appealed. The District Court of Appeal, Peters, P. J., held that evidence sustained findings of arbitration board that employer discharged employee, in violation of bargaining agreement, because of her union activities, rather than because of alleged misrepresentations made by employee in application for employment or because of her alleged Communist affiliations.

Affirmed.

1. Arbitration and Award 🔑73

In absence of some limiting clause in arbitration agreement, merits of award of arbitrators, either on questions of fact or questions of law, may not be reviewed by court except as provided in statute. Code Civ.Proc. § 1288.

2. Arbitration and Award 🔑73

An arbitration agreement can limit powers of arbitrators, but, where it does not do so, courts cannot review sufficiency of evidence or validity of reasoning of arbitrators, except as permitted by statute. Code Civ.Proc. § 1288.

3. Arbitration and Award 🔑73

Limitations in arbitration agreement will not be extended by interpretation, so as to permit review of the facts or of the law by courts, unless such intent is clearly expressed. Code Civ.Proc. § 1288.

4. Arbitration and Award 🔑76

Rules that customarily give finality to both factual and legal determinations in arbitration award are subject to exception that courts will vacate award if it is found to be based on an illegal transaction. Code Civ.Proc. § 1288.

5. Arbitration and Award 🔑43

A valid contract is essential to an operative and valid award by arbitrators. Code Civ.Proc. §§ 1280–1293.

6. Labor Relations 🔑456, 465

Where arbitration board, to which dispute was submitted under collective bargaining agreement between employer and union whether employee had been discharged, in violation of agreement, because of lawful union activities, or whether employee had been discharged because she was a Communist, not only found that employer, in good faith, at time of discharge of employee, believed that employee was a Communist, but found that employee was in fact a Communist, refusal of board to compel employee to answer question whether she was a Communist did not deprive employer of a full and fair hearing as required by arbitration statute, and was no ground for vacating award determining that employee was wrongfully discharged. Code Civ.Proc. §§ 1280–1293, 1288.

7. Labor Relations 🔑458

Where employer knew of alleged misrepresentations by employee in application for employment, but employer did not discharge employee when it discovered misrepresentations or question employee concerning misrepresentations, but sat back for two and a half years until employee became president of union and union was in middle of labor negotiations, with employee as one of chief union negotiators, and then discharged employee, using misrepresentations as an excuse, finding of arbitration board that employer had waived right to discharge employee for misrepresentations was conclusive on court. Code Civ.Proc. §§ 1280–1293, 1288.

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* Subsequent opinion 278 P.2d 905.

8. Contracts ⚿108(1)

Though, in a proper case, in absence of statute, courts possess power to declare contracts, transactions and activities of individuals, associations and corportions to be illegal because in violation of public policy, public policy is such a vague and uncertain thing that such power should be exercised with restraint and only in the very clearest of cases.

9. Labor Relations ⚿372

Where employer knew of employee's alleged Communist affiliations, but it did not discharge employee or even question her about her affiliations, and sat back for two and a half years until employee became president of union and employer and union were in middle of labor negotiations, with employee as one of the chief union negotiators, and then discharged employee, using as an excuse the alleged Communist affiliations, employer could not be permitted to discharge the employee and thus interfere with the union.

10. Labor Relations ⚿458

Where employer knew of employee's alleged Communist affiliations, but it did not discharge employee or even question her about her affiliations, and sat back for two and a half years until employee became president of union and employer and union were in middle of labor negotiations, with employee as one of the chief union negotiators, and then discharged employee, using as an excuse the alleged Communist affiliations, finding of arbitration board, to which dispute was submitted under collective bargaining agreement between employer and union, that the real reason for the discharge of the employee was because of union activities was conclusive on court. Code Civ. Proc. §§ 1280–1293, 1288.

Gardiner Johnson, Thomas E. Stanton, Jr., San Francisco, for appellant.

Edises & Treuhaft, Bertram Edises, Henry F. Saunders, Oakland, for respondents.

PETERS, Presiding Justice.

On October 6, 1949, Doris Walker, a member and president of the respondent labor union, was discharged by the Cutter Laboratories, her employer. The union contended that Doris had been discharged because of her lawful union activities, and that such discharge was in violation of a collective bargaining agreement existing between the union and the employer. The employer contended that it had discharged Doris because she had made false statements in her application for employment, and because she was a dedicated communist, and urged that these were just causes for dismissal within the meaning of the collective bargaining agreement. Pursuant to the terms of that agreement the dispute was submitted by both parties to a board of three arbitrators, one chosen by each of the disputants, and the third being a neutral arbitrator. The arbitrators, after taking considerable evidence, found that Doris had not been discharged for just cause within the agreement, but had, in fact, been discharged because of her union activities, that this was in violation of the collective bargaining agreement, and ordered her reinstated and paid limited back pay as provided in the agreement. The union duly moved the Superior Court to confirm this award. This motion was resisted by the employer on the basic grounds that the arbitrators had erroneously and prejudicially denied to it a fair hearing in that they had refused to compel Doris to answer questions as to whether she was a communist, and about her claimed communist activities. It was also affirmatively urged that the award was illegal and violative of public policy in that it ordered the reinstatement into a defense plant of a dedicated communist. A motion to vacate the award on these grounds was made by the employer. The trial court, in a memorandum opinion, pointed out that no prejudice was suffered by appellant by the refusal of the arbitrators to compel Doris to answer the disputed questions, because other evidence was introduced on these matters and because the arbitrators found that Doris was a member of the communist party up to the date of her discharge. The excluded evidence was, therefore, held to be cumulative and its exclusion nonprejudicial. Thereupon, the trial court denied the motion to vacate and ordered the award confirmed. The employer, then, offered objections to the proposed findings, offered to produce evidence on its affirmative defense of illegality, and demanded a hearing on the issue. The amendments were rejected, the hearing denied, the award confirmed, and judgment ordered entered pursuant to the award. Cutter Laboratories appeals.

The collective bargaining agreement between the parties, effective at all times here relevant, provided for submission of union grievances to arbitration, provided how the arbitrators should be selected, and further provided that: "The decision of the Arbitrator or Arbitration Board shall be final and binding * * * Any dispute as to whether a grievance arises out of the interpretation or application of the Agreement, shall be subject to the grievance procedure as herein defined and shall be subject to arbitration."

[1] The general law on the power of the courts in passing on awards made by arbitrators under agreements similar to the one here involved has recently been reviewed at length by this court in Crofoot v. Blair Holdings Corp., 119 Cal.App.2d 156, 260 P.2d 156. The review of the authorities there contained need not be repeated in this opinion. Suffice it to say that, 119 Cal.App.2d at page 186, 260 P.2d at page 172 of that opinion, after discussing many cases, we concluded: "Under these cases it must be held that in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, may not be reviewed except as provided in the statute." The statute referred to is section 1288 of the Code of Civil Procedure prohibiting the vacation of such awards except in cases "where the award was procured by corruption, fraud or undue means", or "where there was corruption in the arbitrators," or "where the arbitrators were guilty of misconduct" in refusing continuances or in "refusing to hear evidence, pertinent and material to the controversy; or of any other misbehaviors, by which the rights of any party have been prejudiced", or "where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award * * * was not made." (See, also, § 1289, Code Civ.Proc. permitting modification of an award in certain limited situations not here involved.)

[2, 3] Of course the arbitration agreement can limit the powers of the arbitrators, but where it does not the courts are prohibited from reviewing the sufficiency of the evidence or the validity of the reasoning of the arbitrators, except as permitted by the statute. Limitations in the arbitration agreement will not be extended by interpretation so as to permit a review of the facts or of the law unless such intent is clearly expressed. In the Crofoot case the arbitration agreement provided that the decision of the arbitrators should be final " 'as to all facts found' " and also provided that the arbitration was to be " 'mutually conclusive and binding as to all issues * * * save for such rights as the parties * * * may have' " under the terms of the arbitration statute. It was held that under such an agreement the award was final and conclusive not only as to the facts but also as to the law, except as provided by statute. Certainly, in the present case the provision that the decision of the arbitrators shall be "final and binding" upon the parties is at least as broad as the provisions that the award shall be final " 'as to all facts found' ", and that it shall be " 'mutually conclusive and binding as to all issues' " found in the Crofoot case.

In the Crofoot case, in discussing the inability of the courts to review questions of law, even where erroneously decided, this court stated, 119 Cal.App.2d at page 189, 260 P.2d at page 174: "Even if the arbitrator decided this point incorrectly, he did decide it. The issue was admitted properly before him. Right or wrong the parties have contracted that such a decision should be conclusive. At most, it is an error of law, not reviewable by the courts." Various questions of fact, of mixed law and fact, and of pure law are mentioned by the court, and as to each of them the court concludes, 119 Cal.App.2d at page 190, 260 P.2d at page 174: "Questions of fact and the sufficiency of the evidence cannot be reviewed by the courts"; or 119 Cal.App.2d at page 190, 260 P.2d at page 174: "* * * we must conclusively assume those conclusions are supported"; or 119 Cal.App.2d at page 190, 260 P.2d at page 174: "* * * it was an error of mixed law and fact, or of law, and, as such, not reviewable on this appeal", or some such similar expression. It must therefore be accepted as settled law that except as provided by statute, and, as will be later pointed out, as to the defense of illegality, the sufficiency of the evidence to support the findings, mixed questions of law and fact, and pure questions of law contained in an arbitration award under such an agreement as is here involved, cannot and will not be reviewed by the courts.

The Crofoot case is similar to the instant one in another important respect. In that case the arbitrator made a short award completely disposing of the controversy, and supported it by a lengthy opinion setting forth his reasons for making the award, which amounted to detailed findings. In the instant case a similar short award was made, and the two majority arbitrators joined in an opinion giving their reasons for making the award. The dissenting arbitrator filed a detailed dissenting opinion on the facts and on the law. In the Crofoot case, in discussing such an opinion, it was stated, 119 Cal.App.2d at page 190, 260 P.2d at page 174: "Although these reasons are not spelled out in the findings, since it is the law that the arbitrator is under no compulsion to explain his award or give reasons for his conclusions, Sapp v. Barenfeld, 34 Cal.2d 515, 212 P.2d 233, we must conclusively assume those conclusions are supported." At page 192 of 119 Cal.App.2d at page 175 of 260 P.2d is to be found the following: "Obviously, the arbitrator did pass on this issue [an issue not disposed of in the findings or opinion] because he awarded damages to Blair. He was not required to set forth his reasons for doing so. It must be presumed 'That all matters within * * a submission to arbitration were laid before the arbitrators and passed upon by them'. § 1963, subd. 18, Code Civ.Proc."

[4] These rules that customarily give finality to both factual and legal determinations contained in an arbitration award are subject to at least one exception, and that is, the courts will vacate the award if it is found to be based upon an illegal transaction. An application of the rules applicable to this exception is to be found in Loving & Evans v. Blick, 33 Cal.2d 603, 204 P.2d 23. That case involved an arbitration of a disputed sum due under a building contract pursuant to a clause permitting arbitration contained in that contract, and pursuant to a separate agreement to submit the dispute to arbitration. During the course of the arbitration one of the parties presented the special defense that one of the contractor partners was not licensed as required by statute and urged that this illegality invalidated the entire proceedings. The arbitrator made an award to the contractors without specifically passing on the illegality defense. This award was confirmed by the trial court. The Supreme Court reversed. Only three justices approved the reasoning of the majority opinion, one other justice simply concurred "in the judgment" of reversal, and three justices dissented, two dissenting opinions being filed. The basic holding of the majority opinion is disclosed by the following quotation, 33 Cal.2d at page 609, 204 P.2d at page 26: "* * * the rules which give finality to the arbitrator's determination of ordinary questions of fact or of law are inapplicable where the issue of illegality of the entire transaction is raised in a proceeding for the enforcement of the arbitrator's award. When so raised, the issue is one for judicial determination upon the evidence presented to the trial court, and any preliminary determination of legality by the arbitrator, whether in the nature of a determination of a pure question of law or a mixed question of fact and law, should not be held to be binding upon the trial court." The following quotations from the majority

opinion disclose the basis of that opinion, 33 Cal.2d at page 610, 204 P.2d at page 27: "It seems clear that the power of the arbitrator to determine the rights of the parties is dependent upon the existence of a valid contract under which such rights might arise"; and again, 33 Cal.2d at page 610, 204 P.2d at page 27: "In the absence of a valid contract no such rights can arise and no power can be conferred upon the arbitrator to determine such nonexistent rights"; and again, in discussing the provisions of the arbitration statute, and in quoting with approval from 6 C.J.S., Arbitration and Award, § 12, p. 160, it is stated that " 'a claim arising out of an illegal transaction is not a proper subject matter for submission to arbitration, and that an award springing out of an illegal contract, which no court can enforce, cannot stand on any higher ground than the contract itself' "; and again, 33 Cal.2d at page 611, 204 P.2d at page 28: "Since an unlawful transaction cannot be given legal vitality by the arbitration process * * *"; etc. Thus, the majority opinion limits the exception to cases where the contract sought to be arbitrated is itself, illegal.

There should also be mentioned another case, a companion case to the Loving & Evans case, decided the same day, namely, Franklin v. Nat C. Goldstone Agency, 33 Cal.2d 628, 204 P.2d 37. This time four judges concurred in the majority opinion, and three judges dissented. In this case it was held that an order confirming an arbitrator's award in favor of a contractor should be reversed where the petition for confirmation failed to allege affirmatively, and it was not proved that the contractor had been properly licensed. See, also, Pawling v. Malley, 107 Cal.App.2d 652, 237 P.2d 663.

[5] Thus, under the rule of these cases there can be no doubt that a prerequisite of a valid contract is an essential to an operative and valid award. Both cases involved the validity of the very contract authorizing the arbitration. In both cases the underlying contract was invalid because in violation of an express statute. In the present case the validity of the arbitration agreement is not at issue. The theory of appellant is that the arbitrators have found that the employee was a communist, and that to be compelled to reinstate such an employee in a defense plant is against public policy and therefore void.

Before discussing the application, or the possible application, of the rules of these cases to the instant one, a review of the facts should be given.

Cutter Laboratories manufactures vaccines, serums, and other biologicals, for civilians, and, is also under contract to make them for the federal government. The plant is capable of being sabotaged. During the war period the federal government exercised stringent security control over the operations of the plant, and had the right and power, never exercised, to require the discharge of any person who was a bad security risk. Such security control was abandoned at the end of the war, and no such control was exercised during the periods here relevant. Admittedly, no government agency was disturbed about Doris' employment, nor had any such agency recommended her dismissal.

The respondent union was a C.I.O. affiliate. The arbitrators, in their majority opinion, referred to it as a "left wing" organization, and admittedly, in March of 1950, after the occurrences here involved, it was expelled from the C.I.O. The employer, appellant here, had had some labor difficulties with this union before this case arose, but had entered into a collective bargaining agreement with it dated July 23, 1948.

Doris, the discharged employee, had graduated from law school with honors, and had been admitted to the California bar in 1942. She was then employed as an enforcement attorney by the OPA and then went to work for the legal firm of Gladstein, Grossman, Sawyer & Edises, who handle labor cases. She left this employment because, according to her testimony, she became bored with routine legal matters and wanted to gain some practical experience in the labor field. She worked in a cannery for a short time and became an organizer for a tobacco and agricultural workers' union. She went to work for the Cutter Laboratories in October of 1946, after filing with the company an application for employment. This application contained several false statements. It concealed her educational background, failed to disclose that she was an attorney, and falsely represented her employment background. It falsely represented that she had been employed by an attorney as a file clerk. It gave as references the name of an attorney and a dentist who, in their letters of recommendation, at Doris' request, also failed to divulge her legal and work background. Doris' explanation of these misrepresentations is that had she told the truth, Cutter Laboratories would not have hired her.

In all other respects the application was truthful. The application contained no questions about any communist affiliation and no false representations were made as to such beliefs.

When first employed Doris was hired as a label clerk and later as a clerk-typist. She continued in this employment until October 6th of 1949 when she was discharged. During this three-year-period there were no complaints about her work. In the periodic ratings made by her supervisors she was rated as "average" or "above average" upon all of her job qualifications, and "below average" only as to health and absences from employment.

While working for appellant Doris became increasingly active in respondent union, holding various offices, until in the latter part of 1948 she became chief shop steward, whose primary function was to represent the union in grievances arising under the collective bargaining agreement. She represented the union in several controversies with the employer in this capacity. In the spring of 1949 Doris was elected president of respondent union.

During the period of Doris' employment there were some labor difficulties between respondent union and appellant. These arbitrators found that all of these had to do with wage and contract issues, and that there was no evidence of "any work stoppage, strike or other interference with production the avowed objective of which was political, philosophical, subersive or revolutionary." In April of 1947, at a time when Doris was a union official, the union charged appellant before the National Labor Relations Board with engaging in unfair labor practices. The appellant, during this month, investigated the past employment, character, and communist affiliations of Doris, and became fully aware of her false representations in her employment application and of her background, including communist affiliations, and of most of the other facts that two and a half years later were used as the claimed basis of her discharge. Nothing was done about these facts, however, in April of 1947.

In July of 1949 the collective bargaining agreement between appellant and respondent, pursuant to its terms, was opened for negotiations, resulting in November of 1949 (after the discharge of Doris), in a wage increase for the employees, and in other contract changes relating to labor conditions. Doris, as the then president of the respondent, was one of the union negotiators in this labor dispute. It was in the middle of these negotiations that Doris was discharged. The main question in dispute was a wage increase, the company refusing any increase, and the union demanding a 20-cent an hour increase, which, however, the union offered to compromise. The company refused. Relations between the two contracting parties deteriorated. On October 2, 1949, a radio commentator made a radio talk in which he made an attack on the appellant's labor policies. This incensed the executive vice-president of the appellant. He considered the charges unfair. On October 5, 1949, the union placed paid advertisements in three eastbay newspapers stating the union's position and soliciting the members of the public to telephone the executive vice-president of appellant and tell him what their opinion of the situation was. An acrimonious meeting between three representatives of the union, including Doris, and three representatives of the company, including the executive vice-president, was held on October 5, 1949, to discuss a labor grievance. The attorney for the company was also present, which was unusual. During this meeting the union representatives admitted responsibility for the radio broadcast, which made the employer representatives very angry.

The next day, October 6, 1949, Doris was discharged. This was accomplished by reading to her a letter prepared by appellant, which letter was later that day read to the employees at an employees' meeting called by the appellant. The letter states, as reasons for the discharge, falsifications upon Doris' employment application, and communist affiliations. The falsifications are enumerated as the failure to disclose that she had a law school education, had been admitted to the bar in 1942, had worked two years as an enforcement attorney for the OPA, had been employed by the Gladstein firm, and then went to work in a cannery from which position she had been discharged because she refused to answer at a labor hearing whether she was a communist. This discharge was later upheld by the N.L.R.B. She also gave false information as to her prior employment record, which fact was stated in the letter. The letter stated that, although the company had known of these falsifications and normally would have discharged her, it had been decided not to fire her because the company did not want to be charged with persecuting a union official. The letter then went on to charge that the company had now learned of Doris' communist affiliations; that in October, 1948, at an N.L.R.B. hearing she had refused to answer the question as to whether she was a communist or was a member of any communist controlled group; that the company knew that she was a member of several designated groups that were communist controlled; that the company was convinced now that she was and had been a communist; that in view of the company's need for protection from sabotage it was necessary to now discharge her for the "causes mentioned." It is undisputed that prior to her discharge Doris was never asked the truth of these charges, nor was she given a chance to answer them.

The union protested the discharge, claiming that the real reason for the discharge was that Doris was active in union affairs, and that this violated the terms of the bargaining agreement. The dispute, under the terms of that agreement, was submitted by both sides, to arbitration.

Section 3 of Article I of the collective bargaining agreement provided: "The Company agrees that it will not interfere with, restrain or coerce said employees because of membership or lawful activity in the Union nor will it attempt to discourage membership in the Union by discrimination in respect to hiring, tenure of employment or any other term or condition of employment."

Article VIII, section 1, in reference to discharges and layoffs provided:

"No employee shall be discharged except for just cause. The provisions of this section shall not apply to personnel reductions for lack of work or to effect economies.

"In the event an employee is discharged without just cause, he shall be reinstated without loss of pay, seniority, or other benefit, subject to the following limitations: * * *

"In case of reinstatement, the total back pay award allowable shall be limited to the full time regular pay of the employee for the period he was off the payroll, or a period of eight (8) weeks, whichever period is the shorter, less any gross earnings or unemployment compensation received or earned during such period." (In the remainder of the Article minimization of damages, adjustment for sick leave benefits, a warning requirement, and notice of dismissal are dealt with.)

The agreement then sets forth a grievance procedure which was not here followed by the employer, and for the submission of disputes to arbitration. Admittedly, the issue here submitted to arbitration was whether the company had "just cause" for the discharge of Doris.

The majority of the arbitrators reviewed the evidence at some length and concluded that Doris was "unjustly discharged, that the reasons assigned by the Company for the discharge were not the real reasons and had been waived, and that the discharge interfered with, restrained and coerced an employee because of participation as an officer and negotiator on behalf of the Union in a wage negotiation."

The basic evidence that the company introduced at the hearing about Doris' affiliations dealt primarily with her activities between 1942 and 1947, except her refusal in October of 1948, eleven months before her discharge, to answer questions at the N.L.R.B. hearing. This evidence certainly would support a finding that Doris was affiliated, in these periods, with communist front organizations and was a communist. At the hearing before the arbitrators Doris was asked if she had ever been a member of the communist party. She refused to answer, her counsel objected, and the objection was overruled by the arbitrators. Counsel for Doris then offered to stipulate that the company, upon the evidence before it, at the time of discharge, in good faith believed that Doris was a communist. The stipulation was refused by the company. The board then told the witness that she would not be instructed to answer the question but that the board would draw "all justifiable inferences" from such refusal. Doris refused to answer on the ground that such question unjustifiably invaded her private beliefs. She also, on the same grounds, refused to answer a series of questions dealing with her alleged membership in related communist groups, with certain associations, or as to the authenticity of certain documents presented to her.

It should be here mentioned that the arbitrators extended to the company a similar immunity from cross-examination as to the sources of much of its information, with the same caveat as to adverse inferences.

The arbitrators in their award found that the company knew the basic facts about Doris, including her falsification of her employment application and of her communist affiliations, as a result of its investigations in April of 1947; that, in fact, the company officials believed that she was a communist within six months after she was hired; that the company was indifferent to such facts; that the company knew, or should have known, of all the facts relied upon in October of 1949 for the discharge in 1947 and not later than October of 1948; that the arbitration board was not the forum in which to decide the company's responsibilities toward national defense; that the company had no right of discharge beyond its collective bargaining agreement; that the issue was whether "just cause" existed for the discharge.

The following finding should be quoted: "The Company maintains that the basis for the discharge was two-fold: the omissions and falsifications in the Application for Employment and membership in the Communist Party with the full implications of dedication to sabotage, force, violence and the like, which Party membership is believed to entail.

"That the Company honestly believed all of these things is admitted and the accuracy of those beliefs is established in the record as follows: by admission with respect to the omissions and falsifications in the Application for Employment; by undenied and uncontradicted evidence with respect to the membership in the Communist Party; and by uncontradicted evidence that the Company's beliefs about the full implications of Party membership were prevalently understood and shared.

"In this view of the record, and we take this view, we are unable to find that the Company has been denied a fair hearing by reason of our refusal to instruct Doris Walker to answer the questions put to her touching this issue. Assuming that her answers would have been favorable to the Company's position, they would serve no more than to corroborate what we find is already established by the record; and the Company offers no convincing reason why further corroboration is necessary. The Company's motions are accordingly denied."

The board then stated that even though an employer may once have had just cause for a discharge, such cause may be lost by unreasonable delay, and that, in view of the collective bargaining agreement, the issue still remained as to whether the grounds asserted were the real causes for the discharge. The board found, on the evidence, that after the company acquired knowledge of the main facts upon which it now relies in April of 1947, it evidenced no concern over those facts, and made no further investigation until 1949; that there was no reasonable excuse offered by the company for this delay in asserting the grounds for discharge now asserted; that general principles of policy require that labor disputes and grievances be quickly settled; that under the collective bargaining agreement here involved the "employer should not be entitled to carry mutually known grounds for discharge in his hip pocket indefinitely for future convenient use"; that the grounds "asserted by the Company for the discharge were stale."

The arbitrators then went on to find that, in fact, the discharge in the middle of labor negotiations was retaliatory in nature and designed to "restrain, coerce or interfere with the employee because of lawful Union activity," and that the assigned reasons were not the real reasons, and had been waived.

[6] Appellant first attempts to bring itself within the literal terms of section 1288 of the Code of Civil Procedure, which is the section prescribing the situations in which the courts may vacate an arbitration award. The section provides, so far as pertinent here, that an award may be vacated where it is "procured by corruption, fraud or undue means", or where the arbitrators were guilty of misconduct in "refusing to hear evidence, pertinent and material to the controversy; or of any other misbehaviors, by which the rights of any party have been prejudiced", or "where the arbitrators exceeded their powers". It is contended that the basic issue was whether Doris was a communist; that when the arbitrators refused to order her to answer questions about her communist affiliations they prevented appellant from proving its case, and deprived it of a fair hearing in violation of the above sections. The answer to these contentions is obvious. The board told the witness that if she did not answer the questions it might indulge in adverse inferences. Then the board not only found that appellant, in good faith, at the time of discharge, believed that Doris was a communist, but found that Doris was in fact a communist. Obviously, the answers to these questions, assuming that they would have supported appellant, could have proved no more than the board actually found to be true. Thus, as held by the board, the evidence not required to be produced would have been merely cumulative. The board's refusal to compel an answer in no way adversely affected appellant, nor could it have deprived it of a full and fair hearing. Clearly, none of the statutory grounds set forth in section 1288 of the Code of Civil Procedure for vacating an award exist.

Appellant's main contention is that regardless of statute the award here was "illegal" in the same sense that that term was used in Loving & Evans v. Blick, 33 Cal.2d 603, 204 P.2d 23, and Franklin v. Nat C. Goldstone Agency, 33 Cal.2d 628, 204 P.2d 37, discussed, supra. It is urged that to order the reinstatement of a dedicated communist, who had infiltrated herself into a defense plant by false representations, is against public policy, and is therefore illegal and void.

[7] So far as the misrepresentations in the employment application are concerned, the finding that such cause for discharge had been waived is here conclusive. Certainly such misrepresentations would be just cause for a discharge if seasonably urged. But here the employer knew of such misrepresentations in April of 1947. It did not then discharge the employee, nor even question her about the false statements. It sat back for two and a half years, waited until the employee had become president of the union, waited until the company and the union were in the middle of labor negotiations with the employee as one of the chief union negotiators, and then discharged her, using the falsifications as an excuse, at a time when such discharge would be most injurious to the lawful activities of the union. As stated by the arbitrators, an employer cannot sit on a known cause for discharge and do nothing about it for two and a half years and then use this cause with the intent and for the purpose of injuring the union in its lawful labor activity. The finding of waiver is now conclusive.

Appellant, in an attempt to establish its public policy argument, builds up a most emotional picture about what might happen if a communist were ordered reinstated in a defense plant. It is interesting to note in this regard that, as pointed out by the arbitrators, no federal or state agency has expressed any alarm at such possibility. During the war period the federal government insisted on security measures, such as the right to insist upon the discharge of any person deemed a bad security risk. Upon the termination of hostilities such security restrictions were removed. The period here involved was after the termination of hostilities and before the commencement of the Korean conflict. No federal agency complained about the employment of Doris, or at any time suggested that she be discharged. Although the evils of communism were well known long before 1947, neither the defense agencies of the government nor appellant saw fit to screen applicants for employment on the basis of their possible communist affiliations. The application for employment form prepared by appellant and signed by Doris contained no questions about the possible communist affiliations of the prospective employee. It was not until after the award here involved was rendered that such questions were added to the form. It must be remembered that appellant knew of Doris' affiliations at least as early as April of 1947. Admittedly, thereafter and up until her discharge in October of 1949, appellant made no effort to restrict her activities, nor did it take any security measures of any kind. Admittedly, her work during this entire period was entirely satisfactory to appellant, and admittedly, during this period, she committed no unlawful act against the appellant. Appellant did not consider her a menace until she became a negotiator for the union in a legitimate labor dispute. If the reinstatement of Doris as an employee is attended with the terrible possibilities now pictured by appellant, such possibilities have existed since 1947. If appellant is correct now in its attitude, it has been a willing and active participant in undermining the national defense by keeping Doris in its employ.

The precise limits of the power of a court to vacate an arbitration award on the ground of illegality have not been definitely fixed by the courts. Three members of the Supreme Court, by their dissents in the Loving & Evans, and the Goldstone cases, are definitely of the opinion that legality is simply one of the issues before the arbitrators, and that their decision on that issue, as on other issues, is not subject to review, except as provided by statute. Three justices, with a fourth concurring "in the judgment" are of the opinion that the courts may and should vacate on the ground of illegality, at least in certain situations. But, assuming as we do that the majority opinions in those two cases properly state the law, all that was decided by those opinions was that when the underlying contract out of which the dispute sought to be arbitrated is illegal because in violation of a statute the courts have the power and duty to vacate. Here, of course, the collective bargaining contract, which is the contract forming the basis of the arbitration, is perfectly legal. The asserted illegality is not predicated on any term of that contract, nor does it arise out of the terms of that contract, but is based on facts developed at the hearing before the arbitrators. It is argued by respondent, with some merit, that where the claimed illegality thus appears it is merely another factual issue and that the finding of legality by the arbitrators like other factual findings is not subject to review.

[8] It should also be mentioned that the illegality involved in the two cited cases consisted of the violation of a statute. Here the asserted illegality lies in the vague and uncertain field of a requested court declared public policy. While there can be no doubt that, in a proper case, in the absence of statute, courts possess the power to declare contracts, transactions and activities of individuals, associations and corporations to be illegal because in violation of public policy, Safeway Stores v. Retail Clerks etc. Ass'n, 41 Cal.2d 567, 261 P.2d 721, such public policy is such a vague and uncertain thing that the power should be exercised with restraint and only in the very clearest of cases. Maryland Casualty Co. v. Fidelity & Casualty Co., 71 Cal.App. 492, 497, 236 P. 210; Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 600, 47 P. 582, 35 L.R.A. 309; Southern Pacific

R. Co. v. Stibbens, 103 Cal.App. 664, 680, 285 P. 374. As was said in National Auto. Ins. Co. v. Winter, 58 Cal.App.2d 11, at page 22, 136 P.2d 22, at page 28: "'It has been well said that public policy is an unruly horse, astride of which you are carried into unknown and uncertain paths'".

It must also be remembered that neither the federal nor state governments has seen fit to declare by statute that membership in the communist party is a crime. While the Smith Act, 18 U.S.C.A. § 2385, does make the knowing advocacy of the forceful overthrow of government a crime, the later Internal Security Act of 1950, 50 U.S.C.A. § 783(f), expressly provides that "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of * * * any * * * criminal statute." See Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137; Communist Party of United States of America v. Peek, 20 Cal.2d 536, 127 P.2d 889.

It must also be remembered that there is also a strong public policy, evidenced by statutes, operating in favor of respondent union and somewhat contrary to the uncertain public policy asserted by appellant. There is first a strong public policy in favor of arbitration, of settling arbitrations, particularly labor arbitrations, speedily and with a minimum of court interference, and of making the awards of arbitrators final and conclusive. This public policy is expressed in our arbitration statutes, §§ 1280–1293 of the Code of Civ.Proc. There is also a strong public policy expressed in the National Labor Relations Act, § 151 et seq., 29 U.S.C.A., and in section 923 of the Labor Code of California in favor of worker organization and against employer interference and coercion.

[9] These comments indicate the difficulty that exists in holding that it is clearly against public policy for an employer to be compelled to reinstate in a plant where some defense work is performed, a communist employee who is a mere label clerk or clerk-typist and who admittedly has never, during her employment, committed any act of sabotage or unlawfully injured the employer. We are not required to decide that question in this opinion. In the instant case the arbitrators have found that membership in the communist party was not the real reason for the discharge, but that the real reason for the discharge was to interfere with the lawful labor activities of the union. The arbitrators also found that this was a direct violation of the collective bargaining agreement. Thus the appellant, who it has been found has unlawfully violated its contract and the public policy announced in section 923 of the Labor Code, seeks to support its unlawful action by asserting that the employee was a communist, which was one of the reasons set forth in the letter of discharge, but which, it has been found, was not the real reason at all. Certainly it is implicit in the collective bargaining agreement that the "just cause" for the discharge must be not only stated to the employee, but the stated reason must be the real reason for the discharge. Where, as here, the real reason for the discharge was an attempt to interfere unlawfully with the union, the employer cannot be permitted to so interfere with the union by asserting a reason that was not asserted in good faith and did not, in fact, motivate the employer in making the discharge. What was the real reason for the discharge was obviously a question of fact for the arbitrators, and their finding on this issue is binding and conclusive on the courts.

[10] In addition, everything said in this opinion about the waiver of the ground of falsifications in the employment application is also applicable to the present issue. Appellant knew of the employee's communist affiliations for two and a half years before it attempted to use such affiliations as an excuse for the discharge. It would be contrary to public policy, as evidenced by the statutes already mentioned, and contrary to the letter and spirit of the collective bargaining agreement, if the employer were to be permitted to sit on a known assumed cause for discharge and then assert it for the purpose of interfering unlawfully with a lawful labor activity of the union. It must be remembered that it is the union, not Doris, that is the respondent here, and

it is the union's rights that were adversely and unlawfully affected by the discharge. It must be held that the finding of waiver is a finding on a question of fact, and the arbitrators' finding, for reasons already stated, is conclusive.

The order and judgment appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

122 Cal.App.2d 752

In re BALDRIDGE.

BRIGGS v. BALDRIDGE.

Civ. 19829.

District Court of Appeal, Second District,
Division 1, California.
Jan. 25, 1954.

Proceeding on petition to have aunt declared incompetent and to have guardian appointed for her person and estate. The Superior Court, Los Angeles County, Louis H. Burke, entered decree adjudicating aunt to be incompetent as to her property, and ordering appointment of a guardian for her estate, and aunt appealed. The District Court of Appeal, Drapeau, J., held that finding of trial court was not supported by substantial evidence.

Decree reversed.

1. Mental Health 🔑155

All conflicts and any reasonable doubt as to sufficiency of evidence must be resolved in favor of the order appointing guardian for estate of person incompetent to manage his property.

2. Mental Health 🔑155

On appeal from judgment adjudicating a person to be incompetent and ordering appointment of guardian of her estate, District Court of Appeal must uphold findings of trial court if there is any substantial evidence which, together with aid of all inferences reasonably to be drawn from it, tends to support the judgment.

3. Mental Health 🔑10

In proceeding to have aunt declared incompetent and guardian appointed for her person and estate, evidence was insufficient to sustain finding of incompetency as to property.

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Homer H. Gooing, Huntington Park, for appellant.

Arthur E. Briggs, Los Angeles, for respondent.

DRAPEAU, Justice.

The petitioner is a nephew of Dora M. Baldridge. He sought to have her declared incompetent and a guardian appointed for her person and estate.

After hearing the evidence, the trial court found that Mrs. Baldridge "is competent to manage her own person and her household affairs and expenses" and denied the petition for guardianship of her person.

The court also found that "Dora M. Baldridge is incompetent by reason of old age, physical illness and infirmity rendering her unable, unassisted, properly to manage and take care of her property, and by reason thereof is likely to be deceived or imposed upon by artful and designing persons", and granted the petition for guardianship of her estate. The Citizens National Trust and Savings Bank of Los Angeles was appointed such guardian, and letters of guardianship issued accordingly.

Mrs. Baldridge appeals from the order adjudging her incompetent and appointing a guardian of her estate.

It is contended that the adjudication of incompetency is contrary to the evidence and the law. This for the reason that to deprive appellant of the management and control of her own property on the basis of the evidence presented amounts to a denial of due process.

[1, 2] In Guardianship of Walters, 37 Cal.2d 239, 245, 231 P.2d 473, 477, the Supreme Court of this State held as follows:

"In considering appellant's contention that the evidence does not support the finding of incompetency, we must test the evidence in the light of Probate Code section 1460, which provides: '* * * the phrase "incompetent person," "incompetent," or "mentally incompetent," shall be construed to mean or refer to any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other cause, is unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof is likely to be deceived or imposed upon by artful or designing persons.' All conflicts and any reasonable doubt as to the sufficiency of the evidence must be resolved in favor of the order. See In re Estate of Reed, 198 Cal. 148, 151, 243 P. 674; In re Estate of Bristol, 23 Cal.2d 221, 223–224, 143 P.2d 689. In cases of this type, as in any other, we must uphold the findings of the trial court if there is any substantial evidence which, together with the aid of all inferences reasonably to be drawn from it, tends to support the judgment. Matter of Coburn, 165 Cal. 202, 212–213, 131 P. 352; Estate of Reed, supra, 198 Cal. at pages 150–151, 243 P. 674; In re Estate of Watson, 176 Cal. 342, 346, 168 P. 341; In re Estate of Schulmeyer, 171 Cal. 340, 342, 153 P. 233; In re Estate and Guardianship of McConnell, 26 Cal.App.2d 102, 106–107, 78 P.2d 1043."

[3] Mrs. Baldridge, the alleged incompetent, was about eighty years of age at the time of the hearing. Her only living child, a daughter, Jessie Baldridge, had died about two months before. Her husband died in December of 1948. He had been a successful business man, the owner and operator of the Baldridge Packing Company. Upon his death, ownership of the packing plant vested in Mrs. Baldridge.

In March of 1951, the plant was sold for $265,000, of which $115,000 was paid in cash and the balance was secured by a first trust deed. This trust is being paid off to Mrs. Baldridge in monthly installments of $1,500 plus interest.

Mrs. Baldridge testified that the cash payment was deposited in Bank of America and that "a hundred and some thousand" dollars remain in the bank; that "we have used part of it * * * to pay expenses."

In August of 1951, Paul B. Sink and appellant's daughter Jessie formed a partnership for the operation of a cafe and cocktail lounge in Huntington Park. At that time Mr. Sink invested in the business $25,000 which he had borrowed from the Baldridge Packing Company upon his unsecured promissory note. Mr. Sink had been connected with the packing company since December 15, 1929. Prior to that date he had supervised the construction of the plant. After Mr. Baldridge died, Jessie Baldridge managed the plant and Mr. Sink acted as her assistant. Appellant testified that she had known Mr. Sink ever since she came to California and that he was like a son to her; that he had no interest in the packing plant at any time but was merely paid a salary, and that when the loan was made to him, she knew all about it.

Mr. Sink testified that while appellant and her daughter Jessie allowed him to voice his opinion regarding business matters, "they didn't necessarily follow it by any means", and that his approval or disapproval had little effect upon them, "because they had a mind of their own."

Dr. Carmody, the Baldridge family physician for ten years, testified that while appellant had hardening of the arteries and high blood pressure, she was in fair health for a woman of her years; that he thought her mental health was good. As to her capacity to handle business affairs, he "wouldn't know how well any person could handle business affairs."

The three women companions living with appellant, several neighbors, tradesmen, a banker and her dentist all testified to the effect that she had an active interest in managing her home, had a will of her own; handled the money, paid the bills, worked in her garden; was very smart, very clever; very well-informed; that her mental acuity was very good; she had a keen mind and a clear eye. At the time the plant was sold, appellant "seemed to have her faculties very well established"; that there had been no perceptible change in her during the last four or five years as far as her mental status was concerned. "She seemed to have all her faculties * * * she's just as mentally alert as ever."

Opposed to this, petitioner Briggs testified that when he called on appellant shortly after her daughter's death, she was unable to recall whether he was her nephew or her deceased husband's nephew, and she told him her memory was very bad.

When interrogated, appellant recalled early events and persons; indicated that she was conversant with the packing business through discussions with her late husband; that she knew nothing about the corporation, except that she and her husband owned the entire business. She testified that she owned the house where she lived; that she had sold the packing plant and was receiving a monthly check from the sale. She produced one such check which she had just received. When the trial judge questioned her about this, appellant correctly defined principal and interest, and explained that as payments were applied to the principal, there was a corresponding reduction in the interest.

Other than the suggestion of poor memory, there was nothing in the testimony of the witnesses indicating that appellant was of unsound mind. The only medical testimony produced was that of her own doctor, who had attended her for ten years and was of the opinion that her mental condition was good.

So far as the record discloses, appellants's one error of judgment was to lend $25,000 to Mr. Sink without security. However, it was held in Re Guardianship of Waite, 14 Cal.2d 727, 731, 97 P.2d 238, 240: "* * * there must be something more than poor business judgment to establish incompetency. As the court remarked in Re Estate of Watson, 176 Cal. 342, 345, 168 P. 341, 343, speaking of the alleged incompetent: 'She was the owner of the property. It was her right to manage it as she pleased, either personally or through agents of her choice, and to dispose of it as she saw fit, unless her mental faculties were impaired to such an extent as to make her unable to properly manage and take care of it or to render her liable to imposition by "artful or designing persons"'."

In our opinion the finding of incompetency in the case here under consideration is not supported by any substantial evidence.

The decree adjudicating appellant to be incompetent and ordering appointment of a guardian of her estate is reversed.

WHITE, P. J., and DORAN, J., concur.

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122 Cal.App.2d 777

REDEVELOPMENT AGENCY OF CITY AND COUNTY OF SAN FRANCISCO et al.

v.

HAYES et al.

No. 15893.

District Court of Appeal, First District, Division 1, California.

Jan. 26, 1954.

As Amended Jan. 29, 1954.

As Amended on Denial of Petitions for Rehearing Feb. 25, 1954.

Hearing Denied March 25, 1954.

Redevelopment agency and others brought mandamus proceeding against chairman of agency to compel him to execute certain loan and grant contracts with the United States, and taxpayers and residents and owners of realty in blighted area intervened. The District Court of Appeal, Bray, J., held that the Community Redevelopment Law was not unconstitutional on grounds raised.

Peremptory writ of mandate issued.

1. Mandamus 🔑153

In mandamus proceeding by redevelopment agency against chairman of agency to compel him to execute certain loan and grant contracts with the United States, those who were taxpayers and residents and owners of realty in blighted area sought to be eliminated by agency had such an interest in the matter in litigation as to be entitled to intervene. Health and Safety

Code, §§ 33000–33954; Code Civ.Proc. § 387; Housing Act of 1949, § 101 et seq., 42 U.S.C.A. § 1451 et seq.

2. Mandamus ⚷153

In mandamus proceeding by redevelopment agency against chairman of agency to compel him to execute certain loan and grant contracts with the United States, intervenors were entitled to all procedure and remedies to which the chairman would be entitled to resist claims of agency, but were limited to the same procedure and remedies. Health and Safety Code, §§ 33000–33954; Code Civ.Proc. § 387; Housing Act of 1949, § 101 et seq., 42 U.S.C.A. § 1451 et seq.

3. Eminent Domain ⚷56

Ordinarily, title to realty cannot be seized by a public body merely because a slum presently exists on the realty, and some further necessitous circumstance must exist to validate such seizure.

4. Eminent Domain ⚷56

In order to validate seizure by public body of realty on which a slum exists, clearance of the slum must be impracticable without taking title to the realty, or proposed restrictions, which can be imposed only through medium of a resale, are fairly calculated to prevent recurrence of slum conditions.

5. Health ⚷32

Where buildings in area which consisted of about 28 blocks in city were used wholly or in part for residential purposes, and such buildings, because of age, obsolescence, deterioration, dilapidation, mixed character and shifting uses, were unfit and unsafe for occupancy, and were conducive to ill health, infant mortality, juvenile delinquency and crime, determination by city and redevelopment agency officials under the Community Redevelopment Law that area was a "slum" was not unreasonable or beyond powers of such officials. Health and Safety Code, §§ 33000–33954.

See publication Words and Phrases, for other judicial constructions and definitions of "Slum".

6. Health ⚷32

Where area which consisted of about 325 acres in city was a social and economic liability requiring redevelopment in interest of health, safety and general welfare, and only 15 percent of the area was occupied or used, and only 115 acres were in private ownership, and of those 115 acres only 17.8 acres were improved with houses, and the remainder of the 115 acres consisted of truck yards, deteriorated sheds, and two quarries, the area was a "blighted area" within meaning of the Community Redevelopment Law. Health and Safety Code, §§ 33000–33954, 33041, 33042.

See publication Words and Phrases, for other judicial constructions and definitions of "Blighted Area".

7. Eminent Domain ⚷56

Where no compelling community economic need is shown for redevelopment of area under the Community Redevelopment Law, power of eminent domain may not be used. Health and Safety Code, §§ 33000–33954.

8. Health ⚷32

A combination of many of the conditions characterizing a blighted area under the Community Redevelopment Law establishes a menace to the health, safety and general welfare of the people of the community, and if such menace cannot be removed by private capital or police power, and requires redevelopment as outlined in the act, there exists a compelling community economic need for the redevelopment. Health and Safety Code, §§ 33000–33954.

9. Mandamus ⚷172

Contention that there was no demand for dwellings of class contemplated by redevelopment plan in blighted area in city under the Community Redevelopment Law was for city and redevelopment agency to determine, and not for District Court of Appeal in mandamus proceeding against chairman of agency to compel him to execute certain loan and grant contracts with United States. Health and Safety Code, §§ 33000–33954, 33041, 33042; Housing Act of 1949, § 101 et seq., 42 U.S.C.A. § 1451 et seq.

10. Statutes ⚷107(5), 120(5)

The Community Redevelopment Law entitled an act to consolidate and revise the law relating to community redevelopment and housing for preservation of public health and safety, and the formation, regulation and operation of corporations therefor, by adding Division 24 and Section 40021 to the Health and Safety Code, and repealing certain acts specified therein, is not invalid on ground that it embraces more than one subject, which subjects are not expressed in the title. Health and Safety Code, §§ 33000–33954.

11. Eminent Domain 🔑17

Where blighted area in city included about 325 acres, and only 15 percent of the area was occupied or used, and it constituted a social and economic liability requiring redevelopment in the interest of health, safety and general welfare, redevelopment thereof under the Community Redevelopment Law was for a "public purpose". Health and Safety Code, §§ 33000–33954, 33041, 33042.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Purpose".

12. Constitutional Law 🔑70(3)

A declaration of policy by the Legislature is not necessarily binding or conclusive on courts, but is entitled to great weight, and it is not duty or prerogative of courts to interfere with such legislative finding, unless it clearly appears to be erroneous and without reasonable foundation.

13. Eminent Domain 🔑17

Once it is determined that taking of realty under the Community Redevelopment Law is for a public purpose, fact that private persons may receive benefit from redevelopment is not sufficient to take away from the enterprise the characteristics of a public purpose. Health and Safety Code, §§ 33000–33954.

14. Constitutional Law 🔑227

Eminent Domain 🔑3

The Community Redevelopment Law does not violate the equal protection of the law provision of the federal Constitution because it provides for acquisition of realty by eminent domain and its later resale. Health and Safety Code, §§ 33000–33954; U.S.C.A.Const. Amend. 14.

15. Constitutional Law 🔑278(4)

Health 🔑21

The Community Redevelopment Law does not violate the due process clauses of the federal or state Constitutions. Health and Safety Code, §§ 33000–33954; Const. art. 1, § 13; U.S.C.A.Const. Amend. 14.

16. Constitutional Law 🔑253

A state statute permitting state action in economic affairs does not violate the due process clauses of the federal and state Constitutions, unless it is arbitrary and without reason. Const. art. 1, § 13; U.S.C.A.Const. Amend. 14.

17. Constitutional Law 🔑47

In determining whether a state statute permitting state action in economic affairs violates the due process clauses of the federal and state Constitutions, courts are restricted to an inquiry as to whether any state of facts shown, or which reasonably could be assumed, support the legislative judgment in enacting the statutes. Const. art. 1, § 13; U.S.C.A.Const. Amend. 14.

18. Constitutional Law 🔑47

Where courts pass on question whether a state statute permitting state action in economic affairs violates the due process clauses of the federal and state Constitutions, legislative findings are not binding on court, but such findings are entitled to great respect. Const. art. 1, § 13, U.S.C.A.Const. Amend. 14.

19. Evidence 🔑14

Courts are entitled to take judicial notice of the need for, and the change in attitude towards, redevelopment planning in slum or blighted areas. Health and Safety Code, §§ 33000–33954.

20. Constitutional Law 🔑62

Health 🔑21

The Community Redevelopment Law does not violate constitutional provision providing for separation of powers into three branches of government because the law delegates power to redevelopment agency to determine whether a given area is blighted. Health and Safety Code, §§ 33000–33954; Const. art. 3, § 1.

21. Constitutional Law ⚷205(1)
Health ⚷21

The Community Redevelopment Law does not violate constitutional provision prohibiting the granting of special privileges because the law provides that sale of redeveloped property may be made on basis of its fair value, arrived at as provided in the law, without setting any minimum price. Health and Safety Code, §§ 33000–33954; Const. art. 1, § 21.

22. States ⚷119

The Community Redevelopment Law does not authorize the giving or lending of public monies to private persons in violation of the Constitution. Health and Safety Code, §§ 33000–33954; Const. art. 4, § 31.

23. Constitutional Law ⚷9

In view of statement in constitutional amendment that all provisions of the Community Redevelopment Law are hereby approved, legalized, and ratified, and in view of analysis sent to voters and providing that if constitutional amendment is adopted, it will readily facilitate redevelopment of blighted areas, the people were not restricting their ratification to such portions of the law as dealt with blight caused by slum conditions and refusing ratification to blight caused by other conditions enumerated in the law. Health and Safety Code, §§ 33000–33954; Const. art. 13, § 19.

24. Eminent Domain ⚷3
States ⚷89

The Community Redevelopment Law does not violate constitutional provision that in acquiring lands by gift, purchase, or condemnation for memorial grounds, streets, squares, or parkways, the state or any of its cities or counties may acquire additional lands within, in certain cases, 150 feet, and in other cases within 200 feet, of proposed improvement, and after the improvement is completed may sell excess land not necessary for such improvement, with reservations concerning use of such land, so as to protect the improvement and to preserve its view, appearance, light, air and usefulness. Health and Safety Code, §§ 33000–33954; Const. art. 1, § 14½.

25. Municipal Corporations ⚷63(1), 987

Primarily the adequacy of the finances and safeguards for completing redevelopment plan of slum area under the Community Redevelopment Law was for determination of administrative bodies, and if they were not acting in good faith taxpayers could bring an appropriate proceeding to determine that question. Health and Safety Code, § 33741.

26. Mandamus ⚷153

In mandamus proceeding by redevelopment agency against chairman of agency to compel him to execute certain loan and grant contracts with the United States, intervening taxpayers and residents and owners of realty in blighted area had no right to broaden scope of proceeding by raising contention that contract which redevelopment agency sought to have executed allegedly contained inaccurate data and that agency had prevented development of the area. Health and Safety Code, §§ 33000–33954.

27. Municipal Corporations ⚷63(1)

It was required to be presumed that city and redevelopment agency in making redevelopment plan under the Community Redevelopment Law considered the wisdom and policy of the whole plan in light of objects to be attained, and judgment of city and agency was conclusive in absence of a showing of want of jurisdiction or bad faith or gross extravagance or existence of some fact sufficient to vitiate the plan. Health and Safety Code, §§ 33000–33954.

28. Estoppel ⚷62(4)

Failure of city to develop portion of blighted area owned by city did not estop city from redeveloping the blighted area under the Community Redevelopment Law. Health and Safety Code, §§ 33000–33954.

29. Health ⚷32

Public agencies and courts should be chary of the use of the Community Redevelopment Law to redevelop blighted area unless there is a situation where the blight is such that it constitutes a real hindrance to the development of city and cannot be eliminated or improved without public assistance. Health and Safety Code, §§ 33000–33954.

30. Health ⚷32

The Community Redevelopment Law cannot be used for redevelopment of blighted area merely because public agency considers that it can make a better use or planning of the area than the present use or plan. Health and Safety Code, §§ 33000–33954.

31. Eminent Domain ⚷17

It behooves courts to be alert lest currently attractive projects under the Community Redevelopment Law impinge on fundamental rights. Health and Safety Code, §§ 33000–33954.

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Rose M. Fanucchi, San Francisco, for respondent.

Jack H. Werchick, San Francisco, for interveners.

Edmund G. Brown, Atty. Gen., Eugene B. Jacobs, Deputy Atty Gen., for the State, as amicus curiae in support of some of petitioners' contentions.

BRAY, Justice.

Petition for writ of mandate to compel respondent chairman petitioner Redevelopment Agency of the City and County of San Francisco[1] to execute certain loan and grant contracts with the United States of America.

Questions Presented.

1. Have intervenors the right to intervene?

2. Constitutionality of the Community Redevelopment Law, Part I, Division 24, sections 33000–33954, Health and Safety Code,[2] as applied to (1) slum clearance, (2) blighted area.

Record.

Respondent demurred and in answer to the petition denied none of the facts set forth in the petition, but based his refusal to execute the contracts on the alleged grounds of the unconstitutionality of the act. Two taxpayers in the Diamond Heights Area, Florence Van Hoff and Victor Berg, on behalf of themselves and all others similarly situated, filed a complaint in intervention in which they demurred to the sufficiency of the petition on the ground that the proposed proceedings of the Agency are prohibited by the Fourteenth Amendment to the United States Constitution, and article I, §§ 1, 11, 13, 14, 14½, 21; article III, § 1, and article IV, §§ 24, 31, of the California Constitution. They also answered, denying certain allegations of the petition. Thereupon petitioners demurred to the complaint in intervention both generally and specially and on the ground that intervenors have no right to intervene. Petitioners also moved to strike the whole and all parts of the complaint in intervention on the grounds of intervenors' lack of right and that the complaint is sham, irrelevant and argumentative. At the hearing, intervenors' demurrer to the petition and petitioners' demurrer to, and motion to strike, the complaint were submitted.

Petition.

The petition sets forth that the Agency is a public body corporate and politic created under the act, after a declaration of the board of supervisors of the need for such agency, and the fact that the city had satisfied the "Community Prerequisites" of the act in that the city's Planning Commission has a master plan which includes all the matters required by the act to be in such plan. The Agency has undertaken a program for the elimination and redevelopment of blighted areas, of which the first two are the ones to be considered here, one being known as Western Addition Project and the other as Diamond Heights Project. The petition then gives the steps taken antecedent to the formulation of the redevelopment plans for both projects. As no attack is made on the regularity of those proceedings, they need not be detailed.

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[1] Hereafter referred to as "the Agency."

[2] Hereafter referred to as "the act."

Certain facts are then alleged as to each area. Western Addition is a blighted area which constitutes both a social and economic liability requiring redevelopment in the interest of the health, safety and general welfare of the people of the city and state. It includes approximately 28 blocks and is characterized by buildings used wholly or in part for residential purposes, which because of age, obsolescence, deterioration, dilapidation, mixed character and shifting uses, are unfit and unsafe for occupancy, and conducive to ill health, infant mortality, juvenile delinquency and crime. There are more than 2,000 substandard dwellings and hundreds of rooms in dilapidated rooming houses and row dwellings. More than 60 per cent of the dwelling units are dilapidated or lack private baths; more than 40 per cent have more than twice as many families than originally planned for; more that 50 per cent have inadequate toilet facilities; many lack installed heating; general use of portable coal oil heaters and storage of inflammable material constitute fire hazard; inadequate fire escape and exits add to the hazard of the inhabitants; extreme overcrowding is three and one-half times more prevalent in the area than in the city as a whole. The correction of these blighted conditions cannot be accomplished without redevelopment of the area as a whole, nor by private enterprise alone and without public participation. All of these conditions and this fact have been found by resolution and ordinance of the board of supervisors.

Diamond Heights is a blighted area constituting a social and economic liability requiring redevelopment in the interest of health, safety and general welfare. It includes approximately 325 acres. Much of the area was subdivided in 1863 and 1864; only 15 per cent of the area is occupied or used; 4 per cent is in improved boundary streets; 5 per cent playgrounds; less than 6 per cent interior streets and dwellings. Such unuse and lack of development is due to lots of irregular form and shape having been laid out without regard to the contours and other physical characteristics of the ground such as cliffs, steep gradings and outcroppings of rock; more than 500 parcels are in separate ownership which makes it impossible to effectively assemble the land by private means without public assistance and exercise of the power of eminent domain; there is wasteful street design, unsuited and unadapted to the topography of the area; mapped streets of usable grade are connected with mapped streets of unusable grade, so steep as to render impossible the construction of usable streets; one-third of said streets are too steep to be usable; 66 acres of such mapped streets remain unpaved and undeveloped, there being only 1.4 acres of paved streets. The major portion of the area is unserved by utilities of any kind; existing public open spaces would be inadequate to serve the area if built up. Approximately 85 per cent of the area is vacant and undeveloped; 115 acres are in private ownership, of which only 17.8 acres are improved with houses, the remainder of the private ownership improvements consisting of truck yards, deteriorated sheds and two quarries. As a result of said faulty planning there is an economic dislocation and disuse of the area; a subdivision of lots into irregular form and shape and inadequate size for proper use and development; a layout of lots in disregard of the contours and other physical characteristics of the ground and surrounding conditions; nonexistence of adequate streets and utilities in the area. The area is characterized by the growing or total lack of proper utilization resulting in stagnant and unproductive condition of land potentially useful and available for contributing to the public health, safety and general welfare. The blighted condition is aggravated by the shortage of useful land in the city for residential development to alleviate the acute housing shortage and tends to render the lands unmarketable and thereby to force an abnormal pattern of residential growth.

Redevelopment is necessary to facilitate the redevelopment of congested, deteriorated areas in other sections of the city, particularly in Western Addition. Correction cannot be accomplished without redevelopment of the areas as a whole. This cannot be done by private enterprise alone without public participation and assistance. All of the above has been found by the board of supervisors by resolution and ordinance. Intervenors admit the factual characteristics of the area but deny the conclusions and point out that for a long time past 210 acres have been and still are in public ownership.

The redevelopment of both projects requires (1) acquisition of lands by purchase or eminent domain, (2) demolition and clearance, (3) vacation and abandonment of certain street areas and dedication of other areas for street widenings and other improvements and the consolidation of certain blocks into continuous land areas, (4) rough grading and installation of necessary site improvements and utilities, (5) replatting and zoning in conformity with the city's master plan, (6) disposition of said lands as improved by sale under suitable safeguards, restrictions, covenants and conditions as set forth in certain ordinances. Such redevelopment will eliminate the blight conditions alleged by providing: clearance, elimination and prevention of slum and blighted areas; a proper, well-planned, economic utilization of said areas; adequate open spaces; utilities; streets designed to carry fast through traffic while closing off traffic on other streets, thereby contributing to the safety of the inhabitants of the areas; school, shopping and other community facilities; improved lands near the center of the city for the construction of needed dwelling units; a substantial increase in the number of safe and sanitary dwelling units to ease the acute housing shortage.

Title I of the Housing Act of 1949, P. L. 171, 81st Congress, 42 U.S.C.A. § 1451 et seq., authorizes certain financial assistance to petitioners to aid in this redevelopment. Pursuant to applications filed by the Agency with the Housing and Home Finance Administrator, the Administrator has advanced to the Agency $517,160.82, in addition to which the city has provided $78,962 to the Agency. On June 4, 1953, the Agency adopted a resolution directing respondent, as its chairman, to execute on behalf of the Agency a contract with the United States of America for a loan of $16,022,000 and a capital grant of $6,012,000 to aid in financing Western Addition Project and a contract for the loan of $5,049,000 and a capital grant of $334,000 to aid in financing Diamond Heights Project, both of which contracts have been approved by the board of supervisors. To satisfy the requirements of said contracts the city has undertaken to provide local grants-in-aid of $3,279,600 for Western Addition and $2,711,000 for Diamond Heights. The contracts have been executed by the administrator but respondent refuses to execute them.

Accompanying the petition are exhibits containing the various resolutions and ordinances of the board of supervisors, the tentative plans of the projects, reports on and photographs of the areas and other data.

1. Right to Intervene.

[1, 2] Intervenors are taxpayers of the city and county of San Francisco and residents and property owners in the Diamond Heights area. Obviously they have "an interest in the matter in litigation," Code Civ.Proc. § 387, and therefore may be permitted to intervene. In People ex rel. Fogg v. Perris Irrigation District, 132 Cal. 289, 64 P. 399, 773, it is held that an intervenor is entitled to all the procedure and remedies to which the respondent would be entitled to resist petitioner's claims. In Boskowitz v. Thompson, 144 Cal. 724, 78 P. 290, 291, it is held that the intervenor is "limited to the same procedure and remedies as is such original party". In Wright v. Jordan, 192 Cal. 704, at page 714, 221 P. 915, 919, it is stated: "As to the interveners herein it will suffice to say that, while they were permitted to intervene to the extent and for the purpose of sustaining or opposing the respective contentions of the petitioners and respondents herein, their rights as interveners herein go no further, since they cannot be heard to broaden the scope or function of this special proceeding by urging claims or contentions which have their proper forum elsewhere, and in which forum they are already embattled."

In our case respondent expressly raises no issue on the facts set forth in the petition. Intervenors in their complaint admit most of these facts although they strenuously deny the conclusions drawn by petitioners therefrom. Under the situation in this case and because of the limited facilities of this court to conduct a trial on factual issues, we deem it unnecessary to determine whether we have the power to permit intervenors to raise issues of fact, but deem it better to confine the issues to those of law, leaving the factual issues, if any, to be determined in a tribunal better adapted to trying them. Therefore we will grant petitioners' motion to strike all of the complaint in intervention except those portions constituting a demurrer.

2. Constitutionality.

(a) *Slum Clearance.*

Although the two projects are a part of one program (undoubtedly other similar projects are to follow) the character of the two areas proposed to be redeveloped are radically different. While the attack on the constitutionality of the act is basically on the fact that after the taking of private property by the power of eminent domain, if necessary, and after its redevelopment, it is to be sold to private persons, the difference in character of the areas presents different legal problems. Therefore we will consider the projects separately.

Clearly, Western Addition is a blighted area of the type usually referred to as a "slum." " 'It is generally accepted that a slum area is one, which because of lack of adequate open spaces and community facilities, and because of a preponderance of sub-standard buildings, does not provide an environment in accordance with the accepted standard of urban neighborhood life.' " Dissenting opinion of Van Voorhis, J., in Kaskel v. Impellitteri, 306 N.Y. 73, 115 N.E.2d 659, 670, quoting from report of William G. Vladeck, Chief of Planning of the New York City Housing Authority. Likewise, it comes within the definition of blighted area given in section 33041, Health and Safety Code: "A blighted area is characterized by the existence of buildings and structures, used or intended to be used for living, commercial, industrial, or other purposes, or any combination of such uses, which are unfit or unsafe to occupy for such purposes and are conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, and crime because of any one or a combination of the following factors:

"(a) Defective design and character of physical construction.

"(b) Faulty interior arrangement and exterior spacing.

"(c) High density of population and overcrowding.

"(d) Inadequate provision for ventilation, light, sanitation, open spaces, and recreation facilities.

"(e) Age, obsolescence, deterioration, dilapidation, mixed character, or shifting of uses."

Statutory or constitutional provisions authorizing local public agencies to undertake urban development projects for slum clearance have been adopted in at least 37 states.[3] Their validity has been almost uniformly upheld.[4]

The precise question involved here has never been passed on in this state. The fact that the elimination of slums and the erection of safe and sanitary low-rent dwelling units for persons of the prescribed restricted income advances the public welfare and protects the public safety and morals and are in fact and law public purposes was determined in Housing Authority v. Dockweiler, 14 Cal.2d 437, 94 P.2d 794. There the constitutionality of the Housing Cooperation Law, 2 Deering's Gen.Laws Supp., Act 3484, including the right of the public agency to use the power of eminent domain for slum clearance was upheld. That act, however, did not contemplate resale of the property condemned. Community Redevelopment Laws practically similar to our act in other states in their slum clearance aspects have been upheld with two exceptions. In the following cases the statute applied provided for the use, if necessary, of the power of eminent domain to obtain slum areas, their redevelopment and their sale and/or lease to private persons. In practically all of them the same federal constitutional questions were raised as in our case. In many of them the same questions were raised as to the particular state constitution as are raised as to the California Constitution in our case. In all of these cases the particular statute was upheld. These cases are: Opinion of the Justices, 1950, 254 Ala. 343, 48 So.2d 757; Rowe v. Housing Authority, 1952, 220 Ark. 698, 249 S.W.2d 551; Zurn v. City of Chicago, 1945, 389 Ill. 114, 59 N.E.2d 18; People ex rel. Tuohy v. City of Chicago, 1946, 394 Ill. 477, 68 N.E.2d 761; People ex rel. Tuohy v. City of Chicago, 1948, 399 Ill. 551, 78 N.E.2d 285; Chicago Land Clearance Commission v. White, 1952, 411 Ill. 310, 104 N.E.2d 236; In re Slum Clearance in City of Detroit, 1951, 331 Mich. 714, 50 N.W.2d 340; State ex rel. Bruestle v. Rich, 1953, 159 Ohio St. 13, 110 N.E.2d 778; Belovsky v. Redevelopment Authority, 1947, 357 Pa. 329, 54 A.2d 277, 172 A.L.R. 953; Opinion to the Governor, 1949, 76 R.I. 249, 69 A.2d 531; Ajootian v. Providence Redevelopment Agency, R.I.1952, 91 A.2d 21; Nashville Housing Authority v. City of Nashville, 1951, 192 Tenn. 103, 237 S.W.2d 946; Foeller v. Housing Authority of Portland, Or.1952, 256 P.2d 752; Hunter v. Norfolk Redevelopment & Housing Authority, 1953, 195 Va. 326, 78 S.E.2d 893.

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[3] See list in Kaskel v. Impellitteri, supra, 115 N.E.2d at page 670.

[4] See list of authorities, idem. 115 N.E.2d at page 670.

The only cases which have failed to uphold statutes similar to ours are Adams v. Housing Authority of City of Daytona Beach, Fla.1952, 60 So.2d 663, and Housing Authority of City of Atlanta v. Johnson, 1953, 209 Ga. 560, 74 S.E.2d 891. The majority opinion in the Florida case determined that the Florida Housing Authority Act, F.S.A. § 421.01 et seq., which authorized slum clearance followed by the construction of housing for people of small income was not to provide housing but to authorize the acquisition of property in slum areas so that it could be sold to private investors for industrial uses. It acknowledged that redevelopment acts "have been upheld by some of the Courts of last resort of other states," 60 So.2d at page 665, without citing any decisions or discussing them. It then stated: "We have our own Constitution and adjudicated cases by this Court which are controlling * * *." In the Georgia case the public authority was to acquire slum property, remove the buildings from it and then sell the unimproved property to industrial enterprises. The court after referring to the fact that it had previously sustained as valid the Georgia Housing Authorities Law "not without some misgivings on the part of some members of the court" stated: "We know that some courts of other jurisdictions have held that this can be done, and others have held that it can not be done. What constitutes a 'public use' under the Constitution and laws of Georgia is a question that must be decided by the courts of this State, and what some other jurisdiction may have decided is in no way binding." 74 S.E.2d at page 893. The decision neither cited nor discussed the decisions which it mentioned. The court apparently was influenced in its decision by the fact that the act did not require new housing to be erected on the slum area before turning it over to private interests. That the court is not in step with modern judicial thought is indicated by its rejection of the argument that removal of slums might decrease juvenile delinquency by saying, "We think juvenile delinquency exists on both sides of the railroad tracks * * *." The two cases last mentioned are not even persuasive authority in the face of the above-mentioned weight of authority.

[3, 4] The latest cases on the subject are Kaskel v. Impellitteri, supra, 115 N.E.2d 659, and Schneider v. District of Columbia, D. C., 117 F.Supp. 705.[5] In the Kaskel case the validity of proceedings for redevelopment of the "substandard or insanitary" Columbus

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[5] Before Prettyman, Circuit Judge, and Curran and Keech, District Judges, sitting as a statutory three-judge court.

Circle area in New York City was upheld. The Schneider case, decided November 5, 1953, contains a well-reasoned discussion of the questions arising from the application of the District of Columbia Redevelopment Act, an act quite similar to our act. The Schneider case was actually two cases consolidated for trial, each dealing with a different type of area, one a slum area, and the other an area somewhat comparable to our Diamond Heights Area. As applied to the slum area the court held the District of Columbia Redevelopment Act valid. We will discuss its application to the other area when we discuss the Diamond Heights problem. The main attack made on the District of Columbia act, as is the attack here, was that it authorized the taking by eminent domain of the fee title to private property and the sale or lease of that title to other private persons for private use. The court first pointed out that there is no doubt of the power of Congress to delegate to the District government the power to clear slums, such power lying within the well-established concepts of police power, namely, the protection of the public health, safety, morals and welfare, and that the clearance of slums is a public purpose to which the power of eminent domain applies. Moreover, it may be exercised not only to eliminate present slums but to prevent future slums. It should be pointed out here that the power of eminent domain applies only to the taking of property for a "public use." Originally the definition of "public use" was very narrowly restricted. Even low-cost public housing which is now universally accepted as a public use, originally would have not been included in the definition. As pointed out in the Schneider case, the more modern courts have enlarged the traditional definition of public use to include "public purpose." The idea now is that the taking of the property itself, as distinguished from the subsequent use of that property, may be required in the public interest. The case then holds that the taking of real property for the public purpose of eliminating or of preventing slums is within the power of eminent domain, even though the use to which the property is put after seizure is not a public use, provided (1) that the seizure of the title is necessary to the elimination of the slum, or (2) that the proposed disposition of the title may reasonably be expected to prevent the otherwise probable development of a slum. Ordinarily, title to real estate cannot be seized by the public body "merely because a slum presently exists upon the land. Some further necessitous circumstance must exist to validate such a seizure. It must be either that the clearance of the slum is impracticable without taking the title to the land or that proposed restrictions which can be imposed only through the medium of a resale are fairly calculated to prevent recurrence of slum conditions." Schneider case, 117 F. Supp. at page 717. The Western Addition Project meets this test.

[5] The Legislature has declared that slum conditions are injurious to the public health, safety, morals and welfare, and that to eliminate substandard housing and other slum conditions acquisition of property by eminent domain is necessary. Here the city and the Agency officials to whom the Legislature has delegated the authority to determine whether such conditions exist and what property is necessary to be taken for the public purpose of eliminating those conditions have acted. We find nothing in the record to indicate that their determination is unreasonable or beyond their powers.

(b) *Diamond Heights.*

[6] It is not contended that Diamond Heights constitutes a slum area. Its claimed necessity for redevelopment is its economic dislocation and disuse. It comes within the terms of section 33042 of the Health and Safety Code: "A blighted area is characterized by:

"(a) An economic dislocation, deterioration, or disuse, resulting from faulty planning.

"(b) The subdividing and sale of lots of irregular form and shape and inadequate size for proper usefulness and development.

"(c) The laying out of lots in disregard of the contours and other physical characteristics of the ground and surrounding conditions.

"(d) The existence of inadequate streets, open spaces, and utilities. * * *"[6]

We have not included subdivision (e) dealing with submerged lots as there are none in the Diamond Heights area.

There are not as many cases dealing with redevelopment statutes concerning deteriorated areas, nor are they as uniform in their decisions as are those concerning slum areas. We have been cited to and found only five cases discussing the subject. The latest is Schneider v. District of Columbia, supra, 117 F.Supp. 705, which, as we have shown, upheld the validity of the District of Columbia Redevelopment Act as related to slum clearance. However, it held the act invalid as related to deteriorated areas, stating that Congress in legislating for the district has no power to authorize the seizure by eminent domain of property for the sole purpose of redeveloping the area according to its, or its agent's judgment of what a well-developed, well-balanced neighborhood would be.

The case then considers one further situation, i. e., where a part of the deteriorated area contains slums. It holds that only that portion of the area geographically necessary to the elimination of slums may be taken.

The court distinguishes Foeller v. Housing Authority of Portland, supra, 256 P.2d 752, and Schenck v. City of Pittsburgh, infra, 364 Pa. 31, 70 A.2d 612, in both of which cases the properties seized were developed for nonresidential purposes, by pointing out that in each case the seizure and resale of the properties was a clear method of serving two purposes, (1) to prevent the recreation of slums, and (2) to enlarge the potential activity upon which the city lived. The court seemed to consider that the first purpose could exist alone but that the second purpose must be concomitant with the first. It referred to Fallbrook Irrigation District v. Bradley, 1896, 164 U.S. 112, 17 S.Ct. 56, 41 L.Ed. 369, which involved an irrigation act of the State of California and the question was whether the construction of irrigation works is a public purpose, and also to Clark v. Nash, 1906, 198 U.S. 361, 25 S.Ct. 676, 49 L. Ed. 1085, where the doctrine of the Fallbrook case was applied to an irrigation project in the state of Utah, although the project, authorized by a state statute, was the condemnation of land by an individual for the purpose of irrigating his own land, and other cases. Concerning these and the Foeller and Schenck cases, supra, the court said that the basis of the decisions was "meeting a compelling community economic need is a public purpose." It then referred to People of Puerto Rico v. Eastern Sugar Associates, 1 Cir., 1946, 156 F.2d 316 certiorari denied 329 U.S. 772, 67 S.Ct. 190, 91 L.Ed. 664, which considered a statute of the insular legislature embodying a far-reaching program of agrarian reform designed to remedy desperate economic conditions existing in the islands. The act authorized the seizure of large holdings of land used for the raising of sugar, especially that owned by corporations, and the redistribution of the land to individuals in small parcels. The statute was upheld upon the public necessity for solution of the general and acute conditions and upon the conclusion that the statute was reasonably calculated to deal with these problems.

Thus, the Schneider decision recognizes that property may be taken for redevelopment for other than purely slum clearance purposes, namely, to meet a compelling community economic need. The case then considers whether as to the non-slum area in the District of Columbia the proposed taking was to meet such need. It states that the redevelopment plan is based on the opinion of its proponents that residential neighborhoods should be "well-balanced" and that the area should contain housing for all income groups. It points out that "No acute housing shortage is to be met", in fact the plan contemplates no more residents after redevelopment than now. "No pressing economic condition" is shown. No purpose of housing for the needy is shown. "No rearrangement of streets is contemplated", the streets in the Project Area being continuous lines of the streets in other parts of the District of Columbia. "In sum the purpose of the plan, in addition to the elimination of slum conditions, is to create a pleasant neighborhood, in which people in well-balanced proportions as to income may live." The court then states: "But as yet the courts have not come to call such pleasant accomplishments a public purpose which validates Government seizure of private property. The claim of Government power for such purposes runs squarely into the right of the individual to own property and to use it as he pleases. Absent impingement upon rights of others, and absent public use or compelling public necessity for the property, the individual's right is superior to all rights of the Government and is impregnable to the efforts of government to seize it. That the individual is in a low-income group or in a high-income group or falls in the middle of the groups is wholly immaterial. One man's land cannot be seized by the Government and sold to another man merely in order that the purchaser may build upon it a better house or a house which better meets the Government's idea of what is appropriate or well-designed." It should be noted that the act involved in the Schneider case, 60 Stat. 790, refers only to "substandard housing and blighted areas." It contains no definition of "blighted area" similar to that contained in section 33042, Health and Safety Code.

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[6] The statute includes both this type of area and slum areas under the term "blighted area." For brevity and in order to distinguish slum areas factually from areas of the type of Diamond Heights we will refer to the latter as "deteriorated" areas, not as a word of description but merely as a word of reference.

[7] We are in accord with the Schneider decision that where no compelling community economic need is shown, the power of eminent domain may not be used. As hereafter shown, there appears to be such need in Diamond Heights.

The next most recent case is Kaskel v. Impellitteri, supra, 115 N.E.2d 659. There the appropriate New York municipal body proceeded under section 72–k of the General Municipal Law to find that a Columbus Circle area was "substandard and insanitary" and to plan a project for the removal of all buildings in it, redevelop it and then sell or lease portions of the area to private concerns. A taxpayer brought suit contesting the finding that the area was substandard and insanitary and asked that a court trial be had to determine that question. The majority opinion which held that as there was ample evidence to justify the City Planning Commission's findings and there was no charge that it acted corruptly or arbitrarily, the courts could go no further into this subject, adopts the minority opinion on all other questions in the case. It is held that the statute providing for slum clearance section 72–k of the General Municipal Law, is constitutional but can only be applied if the project is primarily for slum clearance. The minority opinion was to the effect that there was evidence supporting the plaintiff's claim that the area was not a slum area and slum clearance was not the primary object of the project but was secondary to turning the property over to private enterprise for the construction and operation of a sports coliseum; therefore, the case should be tried to determine the true factual situation.

People ex rel. Gutknecht v. City of Chicago, 1953, 414 Ill. 600, 111 N.E.2d 626, involved the validity of the 1949 amendments to the Illinois Blighted Areas Redevelopment Act of 1947, S.H.A. ch. 67½, §§ 63 et seq., 64, 65(*l*). As originally enacted that act was limited to "slum and blighted" areas—in substance, what we have considered here "slum areas" only—provided for their elimination and the construction of redevelopment projects financed by private capital. The amendment broadened the definition of "blighted areas" to include practically the same conditions set forth in section 33042 of the Health and Safety Code. Following the procedure provided in the act the Chicago Land Clearance Commission determined a certain 40 acre area to be blighted. Thereupon a private corporation submitted to the commission a redevelopment plan whereby it was to acquire the property, construct dwelling units thereon and sell them to private buyers. This plan required the use of public funds and the power of eminent domain. A quo warranto proceeding was brought to determine the validity of the amendment and the proposed procedure. No attack was made on the act as originally enacted as its validity had been sustained in People ex rel. Tuohy v. City of Chicago, supra, 78 N.E.2d 285, and Chicago Land Clearance Commission v. White, supra, 104 N.E.2d 236. While there is mention of slum eradication in the case, a study of it indicates that the question presented was clearly whether the acquisition of vacant land areas by a public agency for subsequent sale to private interests for development for residential use was an acquisition for a public use or public purpose permitting eminent domain to be employed. There was no slum condition in the area to be taken. The tie-in with slum eradication is based upon the statement that the development of areas for providing additional housing is necessary as an adjunct of clearing slum areas. "So far as we are aware, this is the first case in which governmental efforts to deal with unmarketable areas of vacant land have received judicial consideration. * * * What is involved here is, by the definition of the statute, and area which, because of characteristics of scattered ownership, undesirable platting, deteriorated site improvements, or excessive tax delinquencies, has in fact become unmarketable and because of its unmarketability has distorted the normal development of the community.

"The deleterious effect of such areas has been recognized by the Congress which has provided for Federal assistance in eliminating 'land which is predominately open and which because of obsolete platting, diversity of ownership, deterioration of structures or of site improvements, or otherwise substantially impairs or arrests the sound growth of the community * * *.' (42 U.S.C.A. par. 1460.) In the statute here involved, and in another statute known as the Blighted Vacant Areas Development Act of 1949, (Ill.Rev.Stat.1949, chap. 67½, pars. 91.1–91.7,) the General Assembly of Illinois has recognized that such vacant areas in their present condition are incapable of development for housing purposes by private enterprise. They are characterized as economic, social and physical waste lands, the elimination and development of which is declared to be a public use." 111 N.E.2d at page 634.

The court then held that the amendment was valid and constitutional. "The purpose and use to which the vacant blighted property is to be taken is both a public purpose and a public use, since the taking tends to alleviate a housing shortage, is an essential aid and adjunct to slum clearance, removes hazards to health, safety, welfare and morals of the community by developing the area, and eliminates factors impairing and arresting sound community growth." 111 N.E.2d at page 635.

The minority opinion points out that the majority opinion holds that the acquisition of vacant land and its development for residential uses even though unrestricted to low-rent accommodations is sufficiently related to the subject of slum clearance as to constitute the taking of land for a public use, a holding with which the minority opinion disagrees.

Foeller v. Housing Authority of Portland, supra, 1952, 256 P.2d 752 was brought to determine the validity of Oregon's Urban Redevelopment Law. While the project under consideration there was to take an area 53.8 per cent residential and redevelop it into an area completely commercial or industrial, the court held that the primary purpose was to prevent the development of slum conditions in that area. The case cannot be considered authority as to the situation where the area to be taken is a deteriorated one solely.

Thus we find that the only case which upheld the validity of a redevelopment statute as applied to a non-slum area is the City of Chicago case, and even in that case the court felt constrained to tie in the principle of the slum clearance cases by stating that providing additional housing was an adjunct of slum clearance. This constitutes a very elastic tie, for, based on that theory, any project of redevelopment could be supported as slum prevention if only it provided additional housing.

However, it appears from the cases on eminent domain dealing with a new subject to which the power is attempted to be applied that the right to its use depends upon what is referred to in the Schneider case as a "compelling community economic need." Our task, then, is to determine first whether the act is based on such a requirement, and secondly, whether in its application to the Diamond Heights Project such a need is shown. As to the basis of the act—in addition to sections 33041 and 33042, Health and Safety Code, heretofore quoted, there are a number of other significant sections. Section 33040 finds that in many communities there exist blighted areas which constitute social or economic liabilities, requiring redevelopment in the interest of the health, safety and general welfare of the people. These blighted areas are characterized by one or more of the conditions set forth in sections 33041–33044 inclusive. Section 33043 additionally characterizes a blighted area by a prevalence of depreciated values, impaired investments and social and economic maladjustments reducing the capacity to pay taxes so that tax receipts are inadequate for the cost of public services rendered. Section 33044 additionally characterizes a blighted area as one where in some parts a growing or total lack of proper utilization of areas results in a stagnant and unproductive condition of land potentially useful and valuable for contributing to the public health, safety and welfare. The section further refers to a loss of population and reduction of proper utilization of the area resulting in its further deterioration and added costs to the taxpayer for the creation of new public facilities and services elsewhere. Section 33045 declares the policy that the existence of blighted areas characterized by any or all of the conditions in the preceding sections constitutes a rising menace to public health, safety and welfare, cannot be remedied by use of the police power, necessitates excessive expenditures, and their removal is of benefit to the local population and property owners. Section 33046 continues the declaration of policy that such conditions cause continuing deterioration and disuse, that the blight cannot be corrected except by redeveloping the entire area, or substantial portions of it, that there is an impracticability of private assembly of small parcels in scattered ownership, and as a practical matter is so difficult and costly and lacking in legal power as to make it impossible to remedy by private owners. The only practical remedy is by public acquisition, clearance and planned redevelopment. Section 33047 declares that to protect and promote the sound development and redevelopment of blighted areas and the general welfare these conditions should be remedied by all appropriate means including the expenditure of public funds and the use of eminent domain and that the necessity of redevelopment in the interests of health, safety and welfare of the people is a matter of legislative determination.

[8] We do not deem it necessary to determine whether if only one of the designated conditions characterizing a blighted area under the statute exists, the statute could be enforced, as that question is not before us. However, it is clear that a combination of many of them establishes a menace to the health, safety and general welfare of the people of the community, and if such menace cannot be removed by private capital or police power, and requires redevelopment as outlined in the act, there would then exist a compelling community economic need.

Application to Diamond Heights Project.

This brings us to the question as to whether the petition shows a compelling community economic need for the project. Accompanying the petition are a series of exhibits setting forth the proceedings taken by the various city and county authorities, plans of the project, reports considered, maps of the present areas, and maps showing the projected uses to be made of the area. From these, it appears that the board of supervisors found, based upon substantial evidence, that the Diamond Heights area is a blighted one characterized, at least, by the conditions set forth in sections 33042(a) to (d) inclusive, 33044, 33045, 33046 and 33047.

The record shows that approximately 85 per cent of the area consists of vacant land which is in a state of economic disuse because private enterprise in the absence of governmental assistance cannot redevelop it in the community interest. This is due to the gridiron pattern of streets of approximately 66 acres of unimproved streets not adapted to the contour of the land, unsuited to the topography and too steep to be usable; to the fact that lots of irregular form and shape, many of them excessively long and narrow, have been laid out in disregard of the contours and other physical characteristics of the ground such as cliffs, outcroppings of rock, steep grades. There are 500 lots owned by separate individuals whose holdings vary in size from lots of 25 feet width to parcels of half an acre. Only 15 per cent of the area is used. There is a shortage of land in San Francisco and the welfare of the people requires that this unproductive area be used for dwelling and public places. In many instances the blighted condition of the area has resulted in sale of property to the state for delinquent taxes. The tentative plan shows that other than the public places the redevelopment is to be predominantly residential, consisting of single-family houses and multi-family houses. Open space, commercial, public (fire house, schools, park, playgrounds), institutional (churches, nursery schools, community buildings) and other uses are planned. It is not sufficient to say that the streets can be changed by ordinary eminent domain and street proceedings. Because of the peculiar layout of the streets as now shown on the map, the cost of abandonment proceedings and eminent domain proceedings would practically be prohibitive for, because of the many ownerships and the irregularity of the parcels, the cost of the taking and the resultant damage to the parts not taken would nearly equal the entire value of the private areas. While a large part of the area is in public ownership and could be developed by the authorities, it is so broken and interspersed with private ownerships as to require a consideration of the whole area. While probably no one element of the blight is sufficient to justify the taking by eminent domain, the combination of a great and pressing demand for more housing, the correlation of the area with other areas of the city, by streets and public places, the fact that without governmental help the area cannot be developed and will continue to deteriorate, together with all the circumstances shown by the record, demonstrate the compelling community economic need required to permit the application of the act.

[9] Intervenors contend that there is no necessity for the proposed Diamond Heights plan inasmuch as the private owners have had no opportunity to develop the area because 65 per cent of it has been held by public agencies, and the failure of the latter to act is a cause of the present condition. They claim that the area could have been developed many years ago when building costs were lower, the labor supply was more abundant, materials more available, and loans for construction were available at much lower rates. Regardless of the reason for the condition, and what might have been done, we are confronted with the present condition. Intervenors contend that there is no demand for dwellings of the class contemplated by the plan. This question is one for the city and the Agency to determine.

Title of the Act.

[10] All of the points raised against the validity of the act have already been determined in the cases herein cited. However, we will discuss in more detail these points, without attempting to cite all the cases considering the particular point. Thus the claim that the act embraces more than one subject which are not expressed in the title —"An act to consolidate and revise the law relating to community redevelopment and housing for the preservation of the public health and safety, and the formation, regulation, and operation of corporations therefor, by adding Division 24 and Section 40021 to the Health and Safety Code, and repealing certain acts specified herein", St.1951, p. 1922—is similar to the claim made in People v. City of Chicago, supra, 111 N.E.2d 626, concerning the Illinois Blighted Area Development Act. The court said, 111 N.E.2d at page 632: "An act may include all matters germane to its general subject, including the means reasonably necessary or appropriate to the accomplishment of the legislative purpose. * * * To render a provision in the body of a statute void as not embraced in the

title, the provision must be one which is incongruous, or which has no proper connection with the title." The court then pointed out that there was an interrelation between all the matters permitted by the act and found that they were germane to the single subject of redevelopment of blighted areas. That case holds that there is an interrelation between slum clearance and the elimination of stagnant vacant areas. Redevelopment, contrary to intervenors' contention, is not necessarily confined to the one term "build up," in the sense that it can only be applied to changing a built up area. All of the matters provided for in our statute are germane to "community redevelopment and housing for the preservation of the public health and safety." "In our opinion, the interrelationships between slum clearance, the revitalization of 'dead' areas like that here involved, and the construction of additional housing which have thus been recognized by Congress, the General Assembly and this court, amply justify the legislature in regarding the matters involved in the present statute as germane to a single subject—the elimination of slums." People v. City of Chicago, supra, 111 N.E. 2d at page 633.

A somewhat similar contention was held unfounded in Foeller v. Housing Authority of Portland, supra, 256 P.2d 752, at page 777, the court saying that the act "contains only one subject; that is, the revitalization of blighted areas. All else in the act is 'properly connected therewith.'" See also City of Whittier v. Dixon, 24 Cal. 2d 664, 151 P.2d 5, 153 A.L.R. 956, concerning the sufficiency of the Vehicle Parking District Act of 1943.

Public Purpose.

[11] The contention that the proposed Diamond Heights plan does not constitute a public use, is answered in Oliver v. City of Clairton, 1953, 374 Pa. 333, 98 A.2d 47. While in that case there was some slum clearance involved, it appears that the main attack on the redevelopment plan was that the area was not a blighted one because so much of it was vacant land. There the 5 acres which were to be redeveloped for heavy industrial purposes, consisted of 58 residential lots which, however, were not actually laid out with open streets; there were 7 small buildings in the area, and over 90 per cent of the land was vacant and unimproved. The assessed valuations over a decade had decreased, 15 of the lots were delinquent for many years in taxes, and the ownership of the lots was divided among approximately 22 individuals. Except for the fact that half of the few dwellings involved were substandard or slum grade, the situation was similar in many respects to that in Diamond Heights. Appellant there contended that as a large part of the area consisted of vacant land it could not be treated as blighted area. The court pointed out that, just as is the situation with regard to our act, there was nothing in the Pennsylvania act limiting the certification of blighted areas to improved property, but on the contrary vacant areas were expressly included. It then stated: "It may be well to point out once more what was said in the Schenck case, 364 Pa. [31] at page 37, 70 A.2d [612] at page 615, that the Urban Redevelopment Law is to be sharply distinguished from the Housing Authorities Law of May 28, 1937, P.L. 955 * * * in that the latter aimed principally at the elimination of undesirable dwelling houses, whereas the Urban Redevelopment Law 'was obviously intended to give wide scope to municipalities in redesigning and rebuilding such areas within their limits as * * no longer meet the economic and social needs of modern city life and progress.' Redevelopment authorities have the power, therefore, where the conditions prescribed in the act are found to exist, to exercise the right of eminent domain pursuant to a redevelopment proposal even though the redevelopment area may be predominantly open, vacant or unimproved." 98 A.2d at page 52.

The contention is further answered in People v. City of Chicago, supra, 111 N.E. 2d 626, 633: "Next to be considered is plaintiff's contention that the acquisition of vacant land areas of the type here involved by a public agency, for subsequent sale to private interests for development for residential use, is not acquisition for a public use or a public purpose, and that therefore eminent domain may not be employed and public funds may not be expended. This court has recognized the existence of an acute housing shortage, Cremer v. Peoria Housing Authority, 399 Ill. 579, 78 N.E. 2d 276, and the evidence in this case confirms the continued existence of that shortage. We have held that the expenditure of public funds for the acquisition of land by a public agency to be sold to a private developer for the construction of non-low-rent housing constitutes a public purpose. Cremer v. Peoria Housing Authority, 399 Ill. 579, 78 N.E.2d 276. In Zurn v. City of Chicago, 389 Ill. 114, 59 N.E.2d 18, we held that the elimination and redevelopment of slum and blighted areas is a public purpose and a public use regardless of the subsequent sale or lease of the property to private interests after redevelopment had been accomplished. And even more recently, in Chicago Land Clearance Commission v. White, 411 Ill. 310, 104 N.E.2d 236, we held that a condemnation proceeding under the Blighted Areas Redevelopment Act of 1947 was not a proceeding to acquire land for private purposes merely because a Land Clearance Commission had entered into a contract with a private corporation for the sale of the area after it was acquired. Chicago Land Clearance Commission v. White, 411 Ill. 310, 104 N.E.2d 236."

In Foeller v. Housing Authority of Portland, supra, 256 P.2d 752, it was pointed out that the transformation of an entire area which is struggling against obsolete planning and is otherwise blighted into one from which all hazards to the city's health, morals and safety have been eradicated and the placing in deeds conveying such portion of the area as may go into private ownership, of conditions and covenants to prevent the recurrence of blight constitutes a public use of such area. It must be pointed out that neither esthetic views nor considerations of economic advantage to the community or a combination of both are sufficient to justify the use of eminent domain for redevelopment purposes. The redevelopment program must be necessary to protect the public health, morals, safety or general welfare through the elimination of blighted areas. Opinion to the Governor, supra, 69 A.2d 531.

In Fallbrook Irrigation District v. Bradley, supra, 164 U.S. 112, 163, 17 S.Ct. 56, 65, a case arising in California, it was held that the state's power of eminent domain may be exercised if the taking "be essential or material for the prosperity of the community * * *."

[12] The act is premised upon the expressly declared policy that elimination of blighted areas of the Diamond Heights type and the redevelopment of such areas along the lines contemplated here are public uses and purposes and are governmental functions of state concern. As said in Housing Authority v. Dockweiler, supra, 14 Cal.2d 437 at page 449, 94 P.2d 794, at page 801 (dealing with slum clearance for public housing projects): "While such a declaration of policy by the legislative branch of the government is not necessarily binding or conclusive upon the courts, it is entitled to great weight and it is not the duty or prerogative of the courts to interfere with such legislative finding unless it clearly appears to be erroneous and without reasonable foundation."

Public Use.

While in Gravelly Ford Canal Co. v. Pope & Talbot Co., 36 Cal.App. 556, 563, 178 P. 150, the court applied the strict definition of "public use," it is significant that in University of So. California v. Robbins, 1 Cal.App.2d 523, 37 P.2d 163, the court held that the taking of land by eminent domain by a private institution, the University of Southern California, to be used as a library for its own students, was for a public purpose. In Tuolumne Water Power Co. v. Frederick, 13 Cal.App. 498, at page 503, 110 P. 134, at page 136, the court said: "The courts would not be aiding the great enterprises of the West by adopting a narrow and restricted view of the meaning of the words 'public use,' as used by the Legislature and in our Constitution." Both cases advocate an expanded concept of what is use by the public.

Housing Authority v. Dockweiler, supra, 14 Cal.2d 437, 94 P.2d 794, adopted the broader interpretation as the rule to be followed in this state. It might be pointed out that as our community life becomes more complex, our cities grow and become overcrowded, and the need to use for the benefit of the public areas which are not adapted to the pressing needs of the public becomes more imperative, a broader concept of what is a public use is necessitated. Fifty years ago no court would have interpreted under the eminent domain statutes, slum clearance even for public housing as a public use, and yet, it is now so recognized. In addition, slum clearance for redevelopment purposes is likewise so recognized. To hold that clearance of blighted areas as characterized by the act and as shown in this case and the redevelopment of such areas as contemplated here are not public uses, is to view present day conditions under the myopic eyes of years now gone. As said in Miller v. Board of Public Works, 195 Cal. 477, 488, 234 P. 381, 385, 38 A.L.R. 1479: "'As the interest of society justifies restraints upon individual conduct, so also does it justify restraints upon the use to which property may be devoted. It was not intended by these constitutional provisions to so far protect the individual in the use of his property as to enable him to use it to the detriment of society. By thus protecting individual rights, society did not part with the power to protect itself or to promote its general well-being. Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare.'"

[13] Pennsylvania Mut. Life Ins. Co. v. City of Philadelphia, 1913, 242 Pa. 47, 88 A. 904, 905, 49 L.R.A.,N.S., 1062 is not applicable. There the court held that taking private property adjoining a parkway merely to resell it to private persons subject to restrictions for "'the preservation of the view, appearance, light, air, health, or usefulness'" of the parkway, was not a taking for public use. It pointed out that there have been two different interpretations of "public use" in this country, one the broader meaning of "public utility or advantage", the other narrower one of "use, or right of use, by the public," and that it preferred the narrower meaning. However, it indicated that there could be a taking for the purpose indicated if the city were to keep ownership of the property taken rather than resell it. Apparently the question of public use under this decision depended upon whether the property taken is to be continued in public ownership rather than whether the use itself is a public one. In California our courts have followed the broader definition of "public use" and the cases hereinbefore cited have held that if property is taken for a public use, the fact that it is later to be returned to private ownership subject to restrictions protecting the public use, does not make it any the less a public use. The later Pennsylvania cases have refused to follow the narrow interpretation in the Pennsylvania Mutual case, and in addition, have supported the last-mentioned statement. See Belovsky v. Redevelopment Authority, supra, 54 A.2d 277; Schenck v. City of Pittsburg, supra, 70 A.2d 612. While it has been held that private property may not be taken for purely esthetic reasons (that rule is discussed in the Pennsylvania Mutual case, 88 A. at page 906), it would seem proper in the light of the more modern cases, including the later Pennsylvania cases, to take private property if it were needed to protect a parkway and to provide light and air and usefulness for it. Section 14½, article I of the California Constitution (excess condemnation) provides this. Once it is determined that the taking is for a public purpose the fact that private persons may receive benefit is not sufficient to take away from the enterprise the characteristics of a public purpose. Housing Authority v. Dockweiler, supra, 14 Cal.2d 437, 94 P.2d 794; see also Chicago Land Clearance Commission v. White, supra, 104 N.E.2d 236; Herzinger v. Mayor & City Council of Baltimore, Md., 98 A.2d 87, 92; Zurn v. City of Chicago, supra, 59 N.E.2d 18; Waddell v. Chicago Land Clearance Commission, 7 Cir., 206 F.2d 748. "That purpose, as before pointed out, is not one requiring a continuing ownership of the property as it is in the case of the Housing Authorities Law in order to carry out the full purpose of that act, but is directed solely to the clearance, reconstruc-

tion and rehabilitation of the blighted area, and after that is accomplished the public purpose is completely realized. When, therefore, the need for public ownership has terminated, it is proper that the land be retransferred to private ownership, subject only to such restrictions and controls as are necessary to effectuate the purposes of the act. It is not the object of the statute to transfer property from one individual to another; such transfers, so far as they may actually occur, are purely incidental to the accomplishment of the real or fundamental purpose." Belovsky v. Redevelopment Authority, supra, 54 A.2d 277, 282. See also Rowe v. Housing Authority, supra, 249 S.W.2d 551.

McCord v. Housing Authority of City of Dallas, Tex.Civ.App., 234 S.W.2d 108, is not in point here. It decided that the Housing Authority Law under which the Housing Authority purported to act contained no provision for selling or leasing the redeveloped land after slum clearance to private persons. For that reason it confined the definition of "public purposes" as used in the law to the continued ownership of the property after development by the authority. It contrasted the law with a federal law which expressly provided for making slum cleared land available for development by private enterprise.

Equal Protection.

[14] The claim that the Redevelopment Acts because they provide for acquisition of property by eminent domain and its later resale, violate the Fourteenth Amendment to the Constitution in denying to the property owners the equal protection of the law, has been denied in several cases, among others, Ajootian v. Providence Redevelopment Agency, supra, 91 A.2d 21; Nashville Housing Authority v. City of Nashville, supra, 237 S.W.2d 946; Belovsky v. Redevelopment Authority, supra, 54 A.2d 277; Robinette v. Chicago Land Clearance Commission, D.C.Ill.1951, 115 F.Supp. 669; State ex rel. Bruestle v. Rich, supra, 110 N.E.2d 778. While the decision in the Robinette case is merely a "Memorandum and Order," the order dismissing the action for want of a substantial federal question, and is unpublished, it is of value for the reason that in Robinette v. Campbell, 342 U.S. 940, 72 S.Ct. 563, 96 L.Ed. 699, the Supreme Court denied motions for leave to file petitions for a writ of mandamus to compel the trial judge to expunge his order of dismissal. As said in Waddell v. Chicago Land Clearance Commission, supra, 206 F.2d 748, at page 750, where the same federal questions were raised: "Thus it is seen that the Supreme Court has refused to entertain an application to review the questions which appellants have attempted to present by this action."

As pointed out in those cases, the acquiring of the property is for a public use, its sale and the transfer of the property from one individual to another, so far as it may occur, are merely incidental to that use, and not the main object of the statute. The taking from the owner is not arbitrary. It is for a public purpose, The owner is guaranteed and will receive full compensation. In State ex rel. Bruestle v. Rich, supra, 110 N.E.2d 778, in discussing the contention made concerning the proposed redevelopment project, similar to the contention made here, that the plan contemplated taking the property of one person and reselling it to another and was therefore unconstitutional, the court stated that the primary purpose of the plan was to eliminate the blight conditions and provide against their recurrence. It then stated, 110 N.E.2d at page 785: "The exercise of the right of eminent domain under such a project, carried out pursuant to state law, has likewise been held by the Supreme Court of the United States as not to the contrary to the Fourteenth Amendment to the federal Constitution. Burt v. City of Pittsburgh, 340 U.S. 802, 71 S.Ct. 53, 95 L.Ed. 589." See also Waddell v. Chicago Land Clearance Commission, supra, 206 F.2d 748.

Due Process.

[15–19] The act does not violate the due process clause of the Fourteenth Amendment to the federal Constitution. See Robinette v. Chicago Land Clearance Commission, supra, D.C.Ill., 115 F.Supp. 669; People v. City of Chicago, supra, 111 N.E.2d 626, 636. To violate the due process clause a state statute permitting state action in economic affairs must be arbitrary and without reason. Olsen v. Nebraska, 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305; U. S. v. Carolene Products Co., 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234. The courts are restricted to an inquiry as to whether any state of facts known or which reasonably could be assumed support the legislative judgment in enacting the statute. U. S. v. Carolene Products Co., supra, 304 U.S. 144, 154, 58 S.Ct. 778. While the legislative findings are not binding on the court, they are entitled to great respect. Block v. Hirsh, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865; Weaver v. Palmer Bros. Co., 270 U.S. 402, 46 S.Ct. 320, 70 L.Ed. 654. Not only the California Legislature but the Congress of the United States and the legislatures of many states have made legislative findings of the necessity of redeveloping blighted areas by the use of private as well as public means. That modern conditions require such action is shown in the many books, articles and reports on community planning produced in the last few years. The courts, too, are entitled to take judicial notice of the need for and the change in attitude towards, such planning. See article by Hon. Emmet H. Wilson, Consideration of Facts in Constitutional Cases, vol. 17, So.Cal.Law Rev. 335. As article I, § 13 of the California Constitution is identical in scope and purpose with the Fourteenth Amendment of the federal Constitution, what has been said here concerning due process under the latter applies to it under the California Constitution.

Does the Act Unlawfully Delegate Legislative Power to the Agency?

[20] Intervenors contend that as the Agency is delegated the power to determine whether a given area is blighted, such delegation is contrary to article III, § 1 of the Constitution, which provides for the separation of powers into the three branches of government. It is contended that the characterization of blighted areas in the act is so broad as to provide no standards by which the agency may be guided, and hence it has the absolute power to determine what facts constitute any of the elements constituting blight. This same contention in almost identically the same language was made concerning the "Urban Redevelopment Law" of Pennsylvania in Belovsky v. Redevelopment Authority, supra, 54 A.2d 277. The answer given by the court there applies equally here, 54 A.2d at page 283: "One of these assaults is directed against an alleged delegation of legislative powers contrary to the provision of Article II, section 1 of the Constitution, P.S., it being claimed that insufficient standards are set up in the statute to guide the Authority in exercising the powers with which it is vested. The fact is, however, that the act contains as definite a description of what constitutes a blighted area as it is reasonably possible to express; in regard to such factors as the selection and the size of the areas to be redeveloped, the costs involved, and the exact form which the redevelopment in any particular case is to take, it was obviously impossible for the legislature to make detailed provisions or blueprints in advance for each operation. * * * All that the legislature could do, therefore, was to prescribe general rules and reasonably definite standards, leaving to the local authorities the preparation of the plans and specifications best adapted to accomplish in each instance the desired result, a function which obviously can be performed only by administrative bodies. While the legislature cannot delegate the power to make a law, it may, where necessary, confer authority and discretion in connection with the execution of the law; it may establish primary standards and impose upon others the duty to carry out the declared legislative policy in accordance with the general provisions of the act." See also Housing Authority v. Dockweiler, supra, 14 Cal.2d 437, 462, 94 P.2d 794; People v. City of Chicago, supra, 111 N.E.2d 626. Blatz Brewing Co. v. Collins, 69 Cal.App.2d 639, 160 P.2d 37, is not opposed to our views here. That case held that " 'the Legislature may not delegate authority to a board or commission to adopt rules which abridge, enlarge, extend or modify the statute creating the right.' " 69 Cal.App.2d at page 645, 160 P.2d at page 41. That principle is not involved here.

Special Privileges.

[21] Respondent contends that the act violates section 21, article I of the Constitution, which prohibits the granting of special privileges, in that the act provides that sale of the redeveloped property may be made on the basis of its "fair value" arrived at as provided in the act, and as there is no minimum price set, the "fair value" may be less than the actual cost to the Agency. Therefore, says respondent, the purchaser might profit on the transaction, giving him a special privilege over the rest of the public. The same contention was made in Housing Authority v. Dockweiler, supra, 14 Cal.2d 437, 460, 94 P.2d 794, concerning the fact that the houses to be erected were only to be rented to a certain class of citizens, and identically the same contention was made in Opinion to the Governor, supra, 69 A.2d 531, 534; In re Slum Clearance in City of Detroit, supra, 50 N.W.2d 340, 343; and in Belovsky v. Redevelopment Authority, supra, 54 A.2d 277. In all of them it was held that the fact that following the elimination of blighted conditions some incidental advantage might inure to private interests did not cause the taking to lose its public character nor make the statute unconstitutional.

Prohibition of Gifts of Public Moneys.

[22] Respondent contends that the furnishing of local grants-in-aid by the city provided for in the contracts sought to be executed here and the other public financial assistance to the agency proposed, constituted either the giving or lending of public moneys to private persons in violation of section 31, article IV of the Constitution. Actually there is no such gift or lending of money to private persons. The grants-in-aid are primarily for the providing of street improvements, fire protection, traffic control, schools, playgrounds, and other public services. The same objection was made to the Housing Cooperation Law in Housing Authority v. Dockweiler, supra, 14 Cal.2d 437, 458, 94 P.2d 794, and in Veterans' Welfare Board v. Jordan, 189 Cal. 124, 146, 208 P. 284, 22 A.L.R. 1515, to the statute authorizing a bond issue to acquire lands, improve and sell them to veterans. In both cases it was held that the funds were being used by a public body for a public purpose, and were not given or loaned to private persons. In Patrick v. Riley, 209 Cal. 350, at page 357, 287 P. 455, at page 458, the court stated: "As indicated in the case of City of Oakland v. Garrison, supra, 194 Cal. [298] at page 302, 228 P. 433, the fundamental test of the constitutionality of a statute requiring the use of public funds is whether the statute is designed to promote the public interests, as opposed to the furtherance of the advantage of individuals; and such a statute should not be declared unconstitutional because of the fact that, incidental to the main purpose, there results an advantage to individuals." See also People v. City of Chicago, supra, 111 N.E.2d 626.

Effect of Section 19, Article XIII, Constitution.

In 1952 this section was added to the Constitution by adoption by the people of an assembly constitutional amendment. In part it provides: "All of the provisions of the Community Redevelopment Law, as amended in 1951, which relate to the use or pledge of taxes or portions thereof as herein provided, or which, if effective, would carry out the provisions of this section or any part thereof, are hereby approved, legalized, ratified and validated and made fully and completely effective and operative upon the effective date of this amendment." In the analysis of this amendment by the Legislative Counsel sent to the voters appears the following: "In addition, the measure would validate all provisions of the Community Redevelopment Law consistent with the foregoing relating to the use or pledge of taxes." In the arguments in favor of the amendment appears the following: "This Constitutional Amendment provides a method of financing community redevelopment projects by relieving general taxpayers. Community redevelopment must be distinguished from public housing. The purpose is to eliminate blighted areas. Under the law, redevelopment, including the construction of streets, curbs, sidewalks and buildings, must be financed by private capital. However, a city or county must first acquire the property, if necessary by condemnation, because an individual, syndicate or corporation does not have the right of eminent domain and one property owner might refuse to sell and block the development.

"The difference between the expense of acquisition and clearing off the old, dilapidated buildings may be greater than the amount that may be received in the sale of the property for redevelopment in accordance with an officially approved plan. * *

"If adopted, this constitutional amendment will readily facilitate the redevelopment of blighted areas in cities and counties as now authorized by the Community Redevelopment Act of the State of California. Blighted areas are an economic and social drag upon the community and it is good public business to eliminate them."

"While an amendment to a state Constitution ratifying and confirming an act of its Legislature is ineffectual to validate that act, if it impair the obligations of a contract or divest vested rights, still such an amendment may otherwise cure the infirmities of an act, and to that extent the act is thenceforth to be regarded as constitutional." Lee v. Superior Court, 191 Cal. 46, 53, 214 P. 972, 975.

[23] In view of the analysis sent to the voters, "If adopted, this constitutional amendment will readily facilitate the redevelopment of *blighted areas*" and the statement in the amendment that "*All* of the provisions of the Community Redevelopment Law, as amended in 1951 [the act with which we are dealing] * * * are hereby approved, legalized, ratified" etc., it is obvious that the people were not restricting their ratification to such portions of the act as dealt with blight caused by slum conditions and refusing ratification to blight caused by the other conditions enumerated in the act. (Emphasis added.)

Excess Condemnation.

Section 14½, article I, California Constitution.

[24] This section, adopted in 1928, provides that in acquiring lands by gift, purchase or condemnation for memorial grounds, streets, squares or parkways, the state or any of its cities or counties may acquire additional lands within, in certain cases 150 feet, and in other cases within 200 feet, of the proposed improvement, and after the improvement is completed may sell the excess land not necessary for such improvement, with reservations concerning the use of such land so as to protect the improvement and to preserve its view, appearance, light, air and usefulness. The title to Senate Constitutional Amendment No. 16, Stats.1927, p. 2371, the means whereby section 14½ was placed on the ballot, states that it is a resolution to propose to the people as addition to the Constitution a section "relating to the taking of parcels of land by eminent domain where such border upon public improvements." An examination of the argument to the voters concerning the proposed section, see Part I, page 17 of Arguments to Voters for the election of November 6, 1928, clearly shows that the section was intended primarily to apply to "little fractions of lots in the form of slivers or small triangles" left after making the particular improvements mentioned in the section, and in no manner was intended to apply either as an inhibition or otherwise to the projects contemplated in the act. Obviously there is no conflict between this section and the act. This section is limited to memorial grounds, streets, squares and parkways. Were there any such conflict the adoption in 1952 of section 19, article XIII, expressly recognizing the Community Redevelopment Law, would end the conflict. It is interesting to note that in State ex rel. Bruestle v. Rich, supra, 110 N.E.2d 778, at page 787, it was held "even if purchase or condemnation of the fee of the real estate in the slum area does involve acquisition of a greater interest in such real estate than actually necessary to accomplish the purpose of eliminating slum conditions and providing against their recurrence," such acquisition was specifically authorized by section 10 of article XVIII of the Ohio Constitution, which provided for excess condemnation generally, rather than limiting it, as does our Constitution, to specified purposes.

Western Addition Finances.

[25] As to Western Addition intervenors contend that the proposed plan violates section 33741. That section requires that no plan shall be approved unless it contains adequate safeguards that the work will be carried out pursuant to the plan, and it is contended that the plan will cost far more than the estimates shown, that petitioners are not acting in good faith as they are concealing the true costs, and that the moneys to be received from the federal government are not adequate to complete the plan. Primarily the adequacy of the finances and the safeguards for completing the plan are for the determination of the administrative bodies. If they are not acting in good faith, intervenors can bring an appropriate proceeding to determine that question in the trial court.

Clean Hands.

[26, 27] Intervenors contend petitioners are not entitled to equitable relief as they do not come into court with clean hands. This is based upon the contention that the contract which petitioners seek to have executed contains inaccurate data which should be corrected and brought up to date before execution, and that petitioners have prevented development of the area. As we have heretofore shown, this is not the proper forum in which to raise such question, intervenors having no right to broaden the scope of the proceeding. Wright v. Jordan, supra, 192 Cal. 704, 714, 221 P. 915. Whether the agreement is an improvident and unwise one for the Agency to make is for the Agency and the city to determine. As said in In re City and County of San Francisco, 191 Cal. 172, 185, 215 P. 549, 556, "In forming its judgment it must be presumed that the city considered the wisdom and policy of the whole plan in the light of the objects to be attained. The answer to adverse criticism is that the judgment of the city is conclusive in the absence of a showing of want of jurisdiction on the part of the city or a showing of bad faith on the part of its officers or gross extravagance or the existence of some fact sufficient to vitiate the contract." See also City and County of San Francisco v. Boyd, 22 Cal.2d 685, 690, 140 P.2d 666. "'* * * it is not for the courts to pass upon the merits of suggestions as to how the contract might be strengthened by amendments the desirability and effectiveness of which are for the consideration solely of the agencies and governing body to which the Urban Redevelopment Law has committed that responsibility.'" Oliver v. City of Clairton, 1953, 374 Pa. 333, 98 A.2d 47, 51.

[28] We fail to see how the failure of the city to develop its portion of the Diamond Heights Area in the past estops or prevents it from redeveloping the entire area.

[29–31] It should be emphasized that it is the combination in Diamond Heights of practically all the blight conditions mentioned in section 33042, subdivisions (a) to (d), showing a definitely compelling economic need, which permits the use of the act. Public agencies and courts both should be chary of the use of the act unless, as here, there is a situation where the blight is such that it constitutes a real hindrance to the development of the city and cannot be eliminated or improved without public assistance. It never can be used just because the public agency considers that it can make a better use or planning of an area than its present use or plan. As said in Schneider v. District of Columbia, supra, 117 F.Supp. 716 "* * * it behooves the courts to be alert lest currently attractive projects impinge upon fundamental rights."

The demurrers of respondent and intervenors to the petition and of petitioners to the complaint in intervention are overruled. The motion of petitioners to strike all portions of the complaint in intervention other than those which constitute a demurrer to the petition is granted. It is ordered that a peremptory writ of mandate issue commanding respondent to execute the contracts referred to in the petition.

As we have herein stated, our decision is limited to questions of law, based upon the assumption that the findings of the administrative agencies involved in the redevelopment program are true. This decision in no wise bars a determination in a trial court of such issues of fact as may be properly raised in an attack upon an administrative proceeding.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; EDMONDS, CARTER and SCHAUER, JJ., dissenting.

122 Cal.App.2d 819

BROOKS

v.

PARKHILL-WADE, Inc. et al.

Civ. 197.

District Court of Appeal, Second District,
Division 1, California.
Jan. 26, 1954.

Action by automotive service station employee against defendant company, which installed propane storage tank for station, for injuries sustained when propane gas accumulated in employee's rest room and was set off by employee's lighting his pipe. The Superior Court, Los Angeles County, H. S. Farrell, J., granted defendant's motion for non-suit and employee appealed. The District Court of Appeal, Drapeau, J., held that evidence did not justify inference that negligence of defendant company caused the explosion.

Affirmed.

1. Negligence ⚿121(2)

Res ipsa loquitur applies, when it can be said in the light of past experience, that an accident probably occurred because of someone's negligence, and that the defendant is probably the person who was responsible.

2. Gas ⚿20(2)

In action by automotive service station employee against company, which had installed propane storage tank for service station, for injuries sustained when propane gas accumulated in employee's rest room and was exploded by employee's lighting his pipe, evidence did not justify inference that explosion was result of defendant company's negligence.

3. Gas ⚿20(2)

Where defendant company had installed propane storage tank for automotive service station over two years before explosion, which was caused when propane gas accumulated in station rest room and was set off by employee's lighting his pipe, and where control over propane tank, its pipe lines and vending pumps was in owner of station, doctrine of res ipsa loquitur had no application.

Jones & Wiener and William M. Anderson, Los Angeles, for appellant.

Chenoweth, Robertson, Harney & Behr, Los Angeles, and David M. Harney, for respondent.

DRAPEAU, Justice.

Plaintiff was employed in a large gasoline and automotive service station on San Fernando Road in Burbank, Los Angeles county. Gasoline and propane pumps were ranged in two rows, parallel with San Fernando Road. Back of the pumps was a building used for changing tires, and for doing other automotive service work. At the rear corner of the building was a wash and rest room for employees. This room had three windows looking out the east wall of the building.

On May 23, 1951, after completing his day's work, plaintiff went to the wash room. The first thing he did was to fill his pipe with tobacco, strike a match and light the tobacco, and drop the match in the direction of the floor. That is all he remembers, for there was a tremendous explosion.

Plaintiff was seriously burned. At the time of the trial of this case he was still unable to do the work he had been doing before the explosion.

Inquiry followed, to ascertain the source and nature of the vagrant gas that was exploded by plaintiff's match. The assistant chief of the Burbank fire department thought it might have been sewer gas, but that was ruled out later. The public utility gas company made an investigation to see whether it was their product, natural gas.

Tests of samples of air taken from the wash room by the gas company the day after the explosion indicated that there was no sewer gas in the room—at least at the time the samples were taken—and no natural gas. But there was present in the samples a small quantity of propane gas mixed with air.

Propane is an exceedingly dangerous, volatile and inflammable substance. Being heavier than air, it has a tendency to accumulate at the bottom of any enclosed place. Thus accumulated, propane is like a malignant fury, silently lying in wait to inflict bitter and unexpected calamity upon any creature present when it explodes.

Instead of making Snyder-Lynch Company, owner of the service station, a party to this action, plaintiff seeks to recover damages for his injuries from defendant Parkhill-Wade, Inc., only. Plaintiff bases his cause of action upon the theory that Parkhill-Wade was negligent when it installed for Snyder-Lynch a propane storage tank, with pipes to the vending pumps at the front of the service station, and in failing to warn Snyder-Lynch of the dangerous nature of the installation.

The pipe line ran along the east wall of the building, about three feet away from the employees' wash room. Sections of the pipe line were excavated the day after the explosion and found to contain perforations approximately one-eighth of an inch in size. Prior to this no part of the installation had been uncovered since it was put in.

The installation was made in March of 1949, two years before the explosion. And Parkhill-Wade had nothing to do with the tank, pipes, or pumps after they turned them over to Snyder-Lynch. At the time of the installation the Burbank fire department approved the propane dispensing system, after an examination and analysis of the piping by inspectors of the department.

At the end of plaintiff's case, the trial judge granted defendant's motion for nonsuit. Plaintiff appeals from the judgment which followed.

It is conceded by all that the judgment must stand unless plaintiff is entitled to the aid of the legal inference known in our law as res ipsa loquitur.

The governing principles of the decisions are elaborately reviewed, and the law clearly stated by our Supreme Court, in the recent case of Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 247 P.2d 344.

[1] "As a general rule, res ipsa loquitur applies where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible." Zentz v. Coca Cola, supra, 39 Cal.2d at page 446, 247 P.2d at page 349.

"A more difficult question is whether we can say, under all the circumstances, that the accident was of such a nature that it warrants a reasonable inference that defendant, rather than someone else, was responsible for the unknown negligent act or omission * * *." Zentz v. Coca Cola, supra, 39 Cal.2d at page 447, 247 P.2d at page 350.

When the balance of probabilities points to defendant's negligence as the most likely explanantion of the accident, plaintiff is "entitled to invoke the aid of the doctrine of res ipsa loquitur." Zentz v. Coca Cola, supra, 39 Cal.2d at page 449, 247 P.2d at page 351.

[2, 3] In the present case defendant did not have control of the propane tank, pipe lines or vending pumps at any time for more than two years. That control was in the owner of the service station. It was the responsibility of the owner of the service station to see that the installation was at all times in a safe condition. And the pipe with holes in it excavated after the explosion points to negligence of the service station rather than the defendant.

Balancing the probabilities, this Court has come to the conclusion that the explosion was more likely the result of the negligence of the owner of the service station than of the defendant; that it would be an unreasonable inference to hold that defendant rather than the owner of the service station was responsible, or that both were responsible; and that, therefore, res ipsa loquitur does not apply.

"The defendant, of course, should not be liable unless it appears from all the facts and circumstances that there is a sufficient causal connection between his conduct and the plaintiff's injury, and it has been held that res ipsa loquitur will not apply if it is equally probable that the negligence was that of someone other than the defendant." Zentz v. Coca Cola, supra, 39 Cal.2d at page 443, 247 P.2d at page 347.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

123 Cal.App.2d 28

ROCHA v. ROCHA.

Civ. 15811.

District Court of Appeal, First District, Division 1, California.

Feb. 3, 1954.

Suit by wife against husband for divorce, wherein husband filed cross complaint also seeking divorce. The Superior Court, County of Monterey, Anthony Brazil, J., granted husband a divorce on ground of extreme cruelty, and divided the community property and awarded divided custody of the infant sons of the parties, and the wife appealed. The District Court of Appeal, McMurray, J. pro tem., held that when divorce was granted for extreme cruelty of wife, award to husband of more than one half the community property was proper.

Judgment affirmed.

1. Divorce ⚿130

Evidence sustained award of divorce to husband on ground of extreme cruelty of wife.

2. Divorce ⚿252

Husband's cross-complaint in divorce action praying judgment "dividing the community property aforesaid" did not limit court to an equal division of the community property when divorce was granted for extreme cruelty of wife, but award to husband of more than one-half of the community property was proper. Civ.Code, §§ 138, 146, subd. 1.

3. Divorce ⚿301

In suit by wife against husband for divorce, wherein husband filed a cross-complaint, and evidence disclosed that divorce should be granted to husband because of extreme cruelty of wife, record supported award of divided custody of infant sons of the parties.

4. Divorce ⚿296

The matter of awarding custody of infant children of divorced parties is one to be determined in the sound discretion of the trial court.

Thompson & Thompson, Monterey, for appellant.

Rosendale, Thomas, Muller & Talcott, Salinas, for respondent.

McMURRAY, Justice pro tem.

Plaintiff wife appeals from a judgment granting respondent husband a divorce for extreme cruelty; dividing the community property of the parties; and awarding the custody of the infant sons, aged 7 months and 20 months, to appellant except for two fifteen-day periods in January and July of each year, when custody was awarded to respondent.

There is no intimation in the entire record that either party is unfit to have custody of the children.

Appellant contends that the judgment of divorce is not supported by as strong evidence as that produced by her; that the community property should have been divided equally between the parties; and that the award of the custody of the infant sons to the father for thirty days of each year is reversible error.

[1] Appellant does not seriously question the propriety of the decree granting respondent the divorce on the ground of extreme cruelty. There is ample evidence to support the finding of the trial court in this respect and this court will not disturb its action.

[2] It is contended that the trial court erred in dividing the community property since the cross-complaint prays judgment; "2. Dividing the community property aforesaid;" and that this language means that he asks for a division of such property into equal parts. This contention is without merit. Section 146, subd. 1, of the Civil Code, states that an award of community property be made to the parties in such proportions as the court may deem just. In Gaeta v. Gaeta, 102 Cal.App.2d 87, 88, 226 P.2d 619, 620, it is said: "When a divorce is granted on the ground of extreme cruelty the innocent party must be awarded more than one half of the community property and the failure of the court so to divide it is an abuse of discretion requiring a reversal."

[3, 4] The division of the custody of the infant sons of the parties is the most strenuously argued matter on this appeal. Granting that Civil Code, § 138, requires that, other things being equal, the custody of a child of tender years should be in the mother, it cannot be said that an award such as this is, *per se,* an abuse of discretion by the trial court. The record reveals that the court considered the best interests of the children in making this award and felt that such division of custody would afford them an opportunity to know their father without creating any quarrels or emotional scenes of the sort which had taken place in their presence before this action.

The matter is one in the sound discretion of the trial court. Priest v. Priest, 90 Cal. App.2d 185, 202 P.2d 561.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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122 Cal.App.2d 761

CHASTAIN et al. v. ROOK et al.

ROOK v. DAVIS et al.

Civ. 19846.

District Court of Appeal, Second District,
Division 3, California.
Jan. 25, 1954.

Action by owner and driver of ambulance for personal injuries and property damage sustained when ambulance struck automobile in intersection, while on an emergency call, with cross-actions by automobile driver, automobile passenger and driver of delivery truck, whose truck was struck by automobile with which the ambulance had collided. The Superior Court, Los Angeles County, Orlando H. Rhodes, J., entered judgment on verdict on cross actions and ambulance owner appealed. The District Court of Appeal, Vallée, J., held that the verdict was sustained by the evidence.

Affirmed.

1. Automobiles 🔑244(16)

In action for damages sustained when ambulance, which was proceeding on an emergency call, struck automobile at intersection, jury's implied finding that ambulance driver did not give audible signal by siren as was reasonably necessary and did not display lighted lamp visible from front of ambulance was sustained by the evidence. Vehicle Code, §§ 44, 454, 554.

2. Automobiles 🔑175(3)

Where ambulance, proceeding on an emergency call at a speed of 40 or 50 miles an hour, did not sound its siren until about four or five automobile lengths from intersection and did not flash its red warning lamp, automobile which was proceeding into intersection on green light was not required to yield right of way. Vehicle Code, §§ 44, 454, 554.

3. Automobiles 🔑244(16)

In action for damages sustained when ambulance, which was proceeding on an emergency call, struck automobile in intersection, evidence sustained finding that ambulance driver was not proceeding with due regard for the safety of other persons using the highway and that he was arbitrarily exercising privilege of an emergency vehicle. Vehicle Code, §§ 44, 454, 554.

4. Damages 🔑130(1)

$5,468 damages was not excessive where accident victim developed pneumonia in one lung, was confined to hospital about two weeks with an atalectasis, remained in bed for two weeks thereafter, and needed diathermy and heat treatments, and at time of trial she had frequent headaches, pain in her left side, numbness in her hand, and was extremely nervous, and had incurred doctor and hospital bills of $553 and sustained loss of earnings estimated at $1,386.

◆

Lynch & Reilly and Charles H. Lynch, Los Angeles, for appellant.

Walter W. Heil, Los Angeles, for respondents Ellen Louise Chastain and Donna Ellen Chastain.

Morris Lavine and Thomas H. Greenwald, Los Angeles, for respondent Jack Reynolds.

VALLÉE, Justice.

Appeal by defendant Rook from an adverse judgment entered on verdicts of a jury in actions for damages for personal injuries.

Rook commenced an action in the municipal court against Ellen Louise Chastain for damages for personal injuries and to property. Ellen Louise filed a cross-complaint in that action for damages in a sum in excess of the jurisdiction of the municipal court. That action was then transferred to the superior court. Donna Ellen Chastain, a minor, then filed an action against Rook in the superior court for damages for personal injuries. The two actions were consolidated for trial. Later, Donna caused one Reynolds to be served. Reynolds filed a cross-complaint against Rook and Ellen Louise. The jury's verdicts were for Donna, Ellen Louise, and Reynolds against Rook. One judgment was entered in the two actions. Rook appeals.

The grounds for reversal are that the evidence is insufficient to support the verdict and that the damages awarded Ellen Louise are excessive. Neither ground is sustainable.

The action arose out of an intersection collision between an ambulance driven by Rook, an automobile driven by Ellen Louise, and a small delivery truck driven by Reynolds. The accident occurred in the intersection of Eastern Avenue and Olympic Boulevard in Los Angeles. Eastern runs north and south; Olympic, east and west. Traffic at the intersection was controlled by red and green signal lights.

Rook operated a private ambulance service. He maintained an office on Olympic Boulevard three blocks east of Eastern. About 2:30 p. m. on February 5, 1951, he received a call for an ambulance and was told it was an emergency. He left in the ambulance, driving west on Olympic. The ambulance was equipped with a siren and with a red lamp on its front top. Atmospheric conditions were normal. Ellen Louise was driving a Plymouth south on Eastern; Donna was riding with her. Reynolds was driving a Chevrolet truck east on Olympic.

Westbound cars were stopped at the intersection of Eastern and Olympic because of a red signal light. Rook approached the intersection on or near the double center line of Olympic, at a speed between 40 and 50 miles an hour. He did not begin to sound his siren until he was about four or five automobile lengths east of the intersection.

Ellen Louise entered the intersection with a green light, travelling between 15 and 20 miles an hour. At that time she neither heard nor saw the ambulance. The ambulance was right on her when she first heard the siren. Reynolds had stopped on Olympic Boulevard at the intersection in the second lane of traffic from the double line, facing east, waiting for the light for east-west traffic to change from red to green. He testified he saw Ellen Louise enter the intersection and that at that time there was no audible siren. As Rook entered the intersection the ambulance collided with the car of Ellen Louise and her car was knocked into Reynolds' truck. The accident happened about a second or two after Rook first sounded the siren on the ambulance. The ambulance left 24 feet of solid four-wheel skid marks easterly from the point of impact. The red lamp on the ambulance did not flash prior to the accident.

Section 44 of the Vehicle Code provides: "An 'authorized emergency vehicle' is a vehicle of any of the following types: * * *

"(c) When used in responding to emergency calls, any privately owned ambulance, specially constructed and maintained exclusively for ambulance purposes, authorized by permit issued by the Chief of the California Highway Patrol, and any publicly owned ambulance."

Section 554, so far as applicable, provides: "Upon the immediate approach of an authorized emergency vehicle giving audible signal by siren and having at least one lighted lamp exhibiting red light visible under normal atmospheric conditions from a distance of 500 feet to the front of such vehicle:

"(1) The driver of every other vehicle shall yield the right of way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the highway clear of any intersection and thereupon stop and remain in such position until such authorized emergency vehicle has passed, except when otherwise directed by a police or traffic officer."

Section 454 reads: "The driver of an authorized emergency vehicle shall be exempt from those provisions of this code herein set forth under the following conditions:

"(a) Said exemptions shall apply whenever any said vehicle is being driven in response to an emergency call or when used in the immediate pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm.

"(b) Said exemptions shall apply only when the driver of said vehicle sounds a siren as may be reasonably necessary and the vehicle displays a lighted red lamp visible from the front as a warning to others. Under the circumstances hereinabove stated, any said driver shall not be required to observe those regulations contained in Chapter 3 or in Chapters 6 to and including Chapter 13 of Division 9 of this code, but said exemptions shall not relieve the driver of any said vehicle from the duty to drive with due regard for the safety of all persons using the highway, nor shall the provisions of this section protect any such driver from the consequences of an arbitrary exercise of the privileges declared in this section." Included in these chapters are regulations as to speed and right of way.

[1–3] The evidence and the reasonable inferences therefrom, which we have stated in the light most favorable to respondent, disregarding conflicting evidence and inferences, amply support the implied findings of the jury. The parties appear to agree that Rook was on an emergency call. There was evidence from which the jury could have concluded that the ambulance did not give an audible signal by siren as was reasonably necessary, and did not display a lighted lamp visible from the front. The exemption provided by section 454 did not apply. Ellen Louise, having the green light to proceed across Olympic, was not, therefore, required to yield the right of way. Further, the jury reasonably could have concluded that Rook did not drive with due regard for the safety of other persons using the highway, and that he arbitrarily exercised the privilege given him by section 454. Reed v. Simpson, 32 Cal. 2d 444, 449–452, 196 P.2d 895; Cavagnaro v. City of Napa, 86 Cal.App.2d 517, 520–523, 195 P.2d 25.

[4] Ellen Louise was awarded $5,468. Appellant claims it is excessive. She was knocked unconscious. As a result of the accident, she developed pneumonia in a portion of one lung, and a collapse of a portion of that lung behind the pneumonia process in the right upper lobe. She was in a hospital about two weeks with an atalectasis (caving in of the lung). She was in a coma part of this time. On leaving the hospital she was compelled to remain in bed most of the time for two weeks. She had diathermy and heat treatments. Numerous X-rays were taken. At the time of trial she had frequent headaches, pain in her left side, numbness in her hand, and was extremely nervous. Her doctor and hospital bills were $553. She was employed. Her loss of earnings was about $1,386. At the present value of the dollar, the verdict was about $3,000. It is obvious the damages awarded Ellen Louise are not excessive.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

122 Cal.App.2d 891

PEOPLE v. McMANIS et al.

Cr. 948.

District Court of Appeal, Fourth District, California.

Jan. 28, 1954.

Defendants were convicted in the Superior Court of San Bernardino County, A. D. Mitchell, J., of manslaughter, and they appealed. The District Court of Appeal, Griffin, J., held that evidence warranted finding of existence of conspiracy between the two defendants who beat and kicked a victim until he died, with result that each conspirator was liable for the acts of the other, and each was chargeable with involuntary manslaughter in connection with victim's death.

Judgment affirmed.

1. Homicide ⚿63

Where a person, in committing an assault and battery without aggravating circumstances unintentionally causes the death of his victim, the crime is manslaughter.

2. Homicide ⚿34

Involuntary manslaughter is the unlawful killing of a human being in certain unlawful ways without any intention of doing so. Pen.Code, §§ 31, 192, subd. 2.

3. Criminal Law ⚿1144(13)

The District Court of Appeal, on appeal in a criminal case, will not attempt to pass on the weight of the evidence, but it will assume, in favor of the judgment, the existence of every fact which the court could reasonably have deduced from the evidence and will then determine whether such facts are sufficient to support the verdict.

4. Homicide ⚿249

In prosecution of two defendants on charge of manslaughter, wherein it appeared that victim had been beaten and kicked until death resulted, evidence was sufficient to establish beyond reasonable doubt that either one or the other defendant, or both, had willfully and without malice killed such person.

5. Conspiracy ⚿28

A prosecution may be had for either a conspiracy or the crime committed in pursuance thereof, and a conviction thereon may be had for both the conspiracy to commit a crime and the consummated crime committed in pursuance of its purpose.

6. Conspiracy ⚿23

A conspiracy exists if two or more parties in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design, and it may result from the acts of the conspirators in carrying out a common purpose to achieve an unlawful end, or from actions showing an intent to carry out a common purpose to violate the law, and it is not necessary to prove actual agreement to work together in performance of the unlawful acts.

7. Conspiracy ⚿47

Conspiracy may be proved by circumstantial evidence.

8. Homicide ⚿249

Evidence was sufficient to warrant finding of existence of conspiracy between defendants who had participated in beating of a victim who thereafter died, with result that both defendants were responsible for the acts of their fellow conspirator as well as their own, and each might be convicted of involuntary manslaughter. Pen.Code § 192.

◆

Carl T. Rimbaugh, San Bernardino, for appellant McManis.

Julius J. Novack, San Bernardino, for appellant Hufstetler.

Edmund G. Brown, Atty. Gen., Martin M. Ostrow, Dep. Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendants and appellants were charged with and convicted by the court, sitting without a jury, of the crime of manslaughter (involuntary) under section 192 of the Penal Code. Both appealed from the judgment and order denying a new trial.

The evidence shows that about midnight on July 4th, 1952, three youths, Richard Young, Henry Gonzales and Joe Harmer were returning home from a cafe in Colton. Their course took them past a Drive-In cafe located about two blocks from Young's home. As they passed the Drive-In, a group of boys, all strangers to them, many of whom had been drinking Vodka and some mixer, and who had been standing around in the Drive-In for some time, proceeded after them. Apparently defendant McManis led, with defendant Hufstetler and one Houchens following with the rest of the gang pursuing the three boys. Defendant McManis grabbed Gonzales from behind and without warning, hit him on the face with his fist, knocked him to the ground, and kicked him. About the same time, defendant Hufstetler struck Young in the face with his fist, spinning him around, and he was knocked down or slumped down to the ground. Gonzales released himself from McManis and ran away. McManis pursued him for a short distance and returned to the place where Young was lying prone on the sidewalk. McManis, according to some witnesses, kicked Young in the face with his shoe. Defendant Hufstetler observed that Young showed no signs of rousing so he and Houchens pursued Harmer, but Harmer disappeared. McManis, Hufstetler and Houchens returned to the place where the Young boy was lying and then went back to the Drive-In. In a few minutes they left again, and hastened toward the area in which the previous attack had taken place. McManis was in front and according to Hufstetler they encountered Young, who had in the interim staggered upon his feet and walked a short distance away.

There is a conflict of testimony as to subsequent happenings. According to Hufstetler, Young was knocked down and kicked by McManis, and Hufstetler claims he told McManis not to kick him any more. Houchens and Hufstetler left the scene and returned shortly thereafter in an automobile. Houchens and McManis carried and dragged the Young boy a few feet and propped him up against a near-by trash can. At this point there was a pinkish froth or fluid running out of Young's mouth. Shortly thereafter the three individuals left, but McManis later returned to the scene and was briefly questioned by the police who had been called during his absence. McManis left in one of several cars that had by that time appeared on the scene, and went to the home of Hufstetler. Hufstetler, in the meantime, went to the police station and dropped a friend off to see what was happening. After waiting outside for about 30 minutes he left because his friend did not return. Hufstetler later returned with two more friends and had them go into the police station, and when they failed to come out he went home and there found McManis waiting for him. He and McManis then drove to the police station but continued on to a friend's house and spent the remainder of the night there. Hufstetler had a bruised and swollen hand. McManis complained of a hurt foot and limped. Young died as a result of the injuries he received on the way to the hospital that evening.

There is a variance between the story related by McManis and that related by Hufstetler on the witness stand. Each one, more or less, blames the other for the fatal injury. McManis testified generally that there were between 15 and 20 boys at the Drive-In when they arrived; that subsequently there was a movement of the boys toward the sidewalk and that he and Hufstetler started out toward them. McManis admitted striking Gonzales and that Gonzales hit the pavement, but he denied kicking him. He claims that after he stopped chasing Gonzales he went directly back to the Drive-In and on his way he saw Young on the sidewalk and that the other two boys joined him and returned to the Drive-In. He stated that he did see the Young boy hit but could not identify the person who hit him; that after the Young boy was hit he fell to the pavement. He stated that the reason he hit Gonzales was that he used some swear words when he was walking by the Drive-In and that accordingly he and Hufstetler took after him. He then testified that after they returned to the Drive-In they decided to return to the sidewalk where Young was lying; that they saw Young standing up a few feet from where he had been lying and that he asked him what the matter was and that Young was then "wobbling" on his feet; that Young made no reply to his question and was "gurgling" and seemed to be having difficulty in breathing; that Young then fell down in the alley on his back and that he leaned over him and noticed he was bleeding quite a bit from a cut on his lip and that there was blood over his mouth; that within a few seconds a car came up the alley and that Houchens and he dragged Young to an incinerator and sat him up against it; that he heard someone say they had better get out of there so he went to the Drive-In and got in a car and drove away. He stated he returned to the alley to "see if they could find the kid to see if he was hurt"; that when they arrived there the officer told him not to leave; that he did leave soon thereafter because he said another officer told him he could leave. He denied kicking or using any force on Young; denied admitting to anyone that he had kicked him; denied that Hufstetler told him not to kick Young any more; denied that his foot was hurt or that he ever told anyone that it was hurt or that he had injured it kicking someone.

Hufstetler testified generally that he knew the 15 or 20 youths who were at the Drive-In; that the two boys with Young stopped, looked at a motorcycle parked in front of the Drive-In and then continued to walk on; that the gang started moving towards the street out of the Drive-In and that something was said about a fight; that Houchens and he followed McManis and they started after the three boys; that McManis caught up with Gonzales and hit him; that thinking Young was about to hit McManis, he hit Young a blow with his fist to his left jaw; that Young slumped to the ground, going down on one knee and then to his elbow, and rolling on his side; that he and Houchens then took out after Harmer and then returned to the place where Young was lying on the sidewalk; that McManis was standing near him and that he told McManis to leave him alone and that McManis replied: "He isn't out" and proceeded to kick Young in the face; that after he kicked him he told him to leave Young alone and that they then returned to the Drive-In; that McManis then suddenly "took off" to where Young had been lying and they followed him; that Young had gone from the place where he had been lying and they subsequently saw McManis walking toward Young a short distance away; that McManis called to Young and Young stopped and McManis hit Young some place in the head and that Young went down, falling on his back; that McManis then kicked Young two or three times, and that Young then inquired: "Where is my Mexican buddy", and that McManis then hit Young, saying: "That will teach you to run around with Mexicans"; that after seeing McManis knock Young down and kick him two or three times he yelled to McManis to "Come on and leave him alone", and that he and Houchens then returned to the Drive-In and that McManis was still standing over Young; that after he returned to the Drive-In they remained there about five or ten minutes and then all returned to the place where Young had been knocked down, and that McManis and Houchens moved Young to another place near the incinerator; and that they all left and then returned as heretofore indicated.

Other evidence was introduced that McManis subsequently told Hufstetler, when he winced when he was putting on his shoe, that it was because his foot was sore, and he told Hufstetler he had hurt his foot when he kicked the boy. Other witnesses testified that McManis, after that occasion, walked with a limp. Other witnesses testified that Hufstetler admitted striking Young and that thereafter he said his hand hurt.

The doctor testified that there were various injuries to Young's face and that death was due to edema which in turn was proximately caused by an injury to the pons; that this injury was caused by an extreme forcing of the head backward. He testified that in this particular case the injury could have been caused by a blow from an assailant's fist to the left area of Young's jaw while Young was in a standing position, or it might have been caused by any of the blows he received in the face or forehead; that a kick to any portion of the body would contribute to shock which is a factor in death. The doctor also testified that it was probable that a man after sustaining such an injury could walk 100 feet, as the hemorrhage under those circumstances is pretty slow. The doctor described the external injuries of Young as follows: that above the outer part of the right eyebrow there was a deep depression and severe bruises appeared in the scalp a little more than an inch long; that the scalp was not cut but was deeply idented, indicating a severe blow; that around the margins of that depression there was a black greasy substance and that seemed to have been pressed deeply into the tissues of the head and had the appearance of grease or oil; that across the forehead and on the left side of the face there was noticeable redness and swelling; that on the back of the head in the occipital region there was redness and considerable swelling; that his lips were swollen and bruised and that there was a cut on the left upper lip; that there was a bloody frothy fluid coming from the mouth and nose which was exaggerated by a slight pressure on the chest; that a slight hemorrhage on the surface of the brain was found; that in the pons there were many hemorrhages; that in the skull there was a fracture extending from the occipital area as far as the inner left ear. He gave as his opinion as to the immediate cause of death the filling up of the lungs with the bloody fluid which interfered with breathing, and stated that in his opinion the hemorrhage in the pons resulted from the injury to the pons allowing the fluid to enter the lung area, which caused his death; that the depression found above the right eyebrow appeared to have been caused by something with more or less of a blunt edge on it and could have been inflicted by a kick from a foot or a shoe; that the injury to the forehead and left side of the face could have been produced by a man's fists; that with respect to the fracture of the skull, it could have been caused by a flat hard surface such as striking the pavement; that a blow to a man's jaw, particularly if the man were not expecting it, might throw the head in such a position as to cause an injury to the pons; that a kick thereafter might contribute to shock which would be a factor in causing death. He then testified that the injury to the pons area contributed very heavily to causing the edema of the lungs; that the fracture of the skull itself had nothing to do with the cause of death other than as an element of shock. He would not state whether the blow to the forehead, the blow to the jaw, or the blow to Young's mouth caused the fatal injury to the pons, but he did testify that any one of the three blows might have caused the injury to the pons.

Counsel for defendant Hufstetler now argues: (1) that the evidence does not establish beyond a reasonable doubt that the one and only blow inflicted upon the deceased by him caused his death; (2) that the evidence does not establish beyond a reasonable doubt that a conspiracy, common plan or design, or an agreement existed between defendants to attack deceased, and that therefore Hufstetler cannot be held criminally responsible for the acts of defendant McManis on the theory that the act of one conspirator is the act of all; (3) that the evidence does establish that the subsequent acts of defendant McManis were his own independent isolated and individual acts foreign to and outside of any plan or intent of defendant Hufstetler; and that they were the product of the individual malice and mind of defendant McManis, bearing no causal relation or connection with the act of defendant Hufstetler in striking deceased one blow; and that the evidence establishes without contradiction that defendant Hufstetler effectively withdrew from any conspiracy or agreement, if any he had with defendant McManis, by verbally inviting McManis on two occasions to withdraw from further combat, by requesting him to leave deceased alone, and also by walking away from deceased after knocking him down, citing such cases as People v. Kerrick, 86 Cal.App. 542, 261 P. 756; People v. Caballero, 31 Cal.App.2d 52, 87 P.2d 364; People v. Werner, 16 Cal.2d 216, 105 P.2d 927; Commonwealth v. Campbell, 7 Allen, Mass., 541, 83 Am.Dec. 705; 15 C.J.S., Conspiracy, § 74, page 1105 et seq.; Loser v. Superior Court, 78 Cal.App.2d 30, 32, 177 P.2d 320; People v. Newland, 15 Cal. 2d 678, 681, 104 P.2d 778; People v. Perkins, 8 Cal.2d 502, 66 P.2d 631; and People v. Staples, 149 Cal. 405, 86 P. 886.

Counsel for defendant McManis claims (1) that the evidence is insufficient to sustain the verdict of guilty of involuntary manslaughter as a matter of law; (2) that there was no sufficient evidence of a concert or mutuality of action between the defendants rendering them equally culpable; and (3) that defendant McManis was not a principal in this case under Penal Code Sec. 31, citing People v. Alvarez, 73 Cal. App.2d 528, 166 P.2d 896; and People v. Turner, 86 Cal.App.2d 791, 195 P.2d 809.

[1, 2] It has been repeatedly held that where a person, in committing an assault and battery without aggravating circumstances, unintentionally causes the death of his victim, the crime is manslaughter. People v. Lee, 44 Cal.App.2d 84, 111 P.2d 908; People v. Munn, 65 Cal. 211, 3 P. 650; People v. Miller, 114 Cal.App. 293, 299 P. 742. Involuntary manslaughter is the unlawful killing of a human being in certain unlawful ways without any intention of doing so. People v. Kelley, 24 Cal.App. 54, 62, 140 P. 302; Penal Code Sec. 192, subd. 2.

[3] This court on appeal will not attempt to pass on the weight of the evidence. We must assume, in favor of the judgment, the existence of every fact which the court could reasonably have deduced from the evidence and then determine whether such facts are sufficient to support the verdict. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

[4] In this case it is uncontradicted that the defendant Hufstetler, without justification, wilfully struck the deceased Young a blow to the jaw with such force that it caused him to collapse and fall to the ground. His hand was bruised because of the blow. While Young was on the ground he was kicked by McManis who, together with Hufstetler, had followed the deceased and his two companions with the intention of starting a fight. Although there is some conflict as to whether McManis did strike Young to the ground and again kick him after Young had moved a short distance from the scene of the original assault, the court was justified in believing the testimony of either or both defendants in this respect. The evidence clearly shows that there were bruises and swelling on the face and head of the deceased which had been caused by certain blows in addition to the blow rendered by Hufstetler's fist. It was the doctor's opinion that the injury was caused by extreme forcing of the head backwards, and could have been caused by a blow from an assailant's fist to the left area of the deceased's jaw while he was in a standing position, and it could also have been caused by kicks received to the head, or both. It cannot be disputed that McManis's kicks contributed to the shock which in turn hastened Young's death. On appeal, all intendments are to be indulged in which will support the judgment, to the exclusion of those tending to detract from it. People v. Gutierrez, 35 Cal.2d 721, 727, 221 P. 2d 22. Thus, it is quite clear that the evidence is sufficient to establish beyond a reasonable doubt that either defendant Hufstetler or McManis, or both, did wilfully and without malice kill Richard Young.

[5–7] In this state a prosecution may be had for either a conspiracy or the crime committed in pursuance thereof, and a conviction thereon may be had for both the conspiracy to commit a crime and the consummated crime committed in pursuance of its purpose. People v. Hoyt, 20 Cal.2d 306, 125 P.2d 29. The law fixes no time at which the conspiracy must have been entered into, and it does not provide that it have any particular duration. It is not necessary that two persons should meet together and enter into an explicit, express or formal agreement to commit a crime or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the details of the plans or means by which the unlawful combination was to be made effective. It is sufficient if they in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. It may result from the acts of the conspirators in carrying out a common purpose to achieve an unlawful end. People v. Yeager, 194 Cal. 452, 229 P. 40; People v. Griffin, 98 Cal.App.2d 1, 219 P.2d 519. A conspiracy may also result from actions of parties showing an intent to carry out a common purpose to violate the law and it is not necessary to prove an actual agreement to work together in performance of the unlawful acts. The existence of the assent of minds which is involved in the conspiracy may be, and from the secrecy of the crime usually must be, inferred by the jury from the proof of facts and circumstances which, taken together, apparently indicate that they are mere parts of the same complete whole. People v. Allen, 104 Cal.App.2d 402, 231 P.2d 896; People v. Griffin, supra.

[8] In the present case, after "something" was said at the Drive-In where the group of boys were congregated, the group which included Hufstetler and McManis, moved toward the deceased and his two companions. There could be only one logical reason for this "movement", and that reason was to start a brawl and inflict physical punishment upon the recipients. In furtherance of this design, McManis grabbed Gonzales and knocked him to the ground. Hufstetler smashed the deceased, Young, to the ground. The group then went back to the Drive-In, leaving the deceased prostrate on the ground and his companions dispersed. The purpose of their actions, that of "beating up" the deceased and his friends, had been partially and temporarily fulfilled. The facts related and the actions of the defendants indicate the undeniable conclusion that there was a conspiracy, agreement or common plan or design between Hufstetler and McManis to commit an assault and battery upon the person of Richard Young, and that the reasonable, natural or probable consequences of which would be serious injury, and could reasonably be expected to result in the death of Young. Since there was sufficient evidence of a conspiracy existing between them, both Hufstetler and McManis were responsible for the acts of their fellow conspirator as well as their own. People v. Kauffman, 152 Cal. 331, 92 P. 861; People v. Ford, 25 Cal. App. 388, 397, 143 P. 1075; People v. Little, 41 Cal.App.2d 797, 107 P.2d 634, 108 P.2d 63; People v. Griffin, supra.

Here, the evidence shows that the blow to the jaw of the deceased by Hufstetler and the kicks administered by McManis were all part of the process of inflicting the physical punishment. They both could have been logically foreseen and even contemplated before the brawl was entered into. The common design was to "beat up" the deceased and that is exactly what was accomplished. Both Hufstetler and McManis took an active part in the physical beating of the deceased and their acts were clearly connected as part of their design and common plan to engage in the brawl.

Accordingly, there is evidence definitely establishing that there was a conspiracy, agreement or common plan between them to commit an assault and battery upon the person of Young, and that the reasonable, natural and probable consequences of it might be reasonably expected to result in his death.

While defendant Hufstetler testified that he told McManis to stop kicking Young, McManis denied this fact. Other witnesses who testified heard no such remark on behalf of Hufstetler. Even if Hufstetler did testify that he made such a remark, that evidence, in and of itself, would not be sufficient to show a withdrawal of the conspiracy, especially in the light of the fact that the damage of the blow to the jaw by Hufstetler and the subsequent kicks by McManis had already been inflicted and each of said acts may have been the cause of the death of Young.

We conclude that the evidence is sufficient to establish the guilt of both defendants as charged, and that the claims of counsel for both defendants are not sufficiently meritorious to warrant a reversal as to either defendant.

Judgment and order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

122 Cal.App.2d 561

FREEZE v. SALOT et al.

Civ. 19713.

District Court of Appeal, Second District, Division 3, California.

Jan. 18, 1954.

Rehearing Denied Feb. 5, 1954.

Hearing Denied March 17, 1954.

Action to set aside sale of plaintiff's property under deed of trust, on ground that plaintiff was not in default, and to set aside subsequent resale of such property to purchaser who allegedly had notice of such defect, as well as to set aside default judgment entered against plaintiff in prior unlawful detainer action brought by such subsequent purchaser. The Superior Court, Los Angeles County, Ellsworth Meyer, J., entered judgment on order sustaining demurrer to complaint, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that a plea of res judicata was applicable, in view of facts that issues decided in unlawful detainer action were identical with issues in present action, that judgment in prior action was final judgment on merits, and that plaintiff, against whom plea was asserted, was party to prior adjudication.

Affirmed.

1. Judgment 🔑460(1)

Mortgages 🔑369(7)

Complaint alleging that sale of plaintiff's property under deed of trust was invalid, because plaintiff was not in default, and that subsequent resale to purchaser who had notice of such defect was likewise invalid, and seeking to set aside such sales, as well as to set aside default judgment entered against plaintiff in unlawful detainer action brought by such subsequent purchaser, failed to state facts sufficient to constitute cause of action.

2. Appeal and Error 🔑911(3)

An appeal from judgment entered on order sustaining demurrer to complaint seeking, inter alia, to set aside a default judgment entered against plaintiff in unlawful detainer action in municipal court, District Court of Appeal would presume that municipal court had jurisdiction of such action.

3. Mortgages 🔑372(4)

In unlawful detainer action against grantor of deed of trust under which the property involved had been sold, brought by subsequent purchaser of such property, facts that grantor was not in default under deed of trust, that note secured thereby had been fully paid, and that grantor had no notice that property was to be sold, were available to grantor as a defense.

4. Appearance 🔑29

Failure of defendant in unlawful detainer action to appear therein was a confession of truth of all material facts alleged in complaint in such action.

5. Judgment 🔑134

Default judgment is a complete adjudication of all rights of parties embraced in prayer of complaint and stands on same footing as judgment after answer and trial with respect to issues tendered by complaint.

6. Judgment 🔑540

In determining validity of plea of res judicata, whether issue decided in prior adjudication was identical with the one presented in action in question, whether there was a final judgment on the merits, and whether party against whom plea is asserted was a party or in privity with a party to prior adjudication, are pertinent questions.

7. Judgment ⚿747(6)

In action to set aside sale of plaintiff's property under deed of trust, on ground that plaintiff was not in default, and to set aside subsequent resale of such property to purchaser who allegedly had notice of such defect, as well as to set aside default judgment entered against plaintiff in an unlawful detainer action brought by such subsequent purchaser, plea of res judicata was applicable, in view of facts that issues decided in unlawful detainer action were identical with issues in present action, that judgment in prior action was final judgment on merits, and that plaintiff, against whom plea was asserted, was party to prior adjudication.

◆

Emelyn Freeze, appellant, in propria persona.

Robert F. Shippee, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment entered on an order sustaining the demurrer of defendant Salot to a second amended complaint without leave to amend.

The only matter that may be considered is whether the second amended complaint, referred to as the complaint, states facts sufficient to constitute a cause of action.

The material allegations of the complaint are these:

1. On July 3, 1944, plaintiff, being the owner of a parcel of realty, executed a deed of trust to secure a promissory note for $3,060.75 in favor of L. G. and Mary P. Robinson. On August 9, 1951, the Robinsons recorded a notice of default which stated that default had been made by plaintiff in making payments on the note. On December 14, 1951, in conformity with the deed of trust, the property was sold to defendant Salot. On January 14, 1952, the trustee executed a deed of the property to Salot. On December 17, 1951, Salot deeded the property to defendant Aguilar. This deed was recorded on January 14, 1952.

2. Upon information and belief, Aguilar is the alter ego of Salot; and they each purchased the property with full knowledge that it was being sold as a result of a foreclosure and, under such circumstances, were charged with notice of any deficiencies against the note executed by plaintiff.

3. At the time the notice of default was recorded, plaintiff was not in default. The note had been fully paid. Plaintiff never received a copy of the notice of default and had no knowledge of the fact that the property was to be sold on December 14, 1951.

4. Thereafter, plaintiff was served with a copy of a summons and complaint in an action in the municipal court of the Los Angeles Judicial District, entitled "Betty Aguilar, plaintiff vs. Emelyn Freeze," in which allegations were made in support of the right of Betty Aguilar to the occupancy and possession of the property by virtue of the foreclosure sale and the conveyance to her. Plaintiff, "believing that said Action was not meritorious for the reason that she had made all of her payments as aforesaid and could see no reason why any sale of real property should have been made to the said Betty Aguilar, failed and neglected to file an Answer to said Complaint in Unlawful Detainer, and a Judgment was subsequently obtained against plaintiff in said Action on the 21st day of May, 1952."

5. Plaintiff is not well versed in legal affairs; and she believed that a judgment obtained by her in the superior court in an action between the Robinsons and herself, in which the Robinsons were restrained from proceeding with a previous attempted foreclosure, was sufficient protection for her to keep any further foreclosures from taking place or any further attempts to foreclose her interest in the property from taking place, and for that reason, she failed to take the proper steps at the time the summons and complaint were served upon her in the municipal court action. Under the circumstances it would be unfair to permit Salot and Aguilar to profit by the mistake of plaintiff.

The prayer is for a decree setting aside the deed from the trustee to Salot, the sale to Salot, the sale by Salot to Aguilar, and the judgment of the municipal court; and for general relief.

[1] We are reluctantly compelled to hold that the complaint does not state facts sufficient to constitute a cause of action.

[2, 3] We must presume that the municipal court had jurisdiction of the action between Aguilar and plaintiff. See Cheatham v. Municipal Court, 112 Cal.App. 114, 296 P. 305; American Nat. Bank v. Johnson, 124 Cal.App.Supp. 783, 11 P.2d 916; 10 Cal.Jur. (10-Yr.Supp.) 777, § 84.1, and cases there cited. We must conclude from the allegations with respect to the averment of the complaint in the municipal court action that it was a proceeding in unlawful detainer. 10 Cal.Jur. (10-Yr.Supp.) 777, § 84.1, and cases there cited. The facts that plaintiff was not in default under the deed of trust, that the note had been fully paid on November 6, 1948, and that she had no notice that the property was to be sold, were available to her as a defense in that proceeding. Kraemer v. Coward, 2 Cal.App.2d 506, 38 P.2d 458; Harris v. Seidell, 1 Cal.App.2d 410, 414, 36 P.2d 1104; Kelsey v. Richardson, 101 Cal.App. 762, 282 P. 515; Delpy v. Masayoshi Ono, 22 Cal.App.2d 301, 303, 70 P.2d 960; Altman v. McCollum, 107 Cal.App.2d Supp. 847, 853–857, 236 P.2d 914. The question is whether the judgment of the municipal court is res judicata in this action.

Seidell v. Anglo-California Trust Co., 55 Cal.App.2d 913, 132 P.2d 12, was a suit to set aside a trustee's deed to realty for alleged fraud and irregularities in the foreclosure proceeding. The question on appeal was whether a judgment which was rendered in a former proceeding in unlawful detainer was res judicata. The purchaser at the trustee's sale had conveyed the property prior to the proceeding in unlawful detainer. The latter proceeding was brought by a subsequent purchaser against the trustor. The judgment in the latter proceeding was for the subsequent purchaser. The court held in 55 Cal.App.2d at pages 918, 921, 132 P.2d at page 15: "The doctrine of res judicata is applicable to this case. The judgment in the unlawful detainer suit bars the appellants from now contending the trustees' deed to the real property was void on account of the alleged irregularities of procedure in the foreclosure of the deed of trust. The doctrine of res judicata is that an existing final judgment on the merits of a cause rendered by a court of competent jurisdiction is conclusive of the rights of the parties thereto and of their privies on all material issues which were tried and determined and upon all issues which might have been properly tendered therein, in all subsequent actions or suits in any tribunal of concurrent jurisdiction involving the same points either directly or incidentally. Estate of Clark, 190 Cal. 354, 360, 212 P. 622; Hess v. Moodey, 35 Cal.App.2d 401, 408, 95 P.2d 699; 15 Cal.Jur. 97, § 166; 2 Freeman on Judgments (5th Ed.) 1321, § 627; 15 R.C.L. 973, § 450. * * *

"In this case the challenged unlawful detainer judgment determined issues tendered by these appellants in their answer which constituted legal defenses of alleged specific violations of the statute in failing to give the notice of sale required by section 2924 of the Civil Code, lack of consideration for the note secured by the trust deed, and other asserted defects going to the validity of the trust deed and note secured thereby, and to the proceedings on the sale of that property under the provisions of the deed. All of those issues of law, as distinguished from equity, affecting the legality of the note, deed of trust and the sale were properly determined against the defendants in that unlawful detention suit."

Bliss v. Security-First Nat. Bank, 81 Cal.App.2d 50, 183 P.2d 312, was a suit by a trustor to quiet title to realty and to nullify a trustee's sale thereof. Prior to this suit, the purchaser at the trustee's sale had sued the trustor for possession. In the latter proceeding, although the trustor had answered denying the allegations of the complaint, it was stipulated that judgment be entered for the plaintiff. In the Bliss case the court held, in 81 Cal.App.2d at page 58, 183 P.2d at page 317: "But the judgment of the justice's court of Glendale township is itself sufficient answer to this appeal.

After having purchased the property at the trustee's sale Mrs. Grigsby was forced to institute her unlawful detainer action to gain possession of the property which appellant and her husband insisted upon holding after title had become vested in Mrs. Grigsby. Their answer to the Grigsby complaint created the issue of ownership which at the trial was established to be in Mrs. Grigsby. The doctrine of res judicata is applicable."

[4, 5] Plaintiff's failure to appear in the municipal court action was a confession that all the material facts alleged in the complaint in that action were true. 14 Cal. Jur. 887, § 19. A judgment by default is a complete adjudication of all the rights of the parties embraced in the prayer of the complaint and stands on the same footing as a judgment after answer and trial with respect to issues tendered by the complaint. 15 Cal.Jur. 131, § 186.

[6, 7] "In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" Bernhard v. Bank of America, 19 Cal.2d 807, 813, 122 P.2d 892, 895. Having alleged in her complaint in this action that the complaint in the municipal court action contained allegations in support of the rights of Aguilar to the occupancy and possession of the realty by virtue of the foreclosure sale and the conveyance to her, and that Aguilar obtained judgment against her on May 25, 1952, the plea of res judicata is applicable. The issues decided in the municipal court action were identical with the ones presented in this action; the judgment in the municipal court action was a final judgment on the merits; and plaintiff, the party against whom the plea is asserted, was a party to the adjudication of the municipal court.

The judgment in the municipal court action was entered May 21, 1952. The original complaint in the present action was filed October 21, 1952, within six months after the municipal court judgment was entered. The complaint here alleges that immediately after the judgment of the municipal court was obtained, plaintiff placed "the said case" in the hands of her attorney who thereupon conducted an investigation for the purpose of ascertaining what could be done to protect the rights and interests of the plaintiff "in this Action." If the municipal court judgment was taken against plaintiff through her mistake, inadvertence, surprise, or excusable neglect, she could have obtained relief in that action. Code Civ.Proc. § 473. If, as alleged, plaintiff had paid the note in full before the foreclosure and the property was sold without notice to her, she has suffered a great injustice. But having failed to appear in the municipal court action, she is now precluded from asserting matters which would have been a defense to that action.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

122 Cal.App.2d 884

LARRUS et al.

v.

FIRST NAT. BANK OF SAN MATEO COUNTY.

Civ. 15661.

District Court of Appeal, First District,
Division 2, California.
Jan. 28, 1954.

Action by depositors for amount of check credited to their account, but charged back by bank when it found that funds were insufficient. The Superior Court, County of San Mateo, Murray Draper, J., entered judgment for bank, and depositors appealed. The District Court of Appeal, Nourse, P. J., held that where depositors by executing signature cards agreeing to be bound by rules of bank, including rule permitting bank to charge deposits back to depositors' account, intentionally led bank to believe that depositors had accepted such conditions, even if there was no agreement within statute permitting provisions relative to right of bank to charge deposits back to depositor's account to be set aside by written agreement, depositors were estopped to deny their acceptance of bank's rules, and hence bank would not be liable for check drawn on bank and credited to depositors' account but subsequently charged back to depositors, although notice of dishonor of check was not sent within statutory period.

Judgment affirmed.

1. Appeal and Error ⚷428(2)

Where on August 29, court had, in order for judgment, which appellants mistook for appealable judgment, announced intended ruling and appellants filed notice of appeal on October 7, prior to rendition of judgment and filing of findings of fact and conclusions of law, District Court of Appeal would treat notice of appeal as filed immediately after entry of judgment, in view of general desirability of deciding appeals on merits, and in absence of any indication of prejudice and failure of respondent to urge dismissal of appeal. Rules on Appeal, rule 2(c).

2. Banks and Banking ⚷126

Apart from contrary statutory provisions or agreements or fraud or collusion, an overdraft when credited to the payee's account in the same bank, cannot be charged back.

3. Banks and Banking ⚷126

Under statute stating that any credit allowed by any bank for any check, etc., drawn on, through or payable at same bank in which deposited shall be provisional only, subject to final payment provided that such check shall either be found good or else returned unpaid, or notice of dishonor duly sent, at or before end of next succeeding business day, compliance by bank with provision relative to sending of notice of dishonor is a necessary condition to right of bank to disallow check. Gen.Laws, Act 652, § 16c.

4. Statutes ⚷228

The construction of a proviso as a necessary condition is normal, when the statutory rule which it modifies is in derogation of the common law and there are no indications of another intent.

5. Banks and Banking ⚷88

A depositor may expressly agree in writing to be bound by the rules of a bank even though he does not know the contents of such rules, insofar as such rules are not unreasonable or contrary to law or public policy.

6. Banks and Banking ⚷296

Where depositors had signature cards required to be signed prior to opening of savings account at home overnight and had opportunity to read statement over place for signatures to effect that depositor agreed that funds in account should be governed by by-laws, regulations and rules and practices of the bank and depositors returned the signed cards, depositors were bound by rules of bank, notwithstanding that depositors were not advised of contents of by-laws, rules and regulations.

7. Banks and Banking ⚷88

Where depositors by executing signature cards agreeing to be bound by rules of bank, including rule permitting bank to charge deposits back to depositors' account, intentionally led bank to believe that depositors had accepted such conditions, even if there was no agreement within statute permitting provisions relative to right of bank to charge deposits back to depositor's account to be set aside by written agreement, depositors were estopped to deny their acceptance of bank's rules, and hence bank would not be liable for check drawn on bank and credited to depositors' account but subsequently charged back to depositors, although notice of dishonor of check was not sent within statutory period. Gen.Laws, Act 652, § 16c.

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DiMaria, DiMaria & Daschbach, Palo Alto, for appellants.

Ross, Ross & McGovern, Redwood City, for respondent.

NOURSE, Presiding Justice.

This is an action by depositors for the amount of a check credited to their account, but charged back by defendant bank when it found that the funds were insufficient. The court gave judgment for the bank and plaintiffs, depositors, appeal.

[1] The notice of appeal was filed on October 7, 1952, prior to the rendition of judgment and the filing of the findings of fact and conclusions of law, which were all dated October 8, 1952, and filed the same day. However on August 29, 1952, the court had, in an order for judgment, which appellants mistook for the appealable judgment, announced its intended ruling. Under the last provision of Rule 2 (c) of the Rules on Appeal, added by an amendment effective January 1, 1951, we may in our discretion, for good cause, treat such notice of appeal as filed immediately after entry of the judgment. We shall use this power here considering the general desirability of deciding appeals on the merits, the absence of any indication of prejudice and the failure of respondent to urge dismissal of the appeal.

The facts are mainly undisputed. On December 1, 1948, Mrs. Larrus took to the defendant bank, herein further called the bank, with which she and her husband had had no prior dealings, a check of $1500, drawn on it by Martini Motors, signed by Eugene Martini, Mrs. Larrus' brother, and made payable to her and her husband. She testified that the check was given in payment of the balance of a loan made by them to Martini. She asked an employee of the bank whether the check was good and was told that it was, the funds in the account then being sufficient. Mrs. Larrus then stated that she wished to open an account in the name of her husband and herself as trustees for their two named sons and to deposit the check in that account. She was told that for the opening of such an account the signature of her husband also was required. She was given a card for him to sign and signed one herself. The cards contained directly above the space for the signature a printed statement that the depositor agreed that the account was to be carried as a savings account and that the funds in it should be governed by the by-laws, regulations, rules and practices of the bank. Her attention was not expressly called to this clause and she was not advised of the contents of the by-laws, rules and regulations. The following morning, December 2, 1948, Mrs. Larrus took the signed cards and the check endorsed in blank by her and her husband back to the bank and was given a savings pass book in which the amount of the check was entered. The pass book contained printed rules governing savings accounts, which were not called to her attention. The bank records received in evidence show that on December 2, 1948, at the beginning of business there was in the Martini Motors account $2348.88. On that date there were charged to said account one check of $70, one of $1875, one of $25 and the Larrus check of $1500. No deposit was made on it that day. When it was found that by the total of the checks, amounting to $3,470, the account was overdrawn a counter entry of $1500 was made the same day to cancel the charge of the Larrus check and plaintiffs' savings account was charged with that amount. On December 7, 1948, plaintiffs received a return item advice letter dated December 4, 1948, and bearing a postmark of December 6, 1948, advising them that their account had been charged and that the check was being held for their instructions. Appellants did not react in any way on this notice until they communicated with the bank through their attorneys in 1950.

The main question in dispute is the effectiveness of the crediting of appellants' account with the amount of the check. At that time such matters were governed by section 16c of the Bank Act of 1909 as amended, Deering's Gen.Laws, Act 652, which reads in part: "Any credit allowed by any bank organized under the laws of, or doing business in, this State, for any check, note or other instrument providing for the payment of money and drawn on, through or payable at the same bank in which it is deposited * * * shall be provisional only, subject to final payment * * * provided, that any check, note or other instrument providing for the payment of money and drawn on or payable at the same bank allowing such credit shall either be found good or else returned unpaid, or notice of dishonor duly sent, at or before the end of the next succeeding business day when such check, note or other instrument has been received during business hours * * *.

"Any provision of this section may be modified or set aside by an agreement in writing between any bank allowing such credit and any party from whom any such check, note or other instrument is received for collection, deposit, or other purpose."

It is undisputed that although the check was received during business hours, the notice was not sent the next succeeding business day. The court below in the order for judgment expressed the opinion that the failure of the bank to give notice of dishonor within the period limited by the Act did not invalidate the revocation of the credit but made the bank liable for injury only suffered by the depositors because of the delay, whereas no such injury was shown. We do not agree. The language of the statute together with the general rules applicable to the payment or crediting of checks by the drawee bank compel the opposite conclusion.

[2–4] Normally "'A credit given for the amount of a check by the bank upon which it is drawn is equivalent to, and will be treated as, a payment of the check. It is the same as if the money had been paid over the counter on the check, and then immediately paid back again to the account or for the use for which the credit is given.'" Utah Const. Co. v. Western Pac. R. Co., 174 Cal. 156, 164–165, 162 P. 631, 635; Greenzweight v. Title Guarantee & Trust Co., 1 Cal.2d 577, 581, 36 P.2d 186; Briviesca v. Coronado, 19 Cal.2d 244, 246, 120 P.2d 649; 7 Am.Jur. 327; 9 C.J.S., Banks and Banking, § 349, p. 698; 5A Michie Banks and Banking, Perm. Ed. 536–537. In the absence of fraud of the payee a bank which has paid a check which constituted an overdraft, cannot recover the amount paid from the payee (7 Am.Jur. 443; 9 C.J.S., Banks and Banking, § 354, p. 723; 5A Michie, supra, p. 542; Ann. 114 A.L.R. 382, 385, et seq.) Accordingly, the great weight of authority holds that apart from contrary statutory provisions or agreements or fraud or collusion an overdraft when credited to the payee's account in the same bank, cannot be charged back. (7 Am.Jur. 327; 9 C.J.S., Banks and Banking, § 281, p. 587; 5A Michie, supra, 537–38; Ann. 114 A.L.R. 382, 387.) This rule does not suit the banks, which can hardly know before the close of the day's business whether the old balance of the drawer's account plus deposits made during the day are sufficient to pay all checks on the account presented during the day. Compare National Gold Bank v. McDonald, 51 Cal. 64, 69; Ocean Park Bank v. Rogers, 6 Cal.App. 678, 681, 92 P. 879. The American Bankers Association therefore advocated a statutory provision or a bank rule that credit given to a depositor would be subject to revocation at or before the end of the day of deposit if the check was found not good. See I Paton's Digest, 1068. In 1925 such a provision was added to our Bank Code, but it specifically required the return of the check or due notice of dishonor at or before the end of the day of deposit. Section 16c, Stats. 1925, p. 513. In 1943 this section was amended to give the bank one day more time so that it now reads as quoted before. Stats. 1943, Chap. 930. The California cases cited for the rule that the crediting of a deposited check drawn on the same bank constitutes payment are not inconsistent with the above provision of section 16c, if we consider the right of the bank to credit back as based on a condition subsequent. The construction of a proviso as a necessary condition is normal, certainly when the statutory rule which it modifies is in derogation of the common law and there are no indications of another intent. McPhail v. Nunes, 38 Cal.App. 557, 560 et seq., 177 P. 193; 34 Words and Phrases, Provided, p. 675 et seq.; 702 et seq. The same construction of this proviso as a necessary condition seems accepted in Hansen v. Bank of

America, 101 Cal.App.2d 300, 304, 225 P.2d 665, although there it is dictum as the notice was timely given.

[5] The question remains whether the statutory time limit on return of the check or notice of dishonor as condition for charging back has been set aside by an agreement in writing of the parties, or the equivalent, consisting of the cards signed plus the printed rules in the pass book. Appellants contend that these rules cannot be binding on them because they were not brought to their attention at the time they signed the cards. This is not so. There is no reason why a depositor cannot expressly agree in writing to be bound by the rules of the bank for such relation even though he does not know their contents, in so far as the rules are not unreasonable or contrary to law or public policy. The general principle is thus expressed by Corbin. Contracts, Vol. 3, p. 420. "It is quite possible for a party to assent to be bound in accordance with terms of which he is then ignorant, just as he may promise to pay a sum yet to be determined by the future market or by an arbitrator." Compare also section 70 Restatement, Contracts. For the binding effect of the signing of such a clause by a depositor see Krupp v. Franklin Savings Bank in City of New York, 255 App.Div. 15, 5 N.Y.S. 2d 365; Koutsis v. Zion's Sav. Bank & Trust Co., 63 Utah 254, 225 P. 339; Fourth & Central Trust Co. v. Rowe, 122 Ohio St. 1, 170 N.E. 439; I Williston, Contracts, Rev.Ed. p. 259.

[6] Here the clause is clearly printed in the only sentence on the face of the signature card. The card was not printed in such a manner that it tended to conceal the fact that it was an express acceptance of the bank's rules and regulations. Plaintiffs, who had the cards overnight at their home, had the opportunity to read the short text just above the space for their signatures and to ask for the rules and regulations it referred to if they did not wish to subject themselves to them in ignorance of their contents. Having signed and returned the cards without doing so they are bound. Compare George v. Bekins Van & Storage Co., 33 Cal.2d 834, 848, 205 P.2d 1037. Appellant relies on Los Angeles Inv. Co. v. Home Sav. Bank, 180 Cal. 601, 182 P. 293, 5 A.L.R. 1193; Sommer v. Bank of Italy National Trust & Savings Ass'n, 109 Cal.App. 370, 293 P. 98 and Frankini v. Bank of America, 31 Cal.App. 2d 666, 88 P.2d 790, but these cases can easily be distinguished. In the first two cases there was no express agreement to be bound by the bank's rules and regulations. The Los Angeles Inv. Co. case indicates at most that California does not follow the majority rule which holds that a depositor who accepts and retains a pass book containing printed rules is deemed by that fact alone to acquiesce therein (See Ann. to that case, 5 A.L.R. 1203), but it does not decide anything with respect to express acceptance on a signature card. The Sommer case relating to a not well proved provision on some monthly statements is still less in point. The Frankini case was decided on the ground that the rule on which the bank relied was unreasonable.

The relevant provision of the rules in the instant case is as follows: "Any credit allowed for items on this or any other bank or party is only provisional, and until the proceeds thereof, in money, shall have been actually received by this bank, and found good at the close of the day's business, such items may be charged back to the depositor's account, regardless of whether or not the item itself can be returned." We see nothing unreasonable in this provision. It is in accord with the recommendation in I Paton's Digest, 1068, supra, and section 3 of the Bank Collection Code, adopted by several states. 7 Am.Jur. 512. Our section 16c of the Bank Act differed from it by the time limit set for notification but it expressly permits setting aside or modification by written agreement.

[7] We are satisfied that when the appellants executed the signature card agreeing to be bound by all the rules and regulations of the bank they did so for the purpose of leading the bank to believe that they accepted all those conditions. If

these transactions may not be held a "written agreement" within the strict terms of section 16c of the Bank Act they, nevertheless, bring the same result to all intent and purposes in so far as appellants are concerned. That is to say that appellants knowingly and intentionally, by their own act and deed, led the bank to believe that they were willingly agreeing to abide by *all* the rules and regulations concerning the terms of their deposit. They are therefore estopped to deny it at this time.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

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122 Cal.App.2d 771

HEILMAN v. HEILMAN.

Civ. 4754, 4741.

District Court of Appeal, Fourth District, California.

Jan. 25, 1954.

Rehearing Denied Feb. 16, 1954.

Hearing Denied March 25, 1954.

Divorce action by husband wherein he requested that home and furniture be declared community property and that custody of minor child be awarded to husband's parents in accordance with prior out-of-state divorce decree. A cross-complaint was filed by wife. The Superior Court, San Bernardino County, Harold R. Haberkorn, J., granted wife a divorce and custody of minor child with visitation rights to husband and subsequently granted wife's attorney's fees and costs on appeal and husband appealed. The District Court of Appeal, Mussell, J., held that judgment granting divorce to wife was sustained by the evidence.

Judgment and orders affirmed.

1. Divorce 🔑101

Cross-complaint, which alleged required statement of statistical matters, and contained general and specific allegations of extreme cruelty, stated a cause of action for divorce.

2. Divorce 🔑291

Where wife's cross-complaint for divorce made no request for custody of minor child, but a subsequent amendment was made for that purpose and husband's counsel requested the determination of that issue, the determination of the minor child's custody by the court was proper.

3. Divorce 🔑301, 312.6(8)

In divorce proceedings, court's findings, that wife was proper person to have the care, custody and control of minor child and that it was for the best interests of minor child that wife have his custody subject to reasonable visitation by husband, were supported by the evidence and could not be disturbed on appeal.

4. Infants 🔑18

The courts of a particular state have jurisdiction to determine a child's custody if the court has jurisdiction in personam of both parents and the child is physically present and domiciled within the state.

5. Infants 🔑18

Where a child is living in one state but is domiciled in another, the courts of both states have jurisdiction over the question of its custody.

6. Divorce 🔑332

Where, after rendition of Kansas divorce decree which awarded custody of minor child to husband's parents, parties remarried and took back custody of child with knowledge of husband's parents, who treated such retention of custody as proper and legal, but, after becoming domiciled in California, suit for divorce was instituted, California court was empowered to determine child's custody.

7. Divorce 🔑130

Evidence sustained decree awarding wife a divorce on ground of extreme cruelty.

8. Divorce 🔑249(1)

Where husband, in divorce action, requested that home and furniture be declared community property, but evidence indicated that wife had paid full purchase price of furniture from her separate funds, that wife had made $1500 down payment on house which was valued at $7,750, but which had encumbrances of $3,840, and that husband had an interest in a service station, determination that furniture was separate property of wife and that interest in house should be given to wife as her share of community property, showed no abuse of discretion. Civ. Code, § 146.

9. Divorce ⚷182, 194, 221, 308

Court's determination, after rendition of judgment for wife on cross-action for divorce, that husband should pay wife's attorney $950 attorney's fees on appeal, $200 costs on appeal and pay wife $65 a month for support of child, was proper. Civ. Code, § 137.3.

10. Divorce ⚷182, 188, 221

An order for attorney's fees and costs may be made during the pendency of a divorce action and this power continues during the pendency of an appeal from its determination. Civ.Code, § 137.3.

11. Divorce ⚷188, 223

The granting of attorney's fees and costs in a divorce action rests in the sound discretion of court.

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C. E. Crowley, Ontario, for appellant.

Edgar C. Keller, San Bernardino, for respondent.

MUSSELL, Justice.

On October 2, 1951, plaintiff filed this action for divorce in San Bernardino county, California, alleging, among other matters, that the custody of the minor child of the parties had been awarded to plaintiff's parents by virtue of a decree of divorce rendered in the state of Kansas and that certain real and personal property described therein was community property. The prayer of the complaint was for a divorce, judgment that the real and personal property be awarded to plaintiff and that the custody of the child be awarded in accordance with the Kansas decree.

Defendant, in her answer, denied plaintiff's allegations of cruelty; denied that the Kansas decree was still in effect and denied that the real and personal property described in the complaint was community property. She also filed a cross-complaint alleging cruelty as a ground for divorce and sought an award of the community property, temporary custody of the child, temporary support and maintenance, costs and attorney's fees.

During the trial of the action defendant was permitted to file an amendment to her second amended cross-complaint asking for the custody of the said minor child. The trial court also permitted plaintiff to amend his complaint to include an allegation placing the question of the custody of said child in issue.

The trial court found against plaintiff's allegation of cruelty and in favor of defendant on her cross-complaint, awarded her certain property and the custody of the said child subject to reasonable visitation by plaintiff. Subsequent to the rendition of the judgment defendant applied to the court for an allowance of attorney's fees and costs on appeal.

Plaintiff appeals from the interlocutory judgment of divorce and from the orders allowing attorney's fees and costs on appeal and by stipulation, both appeals have been consolidated. The main question before us is whether the court erred in awarding the custody of the minor child to the defendant.

Plaintiff and defendant were first married in Kansas in 1942 and in 1946 the minor child involved was born. On June 1, 1949, the parties were divorced by a Kansas decree which gave custody of the child to plaintiff's parents, subject to reasonable visitation by both parties. On October 20, 1949, plaintiff and defendant remarried, resumed marital relations, took back custody of the child and brought him to California. The child then remained with his parents in California until their separation in June, 1951, except for a period of approximately three months when he was taken to Kansas where he spent some time with his grandparents.

Plaintiff and defendant purchased a home and furniture in California. The down payment on the house amounted to $1,500 and the full purchase price of the furniture was paid by defendant from her separate property. Subsequent payments on the house were made from plaintiff's earnings during the marriage, from other sums received by him from the sale of wheat and out of money secured from his parents. At some time during the marriage plaintiff also acquired a half interest in a filling station. On June 18, 1951, plaintiff and defendant separated. Defendant took the child with her to Kansas. She there visited plaintiff's parents and then went to Idaho where she filed a divorce action on October 2, 1951. Upon being served with papers in the instant action, she brought the child to California and filed an appearance in this action. The child was in California from December, 1951, until after the trial in the instant action and while the decision therein was pending, he was taken back to Kansas by plaintiff's parents.

[1–5] Plaintiff first argues that the second amended cross-complaint failed to state a cause of action for divorce or the custody of the child. The cross-complaint, in addition to the required statement of statistical matters, contains alegations of extreme cruelty, both generally and specifically, and sufficiently states a cause of action for divorce. While there was no attempt in this pleading to obtain custody of the child, by subsequent amendment thereto during the trial and by request of counsel for plaintiff, the question of custody was put in issue and properly determined by the trial court. Plaintiff argues that the trial court lacked jurisdiction to make such a determination because of the provisions of the Kansas decree. In this connection the court found that after the Kansas decree, the parties became reconciled and remarried; that they took back custody of said child with the knowledge of plaintiff's parents and without opposition from them or either of them; that thereafter and until June 18, 1951, plaintiff and defendant retained the custody and control of said child; that plaintiff's parents accepted and treated such retention of custody as proper and legal; that since the entry of the Kansas decree, the conditions and circumstances of the parties have changed greatly; that the parties set up housekeeping again in California; that defendant was chronically ill and unable to properly care for said child at the time of said decree; that she thereafter underwent surgical treatment and at all times since these proceedings were instituted has been in good health and will be able to care for said child; that she is the proper person to have the care, custody and control of said child and that it is for the best interests of said child that defendant have his custody subject to reasonable visitation by plaintiff. These findings are supported by substantial evidence and cannot be here disturbed. Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557. As heretofore noted, the child involved was in California, within the jurisdiction of the court, residing with defendant at the time the second amended cross-complaint was filed, and at all times thereafter throughout the trial of the action. In Sampsell v. Superior Court in and for Los Angeles County, 32 Cal.2d 763, 197 P.2d 739, it was held that there is no question that the courts of a particular state have jurisdiction to determine a child's custody if the court has jurisdiction *in personam* of both parents and the child is physically present and domiciled within the state; that there is authority for the proposition that two or more states may have concurrent jurisdiction over the custody of the child; that in the interests of the child there is no reason why the state where the child is actually living may not have jurisdiction to act to protect the child's welfare and there is likewise no reason why other states should not also have jurisdiction; that if the child is living in one state but is domiciled in another, the courts of both states may have jurisdiction over the question of its custody.

In Foster v. Foster, 8 Cal.2d 719, 726, 68 P.2d 719, 722, it is said:

> "The jurisdiction of the superior court of the county of Los Angeles to make an order modifying the South Dakota decree cannot be challenged upon the ground that the decree of

South Dakota was *res judicata* and could not be changed. It is well recognized that a decree of a court in this state awarding the custody of a minor child of divorced parents to either party in a divorce proceeding has no permanent finality and that it is later subject to change and modification by the same court. This power is expressly reserved to that court by section 138 of the Civil Code. This rule that custody orders are subject to modification applies not only to such orders made and entered by courts of this state, but also to such former orders of courts of other states. As was said in Anthony v. Tarpley, 45 Cal. App. 72, 79, 187 P. 779, 782: 'The child being within this jurisdiction, the courts of this state are not precluded by any judgment or order of a sister state from inquiring into and determining in its own behalf what are the best interests of the child.' "

In In re Inman, 32 Cal.App.2d 130, 134, 89 P.2d 421, 423, the court said:

> "The child being within this jurisdiction, the courts of the state are not precluded by any judgment or order of a sister state from inquiring into and determining on his own behalf what are the best interests of the child. The decree of a sister state is never a bar to inquiry as to the best interests of a child."

[6] In the instant case the court found that there was a change of circumstances since the rendition of the Kansas decree. Plaintiff and defendant submitted the question of custody of the child to the court for decision and the child was living in California at the time of trial. Under these circumstances, we conclude that the trial court had power to make the questioned custody order.

[7] Plaintiff argues that the evidence does not support a judgment granting the defendant a divorce. This argument is without merit. The evidence shows that plaintiff used profanity towards the defendant; that he struck her and left black and blue marks on her arms; that he slapped her across the face; that he was quarrelsome and sarcastic; that he discussed defendant's alleged faults in the presence of their son; and that he refused to pay the doctor bill for defendant's operation, telling her that it was her worry. These facts were amply sufficient to sustain an action for divorce on the ground of extreme cruelty. Furthermore, the question was one of fact for the trial court. Keener v. Keener, 18 Cal.2d 445, 447, 116 P.2d 1.

[8] Plaintiff next argues that the evidence does not support the findings and judgment that the household goods were the separate property of defendant and that the court erred in making disposition of the community property. In this connection defendant testified that the full purchase price of the furniture was paid by her from her separate funds. If the household goods were in fact purchased with community funds, it was the duty of the court to assign the community property to the respective parties "in such proportions as the court, from all the facts of the case, and the condition of the parties may deem just." Civ.Code, § 146; Hellman v. Hellman, 108 Cal.App.2d 588, 593, 239 P.2d 458. The community property consisted of a house of the approximate value of $7,750, against which there were encumbrances of $3,840. There was also an interest in a service station. The interest in the house was given to defendant and that in the service station to plaintiff. There was no abuse of discretion in the disposition of this property. Barham v. Barham, 33 Cal.2d 416, 431, 202 P.2d 289.

[9–11] Finally, plaintiff contends that the court erred and abused its discretion in making its order requiring plaintiff to pay defendant's attorney $950 attorney's fees on appeal, to pay to the defendant $200 costs on appeal and in ordering plaintiff to pay defendant $65 per month for the support of the child. This contention is likewise without merit. An order for attorney's fees and costs may be made during the pendency of the action. Civ.Code, § 137.3. This power continues during the pendency of an appeal. Bruce v. Bruce, 160 Cal. 28, 116 P. 66. The circumstances of both parties as to financial resources and of plaintiff's ability to pay were before the court and the whole matter rested in its sound discretion. Wilder v. Wilder, 214 Cal. 783, 785, 7 P.2d 1032. Since no clear abuse of discretion was shown, the order of the trial court will not here be disturbed.

The judgment and orders are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

123 Cal.App.2d 51

DOYLE et al.

v.

HUNT CONST. CO., Inc.

Civ. 19788.

District Court of Appeal, Second District, Division 3, California.

Feb. 3, 1954.

As Amended on Denial of Rehearing March 1, 1954.

Hearing Denied March 31, 1954.

Petition by owners of house for order confirming award of arbitrators in dispute with contractor. The Superior Court, Los Angeles County, Ashburn, J., modified award and confirmed award as modified. Owners appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained finding that award embraced matters not submitted for arbitration and award was properly modified.

Judgment affirmed.

1. Contracts 🔑292½

Where court appointed arbitrator in dispute between contractor and home owner, under statute providing therefor, but made no findings, and there was no hearing and no determination as to what matters were in dispute, order appointing arbitrator was not determination that all matters complained of by owner should be arbitrated. Code Civ.Proc. § 1282.

2. Arbitration and Award 🔑72

In proceeding to confirm arbitration award in dispute between contractor and home owner, where no judicial determination was made as to what matters were in dispute, evidence sustained finding that arbitrators awarded upon matters previously settled by agreement and not submitted for arbitration. Code Civ.Proc. § 1282.

3. Arbitration and Award 🔑73

The fact that arbitration award embraced matters not submitted for arbitration is ground for modification of award. Code Civ.Proc. § 1289(b).

4. Arbitration and Award 🔑73

Where arbitrators of dispute between contractor and home owner made award upon matters previously settled by agreement between the parties, and no judicial determination had been made as to what matters were in dispute, award was properly modified to strike all items not submitted for arbitration. Code Civ.Proc. § 1282.

Preston D. Orem, Los Angeles, for appellants.

Marlan Proctor, Burbank, for respondent.

SHINN, Presiding Justice.

This is an appeal from a judgment modifying and confirming as modified an award of arbitrators appointed pursuant to the arbitration provisions of a contract under which Hunt Construction Company constructed a dwelling house for John R. Doyle and Fern Doyle.

The matter was heard upon the petition of Doyle for an order confirming the award and the motion of the construction company for an order vacating, modifying or correcting it. Two of the arbitrators signed the award, which listed 19 items, upon 7 of which sums were allowed the owners. The total amount awarded was $1,003.61. Item number 1 was for $319.98. The award was confirmed as to this item and it was modified by striking out all the other items, although as to 12 of them the claims of the owners were found to be unjustified.

The basis of the court's decision was that by agreement made, when construction work was practically completed, the parties had settled their dispute as to the work which was necessary in order to complete the job in a manner satisfactory to the owners, upon the basis of which agreements the court determined that there remained in controversy, and subject to arbitration, only said item number 1, which related to the finishing of work on a balcony. It was also found that the owners had paid the full contract price. The owners, Mr. and Mrs. Doyle, appeal from the judgment.

It is not contended on the appeal that there was insufficient evidence to justify the above-mentioned findings. We must therefore consider the points that are raised in light of the fact that at the time the arbitration was had there was but a single item of the work in controversy.

At the inception of the trial the court called attention to the fact that the parties had not followed the procedure prescribed by section 1282, Code of Civil Procedure, to obtain a judgment declaring the duties of the parties to go to arbitration and defining the matters to be submitted to the arbitrators for decision. The steps taken prior to the arbitration may be summarized as follows: The attorneys of the parties had been appointed as two of the arbitrators, and they were unable to agree on a third arbitrator; the agreement provided no other method for his selection. On March 14, 1952, the owners made a motion upon notice in the superior court for the appointment of a third arbitrator. The court made an order appointing a third arbitrator, stating in the order that he was to act with the others to arbitrate all controversies in accordance with the plans and specifications and the building contract. No findings were made by the court and there was no hearing and no determination as to the matters which were in dispute, nor as to the matters as to which either of the parties refused to go to arbitration. On May 23, 1952 the contractor, upon notice, moved the court for a summary trial and a limitation of the issues to be arbitrated. Without making any finding the court denied the motion, the effect of the order being to leave the subjects of the motion for future determination. Upon the hearing of the motion, no order was made except to place the motion off calendar. Thereafter the owners made up and submitted to the arbitrators a list of all items to be arbitrated, namely, the 19 items above mentioned. The contractor made written objection to the consideration of the items listed and submitted documents upon which its objection was based, namely, the written agreements of the parties. The objection was disregarded and two of the arbitrators, namely, the owners' attorney and the third member, proceeded to a hearing and made the award in question.

[1] In the hearing under review the owners took the position that a proceeding or an adjudication under section 1282 was not necessary, but they also contended that, if it was necessary, the order appointing a third arbitrator was a sufficient determination that all matters as to which the owner complained should be arbitrated. Both of these contentions were rejected by the trial court, and the attention of counsel was directed to the case of Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 182 P.2d 182, in support of the court's ruling that the order appointing the third arbitrator was made without a hearing as required by section 1282 and was not a determination as to what matters were in dispute and subject to arbitration.

The trial proceeded without objection upon the part of the owners to the introduction in evidence of the agreements of the parties. No objection was made upon the ground that there had been no compliance with the provisions of section 1282, nor was there any objection to the jurisdiction of the court. It appears to have been the position of the owners that the arbitrators were the sole judges as to the matters that should be arbitrated, and that the award was conclusive in all respects.

[2, 3] It is clear from the findings of the court that the arbitrators awarded upon matters which were not submitted to them. The fact that the award embraced matters not submitted to the arbitrators was a ground for modification of the award un-

der section 1289(b). The arbitrators proceeded to consider all the matters listed by the owners, without any determination by the court as to the matters which were subject to arbitration under the agreement, and without any agreement on the part of the contractor to submit to arbitration the matters as to which the award was subsequently modified by the court.

It was stipulated at the commencement of the trial that the issues to be tried were those which were presented by the petition of the owners for confirmation of the award and by motion of the contractor for annulment or modification.

[4] The appellants say: "The decision of the court is against law in that the court usurped the functions of the arbitrators by substituting the judgment of the court for that of the arbitrators in deciding questions of both law and fact." The reasons for this statement are obscure and it has no support in the record. It still appears to be the contention of appellants that arbitrators are the sole judges as to the matters that are subject to arbitration, and that if there is an agreement to arbitrate there is no occasion for any proceedings under section 1282. In making this contention they not only treat the section as meaningless legislation but they ignore entirely the finding that all but one item of the matters which had been in dispute had been adjusted by agreement of the parties. It has been held that a proceeding under section 1282 of the Code of Civil Procedure is in substance a suit in equity for specific performance of a contract to arbitrate. Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 347, 182 P.2d 182. This would be an idle proceeding if it did not have for one of its purposes an adjudication with respect to the scope of the arbitration to which the parties have agreed to submit their differences.

The issues determined by the trial court were within the jurisdiction of the court, they were submitted for determination under stipulations and without objection, the findings were within the issues, they stand unchallenged and they establish that in all instances, save one, the items of the award were upon matters not submitted for arbitration, or subject to arbitration under the agreement of the parties. There is no merit in the appeal.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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123 Cal.App.2d 55

PEOPLE v. NOCITA.

Cr. 5085.

District Court of Appeal, Second District,
Division 3, California.
Feb. 3, 1954.

Defendant was found guilty in the Superior Court of Los Angeles County, David Coleman, J., of bookmaking, and from an order granting probation and order denying his motion for new trial, he appealed. The District Court of Appeal, Vallée, J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Gaming 🔑73

Under statute providing that every person who engages in bookmaking is guilty of a public offense, one is engaged in "bookmaking" if he is occupied in, or employed in, the making of a book of bets. Pen.Code, § 337a, subd. 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Bookmaking".

2. Gaming 🔑98(3)

Evidence in prosecution for bookmaking warranted determination that defendant was guilty of making a book of bets on races and football games. Pen.Code, § 337a, subd. 1.

3. Criminal Law 🔑1036(1)

In absence of objection in criminal prosecution to admission of certain evidence, alleged error in the admission of such evidence cannot be considered on appeal.

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Joseph T. Forno, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Martin M. Ostrow, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant was found guilty of bookmaking. Proceedings were suspended and he was granted probation. No final judgment of conviction was rendered. An order granting probation is deemed to be a final judgment, and a defendant may appeal therefrom. Pen.Code, § 1237. Defendant appeals from the judgment and from the order denying his motion for a new trial. He contends the evidence is insufficient to support the finding that he was guilty and the court erred in the admission of evidence.

In the late afternoon of November 1, 1952, four police officers stationed themselves outside defendant's residence. They watched the premises for about twenty minutes and then two of them approached the front door. Through the window they observed defendant sitting at a table making notations on small, white cards. There were several white cards on the table. The officers knocked; defendant opened the door; and the officers identified themselves. When they did so, defendant left the front door, proceeded to the rear of the house, and the officers had "to use restraining force to keep him at the premises." The officers found these articles in the house: on the table, the National Daily Reporter for November 1, 1952, several small pieces of white cards with notations on them, two pieces of paper, each entitled "Nation's Football Forecasts," which corresponded to the lower half of the white cards, "a hand telephone number 6266," several pencils, and a ball point pen; in the kitchen in a circular tin can, two National Daily Reporters, one dated October 31, 1952, the other November 1, 1952, in each of which were "several professional type betting markers" with notations thereon and tally sheets attached; on the dining room table and in a bureau in the dining room, several pads of "professional type betting markers."

A betting marker usually shows the number or name of the horse bet on; the amount of money bet; whether for win, place, or show; the bettor's name or initials; and in many cases the name of the agent or bookmaker who received the bet. The betting markers in the National Daily Reporter of October 31, 1952, bore notations of that character on horses running that day, and those found in the National Daily Reporter of November 1, 1952, bore notations of that character on horses running on that day. An expert identified the National Daily Reporters as scratch sheets. In some instances the scratch sheets indicated whether a horse had won, placed, or showed. The expert testified that the marks were made by a person making book.

The Nation's Football Forecasts is comparable, with respect to football games, to the National Daily Reporter, as applied to horse races. It showed that about fifty-one football games were being played throughout the country on November 1, 1952. An expert testified that a bettor would place an "X" after the team he bet on; he could select three teams in three different games, and should the three win, he would be paid five for one; he could select any number of teams and bet one dollar. The markers, in evidence, were perforated, the upper and lower half bore the same number, the bettor had kept the upper half, the lower half was "retained by the bookmaker." The lower half bore the bettor's name, the teams selected, and the bet.

The pencil writing on the betting markers found in the National Daily Reporter of October 31, 1952, was that of defendant. An expert was unable to identify the writing on the betting markers in the National Daily Reporter of November 1, 1952, as that of defendant.

While the officers were in the house the telephone rang several times; one of them answered. He testified that a female voice was on the line, that she said: "'This is the Smoke Shop. Is Roland [defendant's given name] there?' I stated, 'No, Roland has gone out.' And she said, 'All right, I will call back.'" He testified that in the next call a female voice was on the line and this conversation took place: "'This is Cleo. Is Roland there?' and I stated no, that Roland had gone out, 'But I am taking the phone and everything is all right.' She stated, 'I just wanted the results of the races. I will call him back or he can call me.' She gave me a number; I have it as 29240. And I stated, 'All right,' and we hung up." He also testified that a male voice called and this conversation occurred: "'This is Charlie. How did I do today?' I stated, 'What on?' He stated, 'On the football bets.' I stated, 'Well, I think you won.' He stated, 'How about the action?' I stated, 'The horse action?' He said, 'Yes.' I stated, 'I think you won on that too,' and he stated, 'All right, I will talk to Roland,'—He asked for Roland, incidentally.—'when he comes in.' I told him he had gone out"; and that there were several other similar telephone calls.

Defendant told one of the officers that the pencil notations at the bottom of the betting markers and inside the National Daily Reporter for October 31, 1952, and on slips attached to the white cards, were in his handwriting; he was employed by a man named "Art" at a salary of $50 a week to total the bets; "Art" came by in the evening after five, left the cards, and returned the following day to pick them up after he (defendant) had totaled them; that he did not know who "Art" was.

Defendant testified he lived in the house which the officers entered. He met "Art" in a saloon in Compton. The National Daily Reporter of October 31, 1952, and its contents were left with him by "Art" the night prior to the visit of the officers. He did not see the National Daily Reporter of November 1, 1952, or its contents; that it must have been left that morning. In addition to being a relief bartender, he did semi-accounting work. He had several accounts. He did not know "Art's" last name. He made the arrangements to do the work the last week in October. The night before he was arrested was the first time "Art" had left anything. He tabulated the night prior to his arrest and could see that the figures were bets on horse races and football games. He "had known that he [Art] was a bookie, from coming into the place, and I didn't believe there was any harm in tabulating sheets." There are no recordations of bets in his handwriting on the material found by the officers. The tabulations were the only things he made. The Racing Form belonged to himself or his wife. When "Art" delivered the material the morning the officers visited him, he (Art) told him he was going to be gone for the week end, that he would be back Sunday evening or Monday morning to pick up his tickets and that he had left his (defendant's) telephone number with people to call up "to find out as to how their figures were for the day." In addition to doing the totaling he had to know "who was winning what and who was paying what." He did not try to run away when the officers came.

[1, 2] Penal Code section 337a, subdivision 1, provides that every person who engages in bookmaking is guilty of a public offense. Bookmaking is the making of a book of bets. To engage in is to be occupied in, to be employed in. People v. Coppla, 100 Cal.App.2d 766, 768, 224 P.2d 828. Without analysis of the evidence we have related, it is enough to say that there was substantial evidence to support the conclusion that defendant was engaged in making a book of bets on horse races and football games. Cf. People v. Cohen, 107 Cal.App.2d 334, 237 P.2d 301.

Defendant's testimony alone is sufficient to support the finding of guilt. He admitted he knew "Art" was a "bookie," that the material he used in his computations were records of bets; but he thought that there would be no harm in tabulating the sheets. On this testimony, he aided and abetted "Art" in the making of books on horse races and football games. All persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission, are prinicipals in the crime so committed and are punishable as such. Pen.Code, §§ 31, 971.

Insofar as the question whether the evidence is sufficient to support the finding of guilty of bookmaking is concerned, People v. Coppla, 100 Cal.App.2d 766, 224 P.2d 828, relied on by defendant, is not analogous. In Coppla the defendant had a number of sealed envelopes with betting markers in them. It was held there was no evidence that the defendant knew the contents of the envelopes or that he was aiding and abetting a bookmaker.

[3] Defendant asserts the court erred in admitting the testimony of the officer as to the telephone conversations. His counsel did not object to the testimony, hence the point may not be considered. People v. Ines, 90 Cal.App.2d 495, 500, 203 P.2d 540. Even without the testimony as to the telephone conversations, the evidence is sufficient to support the finding of bookmaking.

The judgment and order appealed from are affirmed.

SHINN, P. J., and WOOD, J., concur.

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123 Cal.App.2d 7

PEOPLE v. LAYA.

Cr. 2486.

District Court of Appeal,
Third District, California.
Feb. 2, 1954.

Defendant was convicted of first degree murder, assault with a deadly weapon with intent to commit murder, and assault with a deadly weapon. The Superior Court of Sacramento County, Bedeau, J., entered judgment, and defendant appealed. The District Court of Appeal, Paulsen, J. pro tem., held that evidence sustained convictions.

Affirmed.

1. Homicide 🔑253(1)

Evidence sustained first degree murder conviction.

2. Homicide 🔑257(1)

Evidence sustained conviction for assault with a deadly weapon with intent to commit murder.

3. Homicide 🔑18(3)

If defendant entered house of others with intention of assaulting girl therein, he was guilty of burglary, and killing of girl's father would constitute first degree murder under statute providing that all murder committed in perpetration or attempt to perpetrate burglary is first degree murder. Pen.Code, §§ 189, 459.

4. Homicide 🔑18(1)

If defendant went to house of girl and advised and encouraged girl to kill him, he was guilty of a felony, and killing of girl's father by defendant would constitute first degree murder. Pen.Code, § 31.

5. Assault and Battery 🔑92

Evidence sustained conviction for assault with a deadly weapon.

6. Assault and Battery 🔑56

Specific intent is not necessary for a conviction for assault with a deadly weapon.

7. Assault and Battery 🔑56

A battery or a wounding constitutes no part of offense of "assault with a deadly weapon," and mere pointing of a gun at a victim constitutes an "assault with a deadly weapon," whether or not it is fired at all.

See publication Words and Phrases, for other judicial constructions and definitions of "Assault With a Deadly Weapon".

8. Criminal Law 🔑1171(1)

Where defendant, while testifying, attempted repeatedly, when answering questions, to make unresponsive statements and to discuss the reason for his actions and state of his feelings, action of district attorney in attempting to prevent defendant from making unresponsive statements before an objection could be made was not prejudicial error.

9. Assault and Battery ⟹96(8)
Criminal Law ⟹1186(4)
Homicide ⟹290

In prosecution for first degree murder, assault with a deadly weapon with intent to commit murder, and assault with a deadly weapon, wherein defendant admitted ownership of pistol and shooting in each instance, instruction that a deadly weapon is any object, instrument, or weapon which, if used in manner in which it appears to have been used, is capable of producing, and is likely to produce, death or grave bodily injury, was not erroneous, and giving of such instruction did not result in miscarriage of justice. Const. art. 6, § 4½.

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Robert R. Harlan, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Gail A. Strader, Deputy Atty. Gen., for respondent.

PAULSEN, Judge pro tem.

Appellant was charged by indictment with the murder of John Camalig and with two counts of assault with a deadly weapon with intent to commit murder. He interposed pleas of not guilty to each count, but was found guilty of murder of the first degree and of an assault upon Suzie Camalig with a deadly weapon with intent to commit murder and of the lesser offense of an assault upon Mary Camalig with a deadly weapon. The jury fixed the punishment on the count of murder at life imprisonment. After denial of appellant's motion for a new trial, judgment was pronounced and he was sentenced to life imprisonment in San Quentin as the penalty for the murder of which he was convicted and to serve the terms prescribed by law for assault with a deadly weapon and for assault with a deadly weapon with intent to commit murder.

Appellant urges that the evidence was insufficient to sustain a conviction of: 1. Murder in the first degree, or, 2. Assault with a deadly weapon upon Suzie Camalig with intent to commit murder, or, 3. Any assault upon Mary Camalig. He complains of misconduct upon the part of the district attorney and declares that the court was in error in the giving of two instructions requested by the People.

The appellant is a Filipino of about 40 years of age. He met the Camalig family in the late spring of 1951 and fell in love with their 16-year old daughter Suzie. Appellant was then in the merchant marine and he and Suzie corresponded until his return to Sacramento in June, 1952. During that time he sent Suzie and her family presents from various parts of the world. He also gave Suzie two certificates evidencing the fact that he had crossed the Equator and the Arctic Circle. These certificates were highly valued by the appellant and he testified that he felt that if Suzie kept them it would mean she was going to accept his proposal of marriage, but that if she returned them it would indicate her rejection of his suit.

Early in the evening of January 18, 1953, appellant called at the Camalig family residence and visited with Suzie and her parents, particularly with her deceased father, John Camalig. Appellant displayed no animosity toward any one at that time and it appeared that he was merely making his usual social call. The evidence makes it clear, however, that both Suzie and the members of her family were opposed to the continuance of the courtship, and appellant was well aware of their attitude. He testified that in order to determine what Suzie's feelings were toward him, he asked her that evening for the return of his certificates and that she professed to have lost them or to be unable to find them. Notwithstanding the fact that appellant was in the living room, Suzie excused herself and went to bed about eight o'clock, leaving him with the father and mother. Shortly thereafter Mrs. Camalig retired and appellant visited with the father until about 9 p. m.

Appellant then left the house and, according to the testimony of Mrs. Camalig, Mr. Camalig went to bed and the house was in darkness. There were three bedrooms in the house, each with a door opening upon the living room and Suzie occupied a bedroom adjoining that of her father and mother.

After leaving the Camalig home appellant went to a movie but remained only a short time as he felt "restless" and was upset at his failure to get Suzie to commit herself definitely. About 11 o'clock that night he returned to the Camalig neighborhood, but instead of driving to the house, as he had done earlier in the evening, he parked the car about 1,000 feet from the Camalig house. Appellant admits that before he left the car he wrote the following note:

> "18 January 1953.
>
> "To All Concerned:
>
> "Whatever else happens is of mutual understanding between Susie and me. It is also a lesson for parents not to play the trade of suckers. Had it not been for the ill will and wilful disregard of Susie's father, Apo Segundo Camalig, the essence of sacred matrimony must have been realized or materialized. This is the best which Susie and I could possibly do."
>
> Signed: "Leo and Susie."

That morning appellant had removed a Mauser automatic pistol from a trunk in which he had kept it for many years and placed it in his car. After writing the note, appellant took the gun and a flashlight and proceeded on foot to the Camalig home.

There is a sharp conflict in the evidence as to the manner in which the crimes were committed. Appellant testified that because of Suzie's attitude toward him and his belief that she would not marry him he determined to visit her and give her an opportunity to shoot him. He stated that on at least one prior occasion she had said that she might shoot him some time. He further stated that he wrote the note with that thought in mind and placed it in his pocket so that it would be found after his death as he did not expect to live any longer. Appellant testified that when he entered the house a light was on in the living room; that John Camalig was in the room partially dressed; that he requested John's permission to talk to Suzie; that after a short argument John struck him upon the head and the shots were fired while John was advancing upon him; that he did not know Suzie had been hit until he heard her call out that she had been shot.

There was abundant evidence to support the implied finding of the jury that the defendant's story was false in most particulars; that all members of the family were in bed and that the house was in total darkness as he stealthily approached it. Suzie testified that she was sound asleep and was awakened by the beams of a flashlight; that she jumped out of bed and saw a man propping open her bedroom door. She recognized the appellant at the time and "screamed" to her father to come; that, without saying a word, and while only three feet away, appellant shot her in the abdomen; that immediately after the shot was fired she heard her father "screaming" from the living room and appellant turned and started toward her father. Suzie lay down on the bed and heard a brief scuffle and three shots fired in the living room.

Mrs. Camalig testified that she was awakened by the sound of shots and a struggle in the living room. She got out of bed, turned on the lights and went out into the living room where she observed appellant on the front porch and her husband near the door of the front porch. Appellant was holding a gun in his hand which he raised and pointed at her and she heard it click twice, but the gun failed to fire. Appellant then went out the screen door of the porch and John Camalig fell to the floor. Mrs. Camalig helped her husband back into the living room and into a chair. She then ran out the back door, awakened her son and Felipe Pascual, a boarder and then ran back to the house and to her husband. At this time appellant returned by way of the front door. Mrs. Camalig faced him and kept backing up while appellant advanced into Suzie's room until the two reached the middle of the bedroom and just as appellant started to raise the pistol from his side Mrs. Camalig and Felipe seized him and during the struggle Mrs. Camalig was shot and slightly wounded. She and Felipe succeeded in taking the gun away from him and subduing him. At this time it was noticed that appellant was in his stocking feet.

Sheriff's officers were called and appellant was placed under arrest. The injured persons were removed to the hospital where John Camalig died the next day. The autopsy showed that he had been shot three times, once in the right forearm and twice in the back.

The questions as to whether the evidence was sufficient to establish an intent to murder Suzie and whether there was premeditation and deliberation in the killing of John are so closely related that the two may be considered together. It seems clear that appellant realized in the early morning of the day of the killing that matters were coming to a head at the Camalig home when he removed his gun from the trunk and put it into his car. His own testimony shows that he was dissatisfied with the actions of Suzie and that he had a slight argument with John Camalig before leaving the house that night. There was abundant evidence to indicate that the day was devoted to planning and to consideration of his problem. The use of the flashlight, the removal of his shoes and the manner of his approach to the house, all have a strong tendency to show a determination to kill and premeditation in determining the plan of his attacks. It is contended that the note is too vague to afford any definite indication of his intentions; but with this we cannot agree. Appellant's statement that he wanted it to be found on him after Suzie shot him was not binding upon the jury. The first and last sentences of the note and the fact that it was purportedly signed by appellant and Suzie, although she could not possibly have signed it, suggest strongly that appellant planned to kill both Suzie and himself and that he hoped the note would lead those who found the bodies to the conclusion that there had been a suicide pact. The remainder of the note evidences a strong conviction upon the part of appellant that the parents and particularly Suzie's father, were responsible for the failure of his marriage plans. The further fact that appellant said nothing when Suzie jumped out of bed and immediately shot her negatives the idea that he intended to give her the chance to kill him.

It is argued that if appellant had intended to kill either Suzie or her father he would not have stopped shooting after wounding them. The jury could well have concluded that he would have finished the killing in each case if he had not been interrupted and prevented from doing so. After he wounded Suzie he was interrupted by the arrival of her father in the room behind him. Immediately after firing three shots and seriously wounding John Camalig he was interrupted by Mrs. Camalig and he could well have believed that Suzie and John were both fatally wounded, especially after he saw John drop to the floor of the porch. Further, the jury was entitled to consider the fact that he reentered the house and with his gun still in his hand advanced to Suzie's room with her mother retreating before him and was only prevented from doing further harm by the fact that he was subdued.

> "Generally the determination of the degree of the crime is left to the discretion of the jury." People v. Tubby, 34 Cal.2d 72, 76, 207 P.2d 51, 54.

It was stated in People v. Daugherty, 40 Cal.2d 876, 884, 256 P.2d 911, 915:

> "* * * the rule that where evidence is open to two equally reasonable constructions, one of which points to the guilt of defendant of a higher degree of crime, and the other to his guilt of a lesser degree, the court must adopt the theory pointing to guilt of the lesser degree, is not a correct statement of law when applied to the consideration of a case by an appellate court. That rule applies to the trier of fact only, be it jury or trial court, the same as does section 1096 which deals with reasonable doubt. * * *"

And the appellate court may not:

> "reduce the degree of the crime unless the evidence is legally insufficient to support the higher degree of which defendant was convicted, and in determining that question, the evidence, even if circumstantial, is not weighed."

In People v. Holt, 25 Cal.2d 59, 70, 153 P.2d 21, 28, it was stated:

> "The function of the jury was to appraise the weight of the evidence; ours is to appraise its legal adequacy; * * *."

[1, 2] The circumstances narrated clearly indicate that appellant, prior to entering the house in the commission of the murder and assault, must have deliberated, thought over and considered his actions. The existence of these elements make the offense murder in the first degree. People v. Gilliam, 39 Cal.2d 235, 246 P.2d 31; People v. Isby, 30 Cal.2d 879, 186 P.2d 405. We are satisfied that the evidence is legally sufficient to support the findings of deliberation and premeditation in the murder case and of an intent to kill in the assault upon Suzie.

Appellant has cited a number of cases in which the Supreme Court has reduced judgments of murder in the first degree to murder in the second degree, but the facts in those cases are so dissimilar to the facts in the instant case that it is not necessary to discuss them or to distinguish them.

There is still another ground upon which the conviction of first degree murder must be sustained. Section 189 of the Penal Code provides in part:

> "All murder * * * which is committed in the perpetration or attempt to perpetrate * * * burglary * * * is murder of the first degree * * *."

The statute defining burglary provides in part as follows:

> "Every person who enters any house * * * with intent to commit grand or petit larceny *or any felony* is guilty of burglary." Pen.Code, § 459. (Emphasis added.)

[3, 4] The facts in the instant case, as outlined above, show that appellant entered the house with intent to commit a felony and that he did, in fact, commit a felony consisting of assault with a deadly weapon upon Suzie Camalig. There was ample evidence, if the jury believed that appellant entered with the idea of assaulting Suzie, to support a finding of burglary on that ground, People v. Miller, 121 Cal. 343, 53 P. 816 or, if it accepted appellant's story that he intended to persuade Suzie to kill him, that in itself would have justified the same finding. "Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony." Penal Code, § 401. And it is equally clear that if he had advised and encouraged Suzie to kill him he would have been guilty of a felony in so doing. Penal Code, § 31.

[5] The contention that the evidence was insufficient to support the conviction of assault with a deadly weapon against Mrs. Camalig as charged in count II of the indictment is also without merit. The basis of this argument is that Mrs. Camalig was shot during a struggle between herself and the appellant.

Mrs. Camalig testified that when the appellant first came into the room his hands were down at his sides and that she did not notice the gun, but that he then raised the gun as if to point it and it was at this time she attempted to take it from him. A few minutes previously appellant had pointed the gun at her and attempted to fire it twice.

Appellant states that Mrs. Camalig was shot when she grabbed the gun. Mrs. Camalig did not so testify. Her testimony on this point is that she grabbed him and that during the ensuing struggle the gun went off.

[6] Specific intent is not necessary for a conviction of the crime of assault with a deadly weapon. People v. Griffin, 90 Cal.App.2d 116, 202 P.2d 573; People v. Mendez, 67 Cal.App. 724, 228 P. 349; People v. Lim Dum Dong, 26 Cal.App.2d 135, 78 P.2d 1026; People v. Walker, 99 Cal.App.2d 238, 221 P.2d 287.

[7] The assault with a deadly weapon had been completed in this case prior to the firing of the shot which struck Mrs. Camalig. A battery or a wounding constitutes no part of the statutory offense of assault with a deadly weapon. The mere pointing of a gun at a victim constitutes an assault with a deadly weapon, whether or not it is fired at all. People v. Thompson, 93 Cal.App.2d 780, 209 P.2d 819, and cases therein cited.

[8] Appellant points out three instances in which he contends the district attorney

committed reversible error by making statements in the presence of the jury which tended to prejudice him. In the first of these the district attorney stated in making an objection that the evidence being elicited by the defense was self-serving and immaterial and was being produced merely for the purpose of creating sympathy. The trial court sustained an objection and instructed the jury to disregard the statement. Later, the district attorney, in making an objection on the ground that the defendant's answer was not responsive to the question, stated that the witness was injecting something not responsive to the question and further said "he just keeps jamming in something that doesn't have anything to do with the question." An objection was again sustained, the remark stricken and the jury properly admonished. Again during the cross-examination of defendant with respect to his testimony that it was his intention to give the gun to Suzie Camalig and ask her to shoot him, the district attorney asked, "Why couldn't you have done that job yourself if you wanted that done?" An objection to this was sustained. An examination of the record shows that the defendant while testifying attempted repeatedly, when answering questions, to make unresponsive statements and to discuss the reason for his actions and the state of his feelings at the time. Considered in their context, it is clear that the district attorney was trying to prevent him from making such unresponsive statements before an objection could be made. The conduct was of such a trivial nature that in view of the court's prompt action it could not have been prejudicial under the circumstances of the case.

Complaint is made to the effect that the giving of "Instruction No. 20" was error because it did not tell the jury that they should return a verdict of a lesser offense "if a reasonable doubt exists as to whether a specific preconceived intent to kill existed." The appellant does not refer to the transcript to identify the instruction and we have been unable to do so. In any event, the court fully instructed on the subject of burden of proof beyond a reasonable doubt and the subject matter was properly covered.

Finally, it is argued that the giving of Instruction No. 18 was erroneous. The basis of this contention is that certain language of the instruction implies that as a matter of fact an assault with a deadly weapon did take place. The instruction reads:

> "A deadly weapon is any object, instrument or weapon which, *if* used in the manner in which it appears to have been used, is capable of producing, and is likely to produce, death or great bodily injury." (Emphasis added.)

Appellant's position is that the phrase "which, if used in the manner in which it appears to have been used," suggests that the appellant used the weapon in a particular manner.

[9] This instruction, without the word "if" was given in People v. Simpson, 87 Cal.App.2d 359, 196 P.2d 933, and People v. Butler, 118 Cal.App.2d 15, 16, 257 P.2d 109, and in those cases was held to be erroneous because there was a sharp conflict in the evidence concerning the use of the weapons at all. In this case appellant admitted the ownership of the pistol and the shooting in each instance, his only contention being on this appeal that when Mrs. Camalig was shot it resulted accidentally and during the struggle for its possession. In order to remove any uncertainty the court inserted the word "if" so that the jury could not misconstrue it. In our opinion, it was not erroneous as given in this case. In any event, in view of all the circumstances, we are constrained to hold that, under Section 4½ of Article VI of the Constitution, the giving of the instruction did not result in a miscarriage of justice.

The judgment and the order are affirmed.

SCHOTTKY and PEEK, JJ., concur.

123 Cal.App.2d 18

RUBINO et al.

v.

UTAH CANNING CO. et al.

Civ. 15646.

District Court of Appeal, First District, Division 1, California.

Feb. 3, 1954.

Consumers of peas brought action against wholesaler to recover for injury caused because of alleged unfitness of peas for human consumption. The Superior Court of the State of California in and for the City and County of San Francisco, Melvyn I. Cronin, J., entered judgment dismissing the amended complaint, and the consumers appealed. The District Court of Appeal, Finley, J. pro tem., held that statutory provision requiring that action for injury to or for death of one caused by wrongful act or neglect of another be brought within one year was applicable rather than statutory provision that action be brought on contract, obligation, or liability not founded on an instrument of writing within two years.

Judgment affirmed.

1. Sales ⚷66

Ordinarily, there is no privity of contract between a processor of foods for human consumption and ultimate consumer thereof.

2. Sales ⚷274

The liability of the processor of foods for human consumption to the consumer is founded on an implied warranty of fitness of food for that purpose. Civ.Code, § 1735.

3. Death ⚷38

Limitation of Actions ⚷31

The legislative intent behind statutory provision that action for injury to or for death of one caused by wrongful act or neglect of another, must be brought within one year, was not to restrict its coverage to tort actions independent of any contractual relation, but to provide a limitation of one year where personal injury or death results, regardless of the tort, contract, or breach of express or implied warranty aspect of the case. Code Civ.Proc. § 340, subd. 3.

4. Limitation of Actions ⚷31

Statutory provision that action for injury to or for death of one caused by wrongful act or neglect of another must be brought within one year, rather than statutory provision that action may be brought on contract, obligation, or liability, not founded on an instrument of writing, within two years, was applicable to action against wholesaler of peas by consumers to recover for injury caused because of alleged unfitness of peas for human consumption, even though action be considered one for breach of implied contract of warranty. Code Civ.Proc. § 339, subd. 1; § 340, subd. 3; Civ.Code, § 1735.

5. Limitation of Actions ⚷95(1)

In action against wholesaler of peas by consumers to recover for injury caused because of alleged unfitness of peas for human consumption, one year statute of limitation began to run from date that consumers became ill because of eating the peas and not from date when consumers determined the cause of the illness. Code Civ.Proc. § 340, subd. 3.

◆

Ferrari & Ferrari, San Francisco, for appellants.

Bronson, Bronson & McKinnon, San Francisco, for respondent.

FINLEY, Justice pro tem.

This is an appeal by plaintiffs from a judgment dismissing their amended complaint following the sustaining of a demurrer thereto after which plaintiffs failed to amend.

The question presented is whether the action is barred by a statute of limitations.

Plaintiffs, husband and wife, allege in their amended complaint that on October 2, 1950, they ate some Del Mesa brand peas at the home of a niece; that these peas were canned by the Utah Canning Company, distributed by respondent Louis

T. Snow & Co., and purchased from First Doe Grocery Store; that at the time of said purchase defendants and each of them had impliedly warranted that said peas were a food fit for human consumption; that unknown to plaintiffs they were not so fit and that after having eaten some of the peas plaintiffs became violently ill; that immediately following the "appearance of the symptoms hereinabove described," plaintiffs "made diligent investigation to determine the cause of said symptoms but were unable to do so until on or about the first day of February, 1952 * * *."

The original complaint was filed on February 27, 1952. A demurrer was sustained to it and the amended complaint filed on June 23, 1952. Demurrer was again interposed, urging among other grounds the bar of the one year statute of limitations, subdivision 3, section 340, Code of Civil Procedure. This demurrer was also sustained with leave to amend, but plaintiffs failed to do so. Judgment followed in favor of Louis T. Snow & Co., the only defendant appearing, and apparently the only one served.

Appellants contend that the cause of action here is one for breach of implied warranty, which sounds in contract, and therefore comes within the purview of subdivision 1, section 339, Code of Civil Procedure, the two year limitation statute. They also contend that the statute started to run not from the date of injury but from the date of discovery of the cause of injury.

Respondent urges that an action for personal injuries, even though couched in terms of breach of warranty, is one in tort and is barred by the provisions of subdivision 3, section 340, Code of Civil Procedure, the one year statute, and also that in an action for personal injuries resulting from the wrongful act of another, the statute of limitations runs from the time the wrong was committed and not from the time of discovery of the cause of injury.

The answer to the question as to which statute of limitations governs must be found in an analysis of the two sections of the Code of Civil Procedure above referred to. Are these sections mutually exclusive; are they mutually inclusive, at least in part, or does one lay down a more general rule which may include causes specifically enumerated in the other without the converse being true? In other words, is one general while the other is more specific but included in the general?

Subdivision 1, section 339, Code of Civil Procedure, so far as applicable here, provides a two year limitation within which an action may be brought "upon a contract, obligation or liability not founded upon an instrument of writing * * *."

[1, 2] There is ordinarily no privity of contract between a processor of foods for human consumption and the ultimate consumer thereof. The liability of the processor to the consumer is founded upon an implied warranty of fitness of the food for that purpose. Civ.Code, § 1735; Vaccarezza v. Sanguinetti, 71 Cal.App.2d 687, 163 P.2d 470; Klein v. Duchess Sandwich Co., Ltd., 14 Cal.2d 272, 93 P.2d 799; Dryden v. Continental Baking Co., 11 Cal.2d 33, 77 P.2d 833.

An implied warranty, one imposed by law, is obviously "* * * a contract, obligation or liability not founded upon an instrument of writing * * *." Were we to go no further it would seem apparent then that subdivision 1, section 339, Code of Civil Procedure, would govern and that any action predicated upon a *liability* for violation of an implied warranty must be brought within the two year limitation. It will be noted, however, that the language of the section above quoted is quite general. There is no indication that the "obligation or liability" referred to *must* depend in any degree upon an oral or implied contract or that personal rights or injuries as well as property rights could not be the basis for the "obligation or liability." Further, there is nothing to indicate a legislative intent that that section *must* apply to all cases falling within its purview to the exclusion of a shorter limitation period applying to a restricted but included classification.

Section 340 of the Code of Civil Procedure provides a one year limitation within which actions based upon the causes enumerated must be brought. At the time this action was commended subdivision 3 of that section read, in part, as follows: "An action * * * for injury to or for the death of one caused by the *wrongful act* or neglect of another, or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized endorsement". (Emphasis added.)

There is no provision in this subdivision which would fall without the scope of the language of subdivision 1 of section 339 of the Code of Civil Procedure. The words "contract," "obligation" or "liability" used in the latter about cover the field. The only qualification is that they cannot be founded upon an instrument of writing. An action for "injury to or for the death of one caused by the wrongful act or neglect of another," whether the wrongful act be the breach of an implied contract or obligation or liability or whether it be based upon neglect to perform an obligation implied or imposed by law, would still be in violation of a "contract, obligation or liability not founded upon an instrument of writing". On the other hand, there could be many violations of a contract, obligation or liability not founded upon an instrument of writing which would not result in "injury to or for the death of one caused by the wrongful act or neglect of another". Therefore we see that all violations of subdivision 3 of section 340, Code of Civil Procedure, would fall within the more general provisions of subdivision 1, section 339, Code of Civil Procedure, but that not all of the possible liabilities arising under subdivision 1 of this section would also fall within the provisions of subdivision 3 of section 340, Code of Civil Procedure. Subdivision 3 of section 340, Code of Civil Procedure, is obviously, therefore, the more specific and subdivision 1 of section 339, Code of Civil Procedure, the more general of the two.

In this action plaintiffs claim *injury* caused by *acts* of defendants in canning, distributing and selling peas unfit for human consumption. It is not alleged in the complaint in so many words that these acts were *wrongful,* but if they were not wrongful in contemplation of law, either as a breach of contract is wrongful or the commission of a tort is wrongful, then they must be rightful. If they are not considered in law to be wrongful, then plaintiffs would have no cause of action.

In 2 Bouv.Law Dict., Rawle's Third Revision, p. 3500 "wrong" is defined as "An injury; a tort; a violation of right. * * * In its most usual sense, wrong signifies an injury committed to the person or property of another, or to his relative rights unconnected with contract; and these wrongs are committed with or without force. But in a more extended signification, wrong includes the violation of a contract; a failure by a man to perform his undertaking or promise is a wrong or injury to him to whom it was made; 3 Bla.Com. 158."

In order for a cause of action against respondent to have arisen, the injury to appellants must have been caused by the *wrongful act* or *neglect* of respondent, and whether considered wrongful as a breach of implied contract of warranty, or wrongful as an indirect assault upon the persons of plaintiffs, the cause would still fall within the language of subdivision 3 of section 340 of the Code of Civil Procedure.

As further evidence that the Legislature did not intend to exclude causes of action founded upon implied contract or warranty from the one year limitation effected by section 340 of the Code of Civil Procedure it will be remembered that subdivision 3 thereof specifically covers actions by "a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized endorsement". The relationship between a bank and its depositors is that of debtor and creditor. Glassell Dev. Co. v. Citizens' Nat. Bk., 191 Cal. 375, 216 P. 1012, 28 A.L.R. 1427; Union Tool Co. v. Farmers' etc. Nat. Bk., 192 Cal. 40, 218 P. 424, 28 A.L.R. 1417; Basch v. Bank of

America, 22 Cal.2d 316, 139 P.2d 1. The debtor and creditor relationship, whether express or implied, is certainly contractual in nature. The case of Allen v. Bank of America, 58 Cal.App.2d 124, 136 P.2d 345, specifically holds that the relation between banker and depositor is founded on contract, and it is common knowledge that most of the reciprocal rights and duties between them are implied or supplied by law.

When we stop to consider that an action by a depositor against a bank for the payment of a forged or raised check or an action on account of a check that bears a forged or unauthorized endorsement is brought under the one year statute by inclusion in the same sentence of the same subdivision, to wit, subdivision 3 of section 340, Code of Civil Procedure, as is an action for injury to or for the death of one caused by the wrongful act or neglect of another, it becomes obvious that the language of the section does not exclude relationships based upon implied contract or warranty.

In the absence of an express agreement, there is an implied agreement or warranty on the part of a bank that it will not pay out the depositor's money on a "forged or raised check" or a "forged or unauthorized endorsement". It has been held, however, that while in a sense injury stemming from a violation of the banker-depositor relationship arises from contract, it is nevertheless viewed in another sense, independent of contract, and sounds in tort involving an element of wrong or a violation of duty. Siminoff v. Jas. H. Goodman & Co. Bank, 18 Cal.App. 5, 121 P. 939; Reeves v. First Nat. Bank, 20 Cal.App. 508, 129 P. 800.

In the unfit food cases involving personal injury the reasoning is similar to that in the banker-depositor cases holding that actions brought for violation of such an implied agreement *may* be ex delicto. In Gosling v. Nichols, 59 Cal.App.2d 442, 139 P.2d 86, 87, the court said: "The gravamen of a cause of action for breach of an implied warranty that food is fit for human consumption is the personal injury which results, and the action 'sounds in tort.' The cause of action is not ex contractu." See, also, Singley v. Bigelow, 108 Cal.App. 436, 291 P. 899; De Mirjian v. Ideal Heating Corp., 91 Cal.App.2d 905, 206 P.2d 20; Jones v. Kelly, 208 Cal. 251, 280 P. 942; Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436 (concurring opinion of Justice Traynor); Speer v. Brown, 26 Cal.App.2d 283, 79 P.2d 179.

In the leading case of Basler v. Sacramento etc. Ry. Co., 166 Cal. 33, 134 P. 993, 994, however, which was an action for injuries sustained while riding on a streetcar, we find this language: "The demurrer was properly sustained for the reason that the cause of action, as pleaded, was one arising *ex delicto;* but even if we should regard it as arising *upon contract,* nevertheless the damages sought are directly referable to the *personal injuries* suffered by Mrs. Basler, and consequently the time for the commencement of the action is limited by the terms of subdivision 3 of section 340 of the Code of Civil Procedure." (Emphasis added.) This language was quoted with approval in Marty v. Somers, 35 Cal.App. 182, 169 P. 411, 412, a malpractice case wherein appellant claimed an express undertaking by the physician " 'to cure him of bladder trouble' ". The treatment left him in worse condition than before. In deciding that subdivision 3, section 340, Code of Civil Procedure, applied, the court said, 35 Cal.App. at page 183, 169 P. at page 412: "In support of the appeal it is urged quite earnestly that the action is one for breach of contract to effect a cure; but it appears quite plain to us, from a consideration of the allegations of the complaint above recited, that the action sounds in tort, and is for the recovery of damages for the defendant's wrongful act or neglect, thus bringing it within the operation of the section of the Code referred to."

From this language it may appear that the court intended to imply that the action must be ex delicto before subdivision 3, section 340, Code of Civil Procedure, would apply. Following the language just quoted, however, the court goes on to say: "We think this case is disposed of by what is said in Basler v. Sacramento etc., Co., 166 Cal. 33, 134 P. 993 * * *." The court then goes on to set forth the same quotation from the Basler case as appears hereinabove, thus indicating that the decision would be the same even though considered as arising from contract. In Harding v. Liberty Hospital Corp., 177 Cal. 520, at page 524, 171 P. 98, at page 100, the court states: "Notwithstanding the conflict of authority from other jurisdictions, we are satisfied that it has become the settled rule in California that actions for injuries caused by the negligent acts of another or his agent must be commenced within the period of one year from the date of the alleged injury, and that the fact that the parties stand in contractual relation to each other does not operate to change the rule or extend the time for the commencement of such actions."

In principle we can see no difference whatsoever between Marty v. Somers, supra, 35 Cal.App. 182, 169 P. 411, and the case of Crawford v. Duncan, 61 Cal.App. 647, 215 P. 573, 574, which was an action against a physician to recover damages resulting from the breach of an express *oral* contract whereby he warranted that his radium treatment of plaintiff would not leave a permanent scar. The result was a scar which was large and disfiguring. Without setting forth the supporting reasoning or citing authority the court said: "This is not an action of tort; that is, it is not an action for malpractice based upon negligence. It is an action for the breach of an alleged oral agreement whereby defendant warranted that his radium treatments would not leave a permanent scar. It is subdivision 1 of section 339 of the Code of Civil Procedure, therefore, and not subdivision 3 of section 340 of that Code, which is applicable; and the statute of limitations did not run until the expiration of two years from the time when plaintiff's cause of action accrued."

It would be difficult also to point out an essential difference between the Crawford case and Hall v. Steele, 193 Cal. 602, 226 P. 854, 855. In the latter a surgeon and dermatologist expressly represented to the patient that by plastic surgery he could alter the shape of her lower lip in a manner outlined. The result was not according to the specifications, and the patient brought suit. The court held that the action was one sounding in tort and that "the sole actionable issue * * * [was] whether or not the operation was skillfully or unskillfully performed."

We do not see how the decision in Crawford v. Duncan, supra, 61 Cal.App. 647, 215 P. 573, can be reconciled with the decisions in Marty v. Somers, supra, 35 Cal.App. 182, 169 P. 411, an earlier District Court of Appeal case, or Hall v. Steele, supra, 183 Cal. 602, 226 P. 854, a later Supreme Court case, or with such cases as Harding v. Liberty Hospital Corp., supra, 177 Cal. 520, 171 P. 98; Kelsey v. Tracy, 42 Cal.App. 409, 183 P. 668; Wetzel v. Pius, 78 Cal.App. 104, 248 P. 288; Kershaw v. Tilbury, 214 Cal. 679, 8 P.2d 109; Huysman v. Kirsch, 6 Cal.2d 302, 57 P.2d 908.

It is true that in Hall v. Steele, supra, 193 Cal. 602, 226 P. 854, the court indicated a different rule *might* apply in the case of a naturopath or "beauty doctor," than would apply in the case of regular medical physicians and surgeons where such a practitioner undertook to remedy a deformity or defect and produced another and perhaps more objectionable deformity. But the point was not involved there and was not decided. The defendant in Crawford v. Duncan, supra, 61 Cal.App. 647, 215 P. 573, *was* a physician.

Aside from the Crawford v. Duncan case we are aware of no other decision in this state wherein subdivision 1, section 339, Code of Civil Procedure, was held to apply to actions involving either implied or express oral warranties where personal injuries were involved. We therefore feel that the decision in that case is contrary to the weight of authority in holding that the governing statute of limitations was subdivision 1, section 339, Code of Civil Procedure, rather than subdivision 3, section 340, Code of Civil Procedure. Harding v. Liberty Hospital Corp., supra, 177 Cal. 520, 171 P. 98.

[3, 4] It seems apparent that the legislative intent behind subdivision 3, section 340, Code of Civil Procedure, was not to restrict its coverage to tort actions independent of any contractual relation, but to provide a limitation of one year where personal injury or death results, regardless of the tort, contract or breach of express or implied warranty aspect of the case. The Uniform Sales Act makes no material distinction between express and implied warranties as far as remedies are concerned. We are satisfied that the instant case falls within the provisions of subdivision 3, section 340, Code of Civil Procedure, and that the action must have been brought within one year from the time the cause of action arose. Basler v. Sacramento etc. Ry. Co., supra, 166 Cal. 33, 134 P. 993; Zellmer v. Acme Brewing Co., 9 Cir., 184 F.2d 940; Harding v. Liberty Hospital Corp., supra, 177 Cal. 520, 171 P. 98.

The next question for consideration is when the statute started to run. Appellants, in their complaint, did not allege fraud or concealment on the part of respondent or the other defendants named, nor was any attempt made to plead a reason for failure to discover the cause of their injury. The allegation was merely that they "made and caused to be made diligent investigation to determine the cause of said symptoms but were unable to do so until on or about the first day of February, 1952."

In Sonbergh v. MacQuarrie, 112 Cal. App.2d 771, 247 P.2d 133, 135, quoting from Scafidi v. Western Loan & Bldg. Co., 72 Cal.App.2d 550, 556, 165 P.2d 260, 269, the following appears: "'Our courts have repeatedly affirmed that mere ignorance, not induced by fraud, of the existence of the facts constituting a cause of action on the part of a plaintiff does not prevent the running of the statute of limitations (citing cases); and that "mere ignorance of the facts, * * * without some valid excuse for ignorance, was of no consequence." Dennis v. Bint, 122 Cal. 39, 44, 54 P. 378, 380, 68 Am.St.Rep. 17, (citing authority).'"

Sonbergh v. MacQuarrie, supra, 112 Cal. App.2d 771, 247 P.2d 133, 134, was an action brought in 1951 for personal injuries alleged to have been sustained as a result of an assault upon plaintiff in 1948. It was further alleged that plaintiff was unaware at the time of the assault that any substantial injuries had resulted; that he took all reasonable precautions to ascertain if he had been injured, and that he could not have learned the extent of his injuries prior to April, 1951, when it first became possible to make a diagnosis that plaintiff had "'organic brain and nervous injuries'", proximately caused by the assault. It is true that apparently there was no claim that plaintiff was unaware of the *cause* of his injuries prior to April, 1951. The allegation was to the effect that although he was aware of the assault and the one who committed it, he was not aware that permanent damage had resulted. The trial court was affirmed in its judgment on the pleadings on the ground that the action was barred by the one year statute which started to run from the date of the assault.

In the instant case awareness of immediate damage is admitted but ignorance of the cause is urged to toll the running of the statute. As held in Dennis v. Bint, 122 Cal. 39, 54 P. 378, 380, cited with approval in Sonbergh v. MacQuarrie, supra, 112 Cal.App.2d 771, 247 P.2d 133, "mere ignorance of the facts * * * without some valid excuse for ignorance, was of no consequence."

[5] We therefore hold that the statute started to run from the date that plaintiffs became ill by reason of eating the peas; that subdivision 3, section 340, Code of Civil Procedure, applies, and that according to the allegations in the complaint the statute had run at the time the complaint was filed.

The judgment is therefore affirmed.

PETERS, P. J., and BRAY, J., concur.

122 Cal.App.2d 902

SILVERS v. WESSON.

No. 15480.

District Court of Appeal, First District, Division 1, California.

Jan. 29, 1954.

As Amended on Denial of Rehearing Feb. 26, 1954.

Hearing Denied March 25, 1954.

Malpractice action for injuries allegedly received because defendant physician and surgeon allegedly was negligent in treating patient's prostate gland trouble over two year period with alleged result that patient incurred a fatal cancer of the bladder. The Superior Court, City and County of San Francisco, Robert McWilliams, J., after entry of judgment upon $30,000 verdict for patient, ordered a new trial on ground that there was not sufficient evidence to establish that alleged negligence of defendant was proximate cause of patient's injury, and patient's executor appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence was not sufficient to establish, as a matter of law, that defendant's negligence was proximate cause of injury.

Order affirmed.

1. Physicians and Surgeons ⇨18(9)

In malpractice action for injuries allegedly received because defendant physician and surgeon allegedly was negligent in treating patient's prostate gland trouble over two-year period, with alleged result that patient incurred a fatal cancer of the bladder, evidence was not sufficient to establish, as a matter of law, that defendant's negligence was proximate cause of injury.

2. Appeal and Error ⇨882(20)

Where, in malpractice action, trial court granted new trial on ground that evidence was not sufficient to establish that alleged negligence of defendant physician and surgeon was proximate cause of injury sustained by patient, and instruction given on proximate cause comported with significant allegations of complaint, patient's opening statement, and questions patient asked medical experts, patient would not be heard to complain that order for new trial was based upon erroneous concept of kind of proof required upon issue of proximate cause.

Philander Brooks Beadle, Morton L. Silvers, San Francisco, for appellant.

Peart, Baraty & Hassard, George A. Smith, Alan Bonnington, San Francisco, for respondent.

FRED B. WOOD, Justice.

Alfred J. Byrnes, plaintiff, appealed from the order which granted a new trial after entry of judgment in his favor upon a verdict for $30,000 in this action against Miley B. Wesson, physician and surgeon, on account of injuries allegedly caused by negligence of the defendant in the care and treatment of the plaintiff.

The order for new trial stated that it was granted "upon the ground of the insufficiency of the evidence to justify the verdict, in that there is not sufficient evidence in the record that defendant's negligence was a proximate cause of the damage alleged by plaintiff."

The question was whether or not defendant's alleged negligent treatment of plaintiff for prostate gland trouble, over a two-year period commencing in June, 1947, was a proximate cause of cancer of the bladder, discovered at the end of this two-year period.

The issue was posed by the allegations of the complaint that "defendants[1] did thereafter [June 2, 1947] so carelessly and negligently diagnose, prescribe for and treat plaintiff as to, and *they did, permit an incipient tumor* in the bladder *to remain undetected and untreated* until on or about June 25, 1949; *that as a proximate result* of said carelessness and negligence of defendants and each of them, said tumor *developed* prior to June 25, 1949 *into a cancer of the bladder, and plaintiff was caused to, and he now does, suffer from an incurable cancer of the bladder.*" (Emphasis added.)

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[1] The only defendants other than Wesson were several fictitiously named defendants who did not enter an appearance.

Appellant[2] claims (1) that there was no conflict of evidence on the issue of proximate cause and that the only inference which can be drawn from the evidence supports the jury's implied finding that defendant's negligence was a proximate cause of plaintiff's damage, and (2) that the trial court based its order for new trial upon an erroneous concept of the kind of proof required under the issue of proximate cause in a malpractice action.

[1] (1) *Appellant's claim that it appears as a matter of law that defendant's negligence was a proximate cause* is not supported by the record.

Plaintiff first consulted a certain physician who upon giving plaintiff a cystoscopic examination informed him he had an enlarged prostate gland and advised an operation. Plaintiff then went to defendant for treatment, stating he wanted to avoid surgery if possible. Defendant undertook to and did treat plaintiff for a period of two years before making another cystoscopic examination, and thereupon discovered a tumor about one-half inch in size at the base of the bladder.[3] Defendant then advised plaintiff he would have to be hospitalized for X-ray treatment and surgery.

Plaintiff then went to a county hospital and consulted other doctors. The tumor was removed and found to be malignant. There were several removals in succession, either of the same tumor recurring or of new tumors successively developing, until it reached an inoperable and incurable stage.

The question is whether or not an earlier cystoscopic examination would likely have resulted in discovery of the tumor in time to have removed it before it became malignant, or at a sufficiently early stage (if carcinomatous) to have eradicated the cancer. In short, was defendant's failure to cystoscope a proximate cause of the development of plaintiff's incurable cancer?

In respect to this question, Dr. Dillon, who saw the tumor shortly after it was discovered, testified it would be very difficult for anyone to say how old it was because some tumors grow very slowly and remain the same size over a particular length of time, whereas others are extremely rapidly growing; it would be almost impossible to tell how long this tumor had been there. Dr. Gilcreest testified that nobody in the world can say how fast tumors grow; it can start as a benign tumor that degenerates in time into a cancer, or with an ulceration that degenerates and goes into a cancer in a period of years, or it can start as a very malignant type of cancer; sometimes a growth may be observed over a period of weeks. Dr. Hand said "We never know when they [cancers] start or when they may start."

There was evidence, too, concerning the likelihood of successful treatment of cancer. Dr. Dillon said that most patients with cancer of the bladder do not recover; any tumor which is treated early presents a better chance of recovery than if treated late. Dr. Gilcreest said the only hope is to ascertain it early, when the tumor is in an early state; prognosis for a man of plaintiff's age is bad. Dr. Hand said that cancers are things that should be removed as soon as possible. Asked if a cancer can be cured, Dr. Wesson said: "Sometimes" you can arrest them; "sometimes" you can cure them, if you can cut everything out. He also said that "sometimes" a little tumor in the bladder, whether malignant or benign, can be destroyed by X-ray.

Plaintiff's counsel asked Dr. Wesson if it was his position that it would not have been a great help in preventing the bladder recurrent tumors if the original tumor had been detected earlier by cystoscopy and removed promptly. He replied: "My answer is that it wouldn't have made much difference. We don't know whether that tumor occurred one week or one month or two months before I saw it. If it had been there very long it would have been very large, but it was removed on July 14th, 1949, and when they did the next operation to remove the tumor from the rectum they had difficulty in finding the site of this tumor, and they had provided radon seeds to put in in case there had been any recurrence, and it was soft, smooth, pliable tissue, just like rubbing your hands over it—so they thought it would be a waste of time putting radon seeds in, they thought they had a cure; and no tumor ever came back at this spot, according to this record." Then the following ensued:

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[2] Upon plaintiff's decease, after the trial, the executor of his estate, Morton L. Silvers, was substituted for him as plaintiff and appellant.

[3] There is a conflict of evidence on the question whether he waited two years before giving another cystoscopy or whether he several times advised a cystoscopic examination and plaintiff each time refused it; also, there is a conflict of medical testimony on the question whether a two-year interval between cystoscopic examinations was or was not standard medical practice in the community. But we have no concern with the issue of negligence. We are concerned only with the issue of proximate cause.

"Q. Is it your position that even though this original tumor had been removed promptly, as it should have been it would still have ended up in this same condition; is that your testimony now? A. Yes.

"Q. Then the neglect, if it was neglect, to remove it over the period of two years, had nothing to do with it? * * *

"The Witness: I suppose I want to say yes, with an explanation again.

"The Court: You may explain.

"The Witness: This man has formed five tumors in five different places. The first tumor was small and it disappeared after it was cut out and burned, completely disappeared. Now, later on, while he was under observation, they found a much bigger tumor that grew in just a few weeks, between two observations. A man that is going to form cancers in the bladder is going to continue to form them."

This testimony given by the experts serves to illustrate the fact that there is evidence sufficient to support a finding of lack of causal connection between defendant's negligence and the cancerous condition which developed. We must remember that the trial judge when considering the motion for new trial was sitting as a trier of the facts, evaluating the testimony and weighing the evidence.

We observe that appellant, in his discussion of this point does not speak of negligence as an effective cause of the *cancer* which developed. He speaks, instead, of defendant's failure to cystoscope as a proximate cause of plaintiff's "damage," of plaintiff's "detriment," and of the "suffering and hardship incident to the growth of the malignant tumor in plaintiff's bladder." He says that but for this neglect plaintiff's chances of living longer and more comfortably would have been greater than now. That is not speaking to the issue framed by the pleadings, as interpreted by counsel and the trial court. It does not accord with the theory upon which the case was tried.[4]

[2] (2) *Appellant contends that the order for new trial was predicated upon an erroneous legal concept as to the kind of proof required in respect to the issue of proximate cause in a malpractice suit.*

Appellant characterizes the asserted erroneous illegal concept as a requirement of "direct evidence upon an ultimate fact which had been properly established by the probative facts in the record," coupled with an asserted requirement, imposed by the trial judge, that there be evidence "that in the majority of similar cases in which the omitted measures are used the disease is arrested or cured."

Appellant does not derive any of this from the order for new trial or from any findings made by the court. He quotes a few passages from an opinion rendered by the trial judge when he announced his decision to grant a new trial. Appellant then says: "It is clear from the written opinion of the trial court that it considered the evidence on the issue of proximate cause insufficient because there was no direct testimony tending to prove that plaintiff would probably have been cured had defendant followed the requirements of standard practice and cystoscoped him at an earlier date."

It is doubtful if it would be proper to resort to an opinion for the purpose of negativing the ground for new trial which was clearly expressed in the order subsequently made and filed. See Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 749–750, 47 P.2d 273. However, the opinion as first rendered and as amplified by a supplemental opinion, clearly demonstrates the theory upon which the case was tried and show that the evidence supports the finding, made by the judge as a trier of the facts, that there was insufficient proof of causation under that theory.

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[4] Discussed at length later on in this opinion.

The first opinion by the judge who presided at the trial, Honorable Robert L. McWilliams, was rendered when he announced his decision to grant a new trial. He had not yet filed an order for new trial. Plaintiff immediately presented a memorandum in which he contended that the issue was not whether defendant's negligence (failure to make a cystoscopic examination at an earlier date than he did) was a proximate cause of plaintiff's incurable cancer (he said "such proof would be well nigh impossible"); instead, he contended it was sufficient for him to establish that "some detriment" proximately resulted, such as loss of the opportunities afforded by medical science to control or cure the tumor, or decreased probability of a cure.[5]

In the opinion first rendered, Judge McWilliams said:

"I have concluded that a new trial must be granted in this case. I am satisfied after a careful study of the briefs and the available record that plaintiff has not proved by a preponderance of the evidence that the failure of the defendant to cystoscope the plaintiff was a proximate cause of plaintiff's becoming afflicted with an incurable cancer of the bladder as contended by him.

"In view of the evidence I cannot disagree with the jury on the issue of negligence. Under the evidence the jury may have been justified in finding that standard medical practice in this locality required that defendant cystoscope the plaintiff to ascertain whether or not he had a tumor of the bladder in view of his symptoms. But there is room for a decided difference of opinion on the subject. Dr. Frank Hinman, who was called by plaintiff on his own behalf and who, of the witnesses who testified, was possibly the outstanding authority on the subject involved, said on a number of occasions that whether or not the plaintiff should have been cystoscoped, in the circumstances that were explained to him in hypothetical questions, was a matter of judgment for the attending physician to decide.

"However, the neglect on defendant's part so to do, conceding that it was negligence, is far from leading to the conclusion that plaintiff is therefore entitled to judgment. It still must be proved that the failure to cystoscope plaintiff was a proximate cause of his having developed the incurable cancer complained of. Whether or not such is the case must be considered in the light of all the pertinent facts.

"Say counsel for the plaintiff, the evidence of proximate cause is to be found in the testimony of Dr. Hand and Dr. Gilcreest and of the defendant himself. I fail to find it there or elsewhere in the record. Plaintiff's counsel cite no testimony of Dr. Hand bearing out their contention. They do cite testimony by him to the effect that plaintiff had no cancer when Dr. Weyrauch cystoscoped him prior to defendant's undertaking his treatment. That may be conceded. They further cite Dr. Hand as having testified that standard practice required that the defendant cystoscope the plaintiff long prior to June 23rd, 1949. I may concede this contention. They further cite him as having testified that a malignant cancer should be removed as soon as possible. I have no doubt of the correctness of this opinion. Counsel further state that the earlier that cancer is discovered the greater the likelihood of successful treatment. This also cannot be successfully contradicted. However, none of these matters is of material aid in the determination of the question with which we are here concerned. I do find, however, some other matters in Dr. Hand's testimony that I regard as quite pertinent and which militate against the contention made on behalf of plaintiff. Thus, Dr. Hand said that the medical profession never knows 'when cancer starts or when they may start.' (Tr. p. 19.) He further testified, contrary to plaintiff's contention, that the sloughing off at the top of the cancer such as the one here found does not indicate that the cancer is not one of very recent origin. He explained that the degree of sloughing in a cancer of the bladder is no particular criterion of how long the cancer has been there, particularly in the absence of infection; also that it is not true that normally you do not expect sloughing until the cancer has started to die off, as plaintiff's counsel argue. (Tr. p. 30.)

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[5] He also requested that the order, when made, reflect the opinion of the court (if that was the court's opinion) that there was "no evidence * * * that defendant's negligence was the proximate cause of any detriment sustained by the defendant" rather than one giving "insufficiency of the evidence to justify the verdict" as a ground, adding:

"Since 'insufficiency of the evidence' means 'contrary to the weight of the evidence' as well as 'want of evidence' plaintiff would be precluded, if that formula were included in the order, from testing upon appeal the correctness of the real ground upon which the motion is granted."

The fact that the order, subsequently filed, did specify insufficiency of the evidence, not want of evidence, lends emphasis to the view we have already expressed, that Judge McWilliams did weigh the evidence.

"Counsel also cite certain passages from Dr. Gilcreest's testimony as bearing them out on this issue of proximate cause. Thus they refer to his testimony that in case of the discovery of a tumor in the bladder '*the only hope is to* ascertain that early when the tumor is in an easy state for removal.' This testimony is very significant as indicating that even when a tumor of the bladder is discovered it is but a matter of hope and not of probability that it can be successfully removed. Moreover, since both Dr. Gilcreest and Dr. Hinman testified that the tumor here involved could have grown to the size it was when discovered in three months time, the defendant might have cystoscoped plaintiff on several different occasions without discovering it at a sufficiently early stage to have permitted its successful removal.

"Counsel also cite Dr. Wesson as having testified that plaintiff should have been cystoscoped at least a year before that was actually done. He is also cited as having testified that urologists agree that all tumors should be removed as quickly as possible because they are all potentially malignant. He is also cited as having testified in answer to the question 'Can you cure a cancer?' '*Sometimes* you can arrest them. *Sometimes* you can cure them if you can cut everything out.' (Tr. p. 25; emphasis here and elsewhere is of course mine.) This testimony certainly does not come near suggesting nor even tending to prove that had plaintiff been cystoscoped and operated upon he would probably have been cured. In fact, the latter passage quoted has the opposite tendency in suggesting that the outcome of these cancer cases is highly speculative. That speculative outcome is further indicated by Dr. Wesson's testimony which counsel for plaintiff also quote in their brief to the effect that 'any little tumor in the bladder can *sometimes* be destroyed by X-rays.' All of these opinions may be conceded to be correct but they are of no material aid in deciding the question under consideration. Prior cystoscopy might have revealed the tumor had it been there when the cystoscopy was performed. But it does not follow that even if it were found it probably could have been successfully removed. It may be conceded that because of defendant's failure to cystoscope plaintiff there was no chance to eradicate the cancer. But it is a far cry from that to the conclusion that had the defendant cystoscoped the plaintiff the cancer could probably have been successfully eradicated.

"Dr. Wesson is further quoted as having testified, as he did, that 'The chances of a patient living longer and more comfortably are greatly increased by the early observation and treatment of the tumor.' (Tr. p. 48). This testimony is also far from proving the point in controversy. It may well be that the chances of a patient's living longer and more comfortably might, by early observation and treatment, be increased from ten percent to forty percent.*

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* "I cannot concur in plaintiff's contention that the word 'chances' as here used means 'probabilities' in the sense for which counsel contend. As stated in

But that is certainly not proof that such early observation and treatment would probably result in curing a cancer, or would probably prevent a benign tumor from continuing to grow and become malignant. It depends in part, as the witness said, on whether 'you can cut everything out.'

"The uncertainty of the situation insofar as plaintiff is concerned is further indicated by the testimony given by the plaintiff himself that Dr. Dillon had explained to him at the San Francisco Hospital when he was operated upon there that the tumor was so situated that 'they couldn't get at it with ordinary surgery and that he thought there was a five percent chance that—with radium treatment, so we had the radium treatment.' (Tr. p. 5). This difficulty of getting at the tumor with ordinary surgery, as Dr. Dillon termed it, with the consequent uncertainty of a successful operation would, it would seem, have presented itself regardless of the date of the operation. It will be recalled that Dr. Wesson testified that the tumor was located 'just behind the inter-ureteric ridge.' (Tr. of Dr. Wesson's testimony, p. 35.)

"Dr. Hinman, although called by plaintiff, was not interrogated as to the matters under discussion and is not cited by counsel for plaintiff in his argument on this phase of the case, nor, I may add, is he cited on scarcely any phase of the case.

"My conclusion is that the showing made by plaintiff is wholly insufficient on the issue of proximate cause as there is no evidence proving that anything that might have been done in the treatment of plaintiff would in all probability have prevented the development of the tumor on plaintiff's bladder into an incurable cancer. It must be remember[ed] that 'The burden of proof resting upon the plaintiff requires that the evidence of negligence proximately causing the injury be evidence which leads—not merely wavers—toward the fact sought to be proved.' Hopkins v. Heller, 59 Cal.App. 447, 454, 210 P. 975. Hearing by Supreme Court denied. In view of my conclusions on this point it is not necessary for me to take the time, of which I have very little to spare, to consider the question of the statute of limitations.

"I may add that I have not considered the affidavits that were filed by the parties. They consisted very largely of hearsay testimony. Moreover, since they were merely filed and not offered in evidence they could not, even though containing competent testimony, properly have been considered by me.

"For the reasons stated above a new trial will be granted on the ground of the insufficiency of the evidence to justify the verdict."

Judge McWilliams' supplemental opinion, given after considering plaintiff's contention that the question was whether "*some detriment* proximately resulted from defendant's negligent acts" reads as follows:

"At the argument between counsel on the form of the order that the court should make in granting a new trial in this case, one of plaintiff's attorneys pressed a point which I believe deserves a word of comment. He contended in substance that even though there is not sufficient evidence that the defendant's negligence had been a proximate cause of the cancer complained of, there was sufficient evidence to justify the jury in finding that as a proximate result of his negligence plaintiff suffered 'some detriment' in that he was thereby 'deprived of the opportunities afforded by medical science' of controlling or curing the tumor, which opportunities were only available upon the tumor being discovered.

"Two answers to that point suggest themselves. The first is that this argument is akin to the one I discussed in my main opinion and the answer to it is the same, namely, that whether or not the tumor

Webster's Dictionary of Synonyms, the word 'chance' may mean degree of probability; as, his chance of success is one in ten; it may mean one possibility of success among many possibilities of failure, as, he is always willing to take a 'chance.' With two throws of the dice one's chances of throwing all sixes would be greatly increased over his chances on one throw. But I doubt if even plaintiff's counsel would argue that that fact proves the probability of his throwing all sixes on two throws."

would have been discovered by one or more cystoscopies so as to have permitted medical science to treat the plaintiff is entirely a matter of speculation.

"A second answer to the argument is that it is inconsistent with the theory upon which the action was instituted and tried. That theory is that as a proximate result of defendant's negligence plaintiff developed an incurable cancer. This is indicated by the allegations of the complaint and also by examination and cross-examination by plaintiff's counsel of all the witnesses who testified. Finally, it evidently was not the theory of the jury as evidenced by the very substantial verdict for $30,000.-00 rendered by them. A verdict for such a sum could in my opinion only have been returned on the theory that as a proximate result of defendant's negligence plaintiff developed an incurable cancer."

It seems clear to us from these opinions that Judge McWilliams did weigh the evidence and deemed it speculative, as a matter of fact, under the pleadings as interpreted and applied by counsel and court during the course of the trial.

In his complaint, plaintiff alleged that as a proximate result of defendant's negligence the "tumor developed * * * into a cancer of the bladder, and plaintiff was caused to, and he now does, suffer from an incurable cancer of the bladder."

In his opening statement, plaintiff's counsel said that during the two years plaintiff was under defendant's care a tumor commenced to grow; that it would have been visible if the bladder had been examined by cystoscope at frequent intervals, and could have been readily removed in its early stages; that when discovered it had by lapse of time gotten into such an advanced stage it could not be successfully removed; that a malignant tumor can be treated properly and successfully if caught in its early stages, but when no longer in its early stages it is too late; that plaintiff has not very much longer to live as a result of this malpractice of the defendant; that this growth of the cancer could very readily, very easily, have been prevented had the doctor kept an eye on the condition of the patient during that two-year period; the reason plaintiff has an irreparable cancer of the bladder is the failure of the defendant to properly cystoscope him.

That statement, made at the very beginning of the trial, indicates that plaintiff's theory of his case was precisely as Judge McWilliams understood it to be.

The same theory is reflected by the questions which plaintiff's counsel asked of the medical experts. For example, counsel asked Dr. Dillon: "Was it [the tumor, the cancer] treated too late to cure it?" He asked Dr. Gilcreest whether the probabilities of "curing a cancer or eradicating it" are increased or decreased by the time of the discovery of the cancer, and whether the plaintiff, in view of his present condition, "has any chance at all of ever getting well."

The jury was instructed as follows:

"Plaintiff in this case alleges in substance that on or about June 2nd, 1947, defendant undertook to diagnose and treat plaintiff, and that thereafter he so negligently diagnosed and treated him as to permit an incipient tumor in the bladder of plaintiff to remain undetected and untreated until on or about June 25th, 1949, and that as a proximate result of the said negligence of defendant the tumor developed into an incurable cancer.

"Evidence merely proving, if there was evidence so proving, that plaintiff had an incipient tumor which subsequently developed into an incurable cancer, would not be sufficient to justify a verdict for the plaintiff. To justify such a verdict plaintiff must also prove that it was a proximate result of defendant's negligence that that result occurred."

The parties have stipulated that this instruction was given by the court upon its own motion and was not specifically requested by either party. This instruction definitely reflects Judge McWilliams' understanding of the theory upon which the case was tried, the same as described in his supplemental opinion. It comports with the significant allegations of the complaint, plaintiff's opening statement, and the questions which plaintiff asked the medical experts.

We find no error in the making of the order for a new trial.

The order is affirmed.

PETERS, P. J., and BRAY, J., concur.

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122 Cal.App.2d 927

BOOTS v. POTTER et al.

BOOTS et al. v. POTTER et al.

Civ. 8228.

District Court of Appeal, Third District, California.

Jan. 29, 1954.

Rehearing Denied Feb. 25, 1954.

Hearing Denied March 25, 1954.

Action by motorist against truck driver, truck driver's employee, and signalman, for personal injuries and, on behalf of himself and children, for death of wife, sustained when overtaking truck struck motorist's pick-up truck which was making left turn off highway in conformity with directions of signalman who was directing drivers of light automobiles to make detour. The Superior Court, Madera County, Murray, J., entered judgment against motorist and for children against defendants, and motorist and signalman and his employer appealed. The District Court of Appeal, Paulsen, J. pro tem., held that where signalman was posted to direct light cars to make left turn into detour around flooded bridge and to permit only heavy trucks to cross bridge, statutes governing left turns applied to motorist who turned into detour at direction of signalman.

Judgments affirmed.

1. Automobiles 🔑204

Facts that highway sign warned of bridge construction ahead and that signalman was stationed to direct automobiles into detour did not excuse motorist from duty to use reasonable care in making left turn into detour, although they might justify his failure to look for overtaking automobiles.

2. Automobiles 🔑246(26)

In action for damages sustained when overtaking truck struck motorist's pick-up truck which was making left turn off highway in conformity with directions of signalman who was directing drivers of light automobiles to make detour, instruction that motorist could not rely completely on signalman's instructions, but was required to use reasonable care for his own safety, was not improper.

3. Automobiles 🔑169

Where signalman was posted to direct light automobiles to make left turns into detour around flooded bridge and to permit only heavy trucks to cross bridge, statutes governing left turns applied to motorist who turned into detour at direction of signalman. Vehicle Code, §§ 544–546.

4. Automobiles 🔑246(26)

In action for damages sustained when overtaking truck struck motorist's pick-up truck which was making left turn off highway into detour in conformity with directions of signalman, instruction that motorists must keep vigilant lookout and that they are required to see that which may be seen by use of ordinary care, was not improper.

5. Automobiles 🔑245(90)

In action for damages sustained when overtaking truck struck motorist's pick-up truck which was making left turn off highway into detour in conformity with directions of signalman, whether motorist's failure to signal before making left turn contributed to accident was for jury. Vehicle Code, §§ 544–546.

6. Automobiles 🔑246(26)

In action for damages sustained when overtaking truck struck motorist's pick-up truck which was making left turn off highway into detour in conformity with directions of signalman, instruction that if jury found motorist's failure to signal did not contribute to accident, motorist should be found free of contributory negligence, was properly refused, since it excluded finding of contributory negligence on other grounds. Vehicle Code, §§ 544–546.

7. Automobiles ⚷246(26)

In action for damages sustained when overtaking truck struck motorist's pick-up truck which was making left turn off highway into detour in conformity with directions of signalman, refusal to instruct jury that motorist, who had stopped before turning, was not required to signal for left turn for 50 feet before turning, as required by statute governing left turns, was not error where motorist did not signal at all and where jury was not informed of this statutory regulation. Vehicle Code, §§ 544–546.

8. Automobiles ⚷246(26)

In action for damages sustained when overtaking truck struck motorist's pick-up truck which was making left turn off highway into detour in conformity with directions of signalman, requested instruction that motorist should be found free of contributory negligence if found to have exercised reasonable prudence, irrespective of whether or not he violated a statute, was properly refused, since it failed to state prima facie presumption of negligence arising from violation of statute and failed to define justifiable breach of statute.

9. Automobiles ⚷246(60)

In action for damages sustained when overtaking truck struck motorist's pick-up truck which was making left turn off highway into detour in conformity with directions of signalman, instruction that if motorist was to recover it could not appear that any negligence on part of motorist contributed to accident did not have effect of placing on motorist burden of proving himself free of contributory negligence and did correctly state law.

10. Appeal and Error ⚷1064(1)

In action for damages sustained when overtaking truck struck motorist's pick-up truck which was making left turn off highway into detour in conformity with directions of signalman, instruction that basic speed law applied to both parties was not prejudicial to motorist.

11. Trial ⚷217

In action for damages sustained when overtaking truck struck motorist's pick-up truck which was making left turn off highway into detour in conformity with directions of signalman, where circumstances of accident were clear, instruction that jurors were not to discuss damages until they had settled question of liability was proper.

12. Appeal and Error ⚷907(2)

Where photographs of situation were available to jury in trial of action for damages sustained when overtaking truck struck motorist's pick-up truck which was making left turn off highway in conformity with directions of signalman, but were not in record on appeal, District Court of Appeal assumed that photographs were sufficient to support finding that signalman was negligent in not taking up position in center of road.

13. Automobiles ⚷244(12)

In action for damages sustained when overtaking truck struck motorist's pick-up truck which was making left turn off highway in conformity with directions of signalman, evidence supported finding that signalman was negligent in failing to inform motorist that trucks were to be allowed to continue straight on highway.

◆

C. Ray Robinson, Merced, by R. A. McCormick & William B. Boone, Merced, Murphy & Adams, Santa Cruz, for appellants.

Stammer & McKnight, Fresno, for cross-appellant.

Hansen & Barstow by C. O. Hansen, Fresno, for respondents.

PAULSEN, Justice pro tem.

As the result of an automobile accident which occurred on January 19, 1951 at the intersection of Highway 152 and County Road 10–N in Madera County, Charles

Boots received personal injuries and his wife, Mary Boots, was killed. One action was filed by Charles Boots to recover for his own injuries and another by Charles Boots and the children of Charles and Mary to recover damages for Mary's death. The same defendants were named in both actions.

The cases were consolidated for trial and are submitted here on the same record. The defendants prevailed in the first action and Charles Boots has appealed from the judgment therein. In the second action Charles Boots was again denied relief against all defendants, but judgment was given against them in favor of the children of Charles and Mary. Charles Boots and the defendants Lee and the Thomas Construction Company have appealed from the judgment in that action.

Highway 152 runs generally east and west and County Road 10–N runs north from it beginning at the point where the accident occurred. On the afternoon of January 19th Boots, accompanied by his wife, was driving a pick-up truck in an easterly direction on the highway and while starting to turn north on the county road was struck by a large truck driven by the defendant Virgil Harley Potter, who had been some distance behind him and was also driving easterly along the highway. It is admitted that Potter was an employee of the defendant Eudy and was acting within the scope of his employment.

The defendant Thomas Construction Company had a contract to repair a bridge on the highway at a point about one-fourth of a mile east of the intersection of the two roads. The president of the company testified that on the afternoon of January 19th flood waters started to come over the bridge and he was instructed by the state inspector on the work to station a flagman outside the limits of the construction area in order to detour the traffic around the bridge by way of the county road. It was decided that heavy trucks would be able to cross the bridge notwithstanding the presence of the water and that light trucks and passenger vehicles should be detoured around the bridge by means of the county road.

The defendant Lee, who had no prior experience in that kind of work, was assigned to the task of flagging at the intersection. He was told to stop all vehicles coming from the west, to detour the light ones around the bridge by way of the county road and to warn the heavy ones of the water on the bridge and then let them proceed east on the main highway.

No special detour sign was placed at the intersection and, except for the presence of the flagman and such information as he might give them, there was nothing to warn motorists approaching from the west that they would not be able to proceed directly along the highway or turn to the north as they pleased. However, at the time of the accident and for some time prior thereto three standard warning signs furnished by the state for use in construction zones were set up on the highway, facing west. To a motorist approaching the intersection from the west the first sign that would appear was a "Slow" sign set up 500 feet west of the intersection; next was a sign reading, "Danger, Bridge Under Construction", placed 200 feet west of the intersection; and at the intersection was a sign marked "Construction Zone, Drive Carefully."

Lee testified that he started flagging about 2:30 P.M. that day and at first stood in the middle of the highway, wearing a red coat and carrying a red flag in his hand. One of the first cars to approach refused to stop and he was almost run over. He stated that a position in the middle of the road under the conditions that then existed, where traffic was also coming from the county road and proceeding toward the west, was too dangerous and he took up a new position on the south shoulder or south edge of the highway.

Boots testified that he traveled the two roads frequently, was familiar with the general situation, and knew that No. 152 was a main highway normally carrying heavy traffic; that as he approached the intersection there were no other vehicles in sight; that he first observed the three warning signs when he was between a quarter and a half mile west of the intersection and at that time he saw the flagman standing on the shoulder of the highway; that he came to a stop and the flagman told him to go north on the county road to a certain point and then turn right and south again to the main highway; that he was not told that heavy trucks were being permitted to continue along the highway and over the bridge and thought that all traffic was being detoured by way of the county road; that while he was talking to the flagman he had his hand out to show he was stopped and through the rear view mirror observed three or four cars come to a stop behind him; that after telling him to go north the flagman motioned with his flag in the direction of the county road and said "All right"; that when that statement was made he immediately shifted into low gear and turned directly across the highway toward the county road, but gave no signal of any kind and did not look back to see if any one was coming along the highway from behind him. After stating that he knew other cars were stopped behind him he testified: "I never paid any attention after, when I got ready to go, that was the end of the road for me, the same as a turn there, I didn't know."

As Boots started his turn into the county road the left rear fender of his pickup was struck by the Potter truck which was then in the north lane of the highway proceeding east and attempting to pass the cars that had stopped. Boots admitted that he did not see the Potter truck until he was hit and did not hear Potter blow his horn. Lee admitted that he did not tell Boots that heavy trucks were being permitted to continue along the main highway to the bridge.

Potter had driven his truck from Texas to the coast several days before the accident over the same road and on January 19th was returning to his home. He admitted that he had driven over the same road several times and knew that there were several roads leading into the highway in that area and had previously noticed the county road in particular, but did not regard the place where the accident occurred as an intersection.

Lee testified that at all times during his conversation with Boots and until after the accident he was standing on the south shoulder of the highway and that he talked to Boots through the right window of the pickup where Mrs. Boots was seated; that from the time the Boots pickup stopped he held the flag down at his side while talking and did not raise it above his head or wave it as the cars following the Boots pickup came to a stop; that he did not see the Potter truck in time to try to stop it or to try to warn Boots; that he was looking at the car immediately behind the Boots pickup and did not see the Potter truck until Potter sounded his horn, at which time Potter's truck was in the north lane about two car lengths from where Lee was standing.

It is clear from the verdicts that the jury considered both Potter and Lee guilty of negligence and Boots guilty of contributory negligence.

The Appeals of Charles Boots

The only questions raised on the appeals by Boots involve the propriety of giving or refusing to give instructions on the subject of contributory negligence.

There are many assignments of error on these appeals and in order to understand them it is necessary to deal first with a pivotal instruction given at the request of Lee and Thomas Construction Company as follows:

> "In this case, there is a dispute as to what was said by and what were the motions made by the flagman, Douglas Lee, immediately before the accident. It is for you to determine this question from the evidence.
>
> "However, regardless of your decision on this question, you are instructed that a person who operates a vehicle on a public highway has no right to rely completely upon the comments or instructions of any other person, and regardless of any such comments or instructions or motions, it was the duty of the Plaintiff, Charles Boots, to exercise ordinary care for his own safety and the safety of others on the highway, and to exercise such care before he made and while he was making the turn immediately before and at the time of the accident."

No case has been called to our attention and we have found none which goes so far as to hold that a motorist can completely and absolutely rely upon the directions of a flagman working on a construction job and be relieved entirely of the duty to otherwise use care for his own safety. The parties to these appeals apparently accept by analogy the standards of care required of one who seeks to cross a railroad track where a warning signal device is in use and we agree that they are applicable here. It is said in Startup v. Pacific Electric Ry. Co., 29 Cal.2d 866, 871, 180 P.2d 896, 899:

> "* * * The railroad tracks are, of course, themselves a warning of danger and a driver of an automobile must take some precautions for his safety when attempting to cross them, even though the railroad his installed some system to warn of approaching trains. Will v. Southern Pacific Co., supra [18 Cal.2d 468, 116 P.2d 44]; Toschi v. Christian, supra, 24 Cal.2d [354] at page 360, et seq., 149 P.2d 848. It is ordinarily a question for the jury whether the precautions taken by the driver of the automobile are sufficient in view of all of the circumstances. Toschi v. Christian, supra, 24 Cal.2d at page 360, 149 P.2d 848; Koch v. Southern California R. Co., supra, 148 Cal. [677] at page 680, 84 P. 176, 4 L.R.A.,N.S., 521; Will v. Southern Pacific Co., supra, 18 Cal.2d at page 475, 116 P.2d 44."

[1] While there were no tracks to serve as a warning in this case, there were other signs and evidence of unusual conditions apparent to appellant. In view of the uncontradicted evidence that appellant was not told that heavy trucks were being permitted to continue on to the bridge we do not hold that the failure to look was negligence as a matter of law that could not be excused. We think it clear, however, that appellant, like the motorist at the railroad track equipped with warning signals, should take into consideration the presence and information of the flagman and that, although this might under some circumstances afford an excuse or justification for the violation of a statute, it could not and did not relieve him of the duty to use reasonable care for his own safety.

[2] Apparently accepting this idea of the law, appellant argues that the instruction had the effect of telling the jury to "omit *all* consideration of the comments, instructions and motions of Lee" in determining whether appellant was guilty of contributory negligence. We do not so construe it. The use of the word "completely" was used to convey the idea that appellant could not rely on the flagman alone and do nothing more to meet the standard of conduct that should be observed by a reasonably prudent man. It also indicated that in determining the question they should take the actions and words of the flagman into consideration with all the other facts in the case. There was no error in giving the instruction.

[3] At the request of defendants Potter and Eudy this instruction was given:

> "You are instructed that Section 544 of the Vehicle Code, which was in full force and effect at the time of the accident involved in this case, provides in part as follows:
>
> " '(a) No person shall turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided herein in the event any other vehicle may be affected by such movement.' "

This was followed by instructions giving the provisions of Sections 545 and 546 of the same code explaining the manner in which the signals should be given.

Appellant contends that these sections were not applicable for the reason that Boots was not making a turn at the time of the accident within the meaning of the sections. It is argued that "the situation was precisely the same as if Boots' pickup were proceeding around a curve in the same highway, or as if one highway had ended at that point and another highway continued on from that point at an angle."

This argument is based upon the assumption of a fact that did not exist. If a barricade or detour sign had been placed across the intersection, effectively warning all traffic that the main highway beyond the intersection was closed and directing all traffic to turn north, the contention might have some merit, but such was not the case. Each motorist at the time he approached the intersection could see three signs, each giving warning of construction work ahead and cautioning him to drive carefully, but there was nothing to indicate in any way as he approached that any traffic was being diverted to the county road. Until he saw the flagman standing in the intersection there was nothing to indicate he should even stop or that he could not, if he drove carefully, proceed across the intersection to the bridge. If he stopped and the flagman talked to him he then learned, for the first time, that new conditions were being imposed. In view of the information given by Lee, if the motorist were the driver of a heavy truck, after stopping he would learn, for the first time, that there was water flowing over the bridge but that he might proceed across it. If he were the driver of a light vehicle, after stopping he would learn, for the first time, that he would have to make the detour by way of the county road, but, as in the case of Boots, would not learn that heavy trucks were being permitted to proceed to the bridge. The fact that Boots assumed it was the end of the road did not make it so as a matter of law.

As far as either kind of traffic was concerned, the situation did not change until the particular motorist was notified by the flagman. The code sections still applied, modified only by the possible application of the rules of excuse and justification for the violation of a statute hereinafter discussed in connection with another instruction.

[4] At the request of Lee and Thomas Construction Company the court gave the following instruction:

> "You are instructed that it is not only the duty of a motorist upon a public highway to keep such a vigilant lookout for other motorists who are lawfully using the highway as is required in the exercise of ordinary care, but it is also his duty to see that which may be seen by the use of ordinary care. It is as negligent to fail to see that which may be seen by the use of ordinary care as not to look at all."

This was a statement of elementary law. Astone v. Oldfield, 67 Cal.App.2d 702, 155 P.2d 398; Bischell v. State of California, 68 Cal.App.2d 557, 157 P.2d 41. If appellant could not rely completely upon the flagman the first part of this instruction was clearly applicable in connection with the instructions concerning the giving of signals when turning. The last sentence was not applicable in view of the fact that appellant did not look at all, but it could not have been prejudicial.

[5] In this connection appellant contends that the evidence discloses as a matter of law that the failure to give a signal could not have been a proximate cause of the accident. He states that "at the time appellant started into the detour the Potter truck was so close and coming so fast that the accident could not have been avoided by any action on anyone's part at the time. * * * When Mr. Boots started into the detour Potter's truck was then only 20 to 30 feet or one to two car lengths away." Potter testified that he saw the pickup long before he got that close and could have avoided the accident if he had seen the signal. With this evidence before it, the question was one for the jury.

[6] Appellant also complains of the refusal to give the following instruction:

> "If you find from the evidence that any failure by the plaintiff, Charles Boots, to give a signal did not contribute to the happening of this accident and that at the time the plaintiff, Charles Boots, began to turn onto the detour, the truck tractor and semitrailer driven by the defendant, Virgil Potter, was not so close to the detour as to constitute an immediate danger if it were traveling at a reasonable rate of speed, then you must find that the plaintiff, Charles Boots, was not guilty

> of contributory negligence in the manner in which he turned into the detour."

There was a conflict in the evidence as to the position and speed of the Potter truck when Boots started to turn, and this was a formula instruction which would have directed the jury to find that Boots had not been negligent "in the manner in which he turned into the detour" if *his failure to give a signal* did not contribute to the accident. It ignored other elements which might have justified a finding of contributory negligence such as failure to look before turning to ascertain if other traffic constituted an immediate hazard. It was properly refused.

[7] He also requested the following instruction, which was refused:

> "You are instructed that the plaintiff, Charles Boots, was not required to signal his intention of turning into the detour for 50 feet before reaching the detour."

It is contended that the court "by implication" instructed the jury that Boots had to give the turning signal for 50 feet before reaching the detour and that this instruction was required to correct that implication. The instructions given on signaling did not include the statutory provision referred to. The evidence was uncontradicted that Boots gave the stop signal until after he had come to a full stop, and he could not have been expected to give a turning signal before he knew he had to turn. Moreover, inasmuch as the instructions given omitted all reference to the length of time the signals should be given there was no need to give the instruction requested. And if it can be successfully argued that such an instruction should have been given to prevent the jurors from applying their own knowledge of the motor vehicle laws in the instant case the error could not have been prejudicial for the reason that Boots gave no signal at all and did not look to see if one was necessary.

[8] Appellant also complains of the refusal to give the following:

> "If you find from the evidence that at the time of this accident the conduct of the plaintiff, Charles Boots, was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence, then you must find that Charles Boots was not guilty of contributory negligence, even though you should also find that he violated a statute."

The instruction as offered was not a correct statement of law. It failed to state the effect of a violation in terms of the prima facie presumption of negligence and gave no instruction concerning the basis upon which a reasonably prudent man might be justified in failing to obey the statute. Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279; Ornales v. Wigger, 35 Cal.2d 474, 218 P.2d 531.

Moreover, the instructions given by the court on this subject are more favorable to appellant than the instruction requested. The code sections were read, but nothing was said about negligence as a matter of law or the effect of a violation. The jury was instructed generally on the subject of negligence and contributory negligence and informed that if appellant "would not reasonably have anticipated that a truck would be attempting to pass him on the left side of the highway at the place of the detour, then, the plaintiff, Charles Boots, was not guilty of contributory negligence in failing to anticipate the presence of the truck." The effect of the instructions, considered as a whole, was to call the attention of the jury to the statutory requirements, and then to inform them that a violation would be of no consequence if under the circumstances appellant acted as a reasonably prudent man.

[9] At the request of the defendants Lee and Thomas Construction Company the court gave the following instruction:

> "You have heard reference in this case to the law of contributory negligence. Contributory negligence means negligence on the part of a plaintiff proximately contributing to his own in-

> juries or damages. Therefore, you are instructed in this case that before the plaintiff Charles Boots may recover either for his own injuries or for the death of his wife, Mary B. Boots, *it must appear from the evidence that the injuries and damages suffered by him were proximately caused by negligence on the part of one or more of the defendants, and it must not appear that such negligence was mixed with any negligence on the part of the plaintiff Charles Boots proximately contributing thereto.* In other words, if any negligence on the part of Charles Boots contributed in any manner or degree, however slight, directly and proximately to the accident, he may not recover in this case." (Italics supplied.)

Appellant contends that the italicised portions of this instruction in effect placed upon him the burden of proving that he was not guilty of contributory negligence, and cites Howard v. Worthington, 50 Cal. App. 556, 195 P. 709, Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066, and Bellows v. City and County of San Francisco, 106 Cal.App.2d 57, 234 P.2d 729. In the Howard case [50 Cal.App. 556, 195 P. 710] the instruction, after stating the rules concerning plaintiff's burden of proof, continued: "you must further find that the evidence shows, by a preponderance thereof, that the plaintiff was not guilty of negligence * * *." In the Rush case [196 Cal. 308, 237 P. 1067], after the preliminary statement on the burden of plaintiff's proof, the instruction read: "It must also appear to your satisfaction, that the plaintiff was without fault or negligence on his part which may in any wise have contributed to the accident." In the Bellows case [106 Cal.App.2d 57, 234 P.2d 730] the court told the jury that "before you can find a verdict in favor of plaintiff and against defendant, you must further find, from a preponderance of all the evidence, that plaintiff herself was not guilty of negligence proximately contributing to the happening of said accident." Such instructions were held to be erroneous. The instruction now under consideration does not have that effect, as it merely stated, "and it must not appear that such negligence was mixed with any negligence on the part of the plaintiff Charles Boots proximately contributing thereto." While we do not recommend this particular wording, when considered in the light of other instructions given on the subject, it could not have been prejudicial.

Two other instructions were properly refused as they were merely negative statements of the rule as to burden of proof and were properly covered by other instructions given.

[10] Appellant requested the following instruction on the basic speed law, except the portion in italics, which was added by the court:

> "In addition to the speed limit of 40 miles per hour, the driver of a truck tractor and semi-trailer must also comply with the basic speed law of this State. The basic speed law of this State is as follows:
>
> "'No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent, having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property.'
>
> *"'No person,' that applies to both drivers of these vehicles."*

It is now contended that this action of the court was prejudicial because there was no claim that Boots was driving too fast.

As requested by appellant, the second paragraph of the instruction used the wording of the code "No person" which applied to all parties and was subject to the same complaint. If the words added by the court had the effect of emphasizing the point they could have had no effect in view of the undisputed evidence that Boots was just starting in low gear when hit.

At the request of Potter and Eudy the court gave this instruction:

> "You are instructed that it would be a violation of your duty as jurors to discuss the nature and extent of the plaintiffs' damages, if any, until you shall have first determined the question

> of whether or not the defendants are liable. The question of liability should first be determined by you before it would be proper for you to in any wise discuss the nature and extent of the plaintiffs' damages, if any; because, unless the defendants are liable, the nature and extent of the plaintiffs' damages, if any, should not enter into your deliberations. In other words, you are first to determine whether or not the defendants are liable. If so, then you will discuss the measure of damages, if any. If the defendants are not liable, you should not consider the nature and extent of the plaintiffs' damages, if any, at all."

[11] It is now argued that the extent of the injuries to Boots and his wife had a direct bearing on the questions of negligence, contributory negligence and proximate cause. In support of his contentions, appellant relies upon Simmons v. Lamb, 35 Cal.App.2d 109, 94 P.2d 814, and Condon v. Ansaldi, 203 Cal. 180, 263 P. 198, in which somewhat similar instructions were held to be erroneous under the circumstances of those cases but in which it was also pointed out that such an instruction would be proper under other conditions.

In the Simmons case the car of plaintiff, while proceeding in a dense fog, struck the rear end of a truck that had stopped. There was a dispute as to where the truck was parked and also a serious conflict as to who was driving the plaintiff's car, plaintiff herself or a young man who was claimed to have been intoxicated at the time. The injuries received by plaintiff could have had a direct bearing on the question as to where she was seated and as to who was driving and also as to the location of the truck. In the Condon case a pedestrian was struck by an automobile and there was great uncertainty as to how the accident happened. In the case now under consideration plaintiff did not sue for damages to his pickup and the instruction did not direct the jury to refrain from considering the question of damages to it but referred to the personal injuries only. Moreover, there was no uncertainty as to how the accident occurred. The evidence was undisputed that the Potter truck struck the pickup on the side while the truck was traveling at a speed of from 25 to 50 miles an hour, throwing the pickup truck 150 feet into the field on the northeast corner of the intersection and that after the accident the Potter truck traveled some 178 feet past the point of impact before it stopped, leaving skid marks of 41 feet before the impact and of 74 feet after the impact. The jury was permitted to consider the photograph of the damaged pickup. The evidence was also undisputed that Boots started from a complete stop and drove directly across the highway in front of the approaching truck without looking to see if the highway was clear. Under these circumstances the giving of the instruction could not have prejudiced the right of appellant.

The Appeals of Lee and Thomas Construction Company

Under the issues raised by the pleadings, if Thomas Construction Company is liable at all the liability must rest upon the doctrine of respondeat superior, and it is now contended that as a matter of law the evidence was insufficient to establish any negligence on the part of Lee.

[12, 13] Several questions are raised but only two need be discussed. First, it was contended at the trial that Lee was negligent in the manner in which he flagged and in failing to stand where he could see and control the traffic and appellants now argue that the evidence, including the photographs exhibited to the jury, demonstrated that he could not safely stand in a more advantageous position, or act otherwise. We do not have the photographs before us and we must, therefore, assume that the jury was warranted in finding that Lee was negligent on that ground, if that was the basis of their decision. Secondly, it was contended at the trial that Lee was negligent in not telling Boots that heavy traffic was not being detoured over the county road and it is now argued that he was under no duty to do so. Considering the situation that existed there, and the assumption of Boots, after listening to Lee, that all traffic was simply making a turn at

the intersection, it is apparent that this was a vital fact in the case and it was a question for the jury to determine if a reasonably prudent man should have given the information under the circumstances and if the failure to do so was the proximate cause of the accident.

The judgments are affirmed.

SCHOTTKY and PEEK, JJ., concur.

Hearing denied; CARTER, J., dissenting.

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GRANT v. WEATHERHOLT et al.

Civ. 19261.

District Court of Appeal, Second District, Division 3, California.

Feb. 3, 1954.

On Petition for Rehearing Feb. 26, 1954.

Hearing Denied March 31, 1954.

Action by contractor against promoter of realty development, his wife, wife of other promoter, individually and as deceased promoter's administratrix, and development corporation wholly owned by such persons for cancellation of trust deed encumbering such realty in favor of wife of living promoter or for subordination of trust deed lien to amount due contractor and for breach of contract with corporation under which contractor advanced improvement money, on ground that one promoter had fraudulently represented realty to be unencumbered at time of making of contract. Wife of deceased promoter cross-complained, as administratrix, for declaratory relief, injunction against sale of realty under trust deed, and accounting of joint venture between promoters and cancellation of note in trust deed. The Superior Court of Los Angeles County, Benjamin J. Scheinman, J., entered judgment and order notwithstanding verdict, which was against all defendants in favor of contractor and against corporation and administratrix and in favor of living promoter and his wife and corporation on cross-complaint, but thereafter granted new trial to corporation, and contractor and deceased promoter's wife, individually and as administratrix, appealed, and corporation cross-appealed. The District Court of Appeal, Shinn, P. J., held that evidence was sufficient to sustain verdict against living promoter and that corporation was liable to contractor.

Judgment reversed in part and affirmed in part.

1. Licenses 🔑39.43

Where contractor was not a duly licensed general contractor at time he made contract with realty development corporation whereby he and another were to obtain salary and cost plus fifteen per cent for improvement work done upon the realty, but contractor obtained such license during course of his performance under contract, contract was void, and contractor could not recover upon it, for breach of it, for value of work done, or for moneys expended thereunder. Business and Professions Code, §§ 7026, 7031.

2. Licenses 🔑39.43

Provisions of Business and Professions Code requiring licensing of contractors, declaring contracts of unlicensed persons invalid, and barring actions based thereon relate only to obligations which arise out of contracts under which express promises are made and to acts which would normally create an implied obligation to render compensation. Business and Professions Code, §§ 7026, 7031.

3. Licenses 🔑39.2

An unlicensed person may not recover compensation where right thereto rests upon an express or implied promise which law denounces as invalid. Business and Professions Code, §§ 7026, 7031.

4. Licenses 🔑39.43

Provisions of Business and Professions Code requiring licensing of contractors, declaring contracts of unlicensed persons invalid, and barring actions based thereon are to be construed and applied so as to accomplish their purpose of protecting public from dealings with incompetent and untrustworthy contractors, and the courts will not impose penalties for noncompliance in addition to those that are provided expressly or by necessary implication. Business and Professions Code, §§ 7026, 7031.

5. Licenses ⚷39.43

Provisions of Business and Professions Code which shield from liability those who enter into contracts with unlicensed contractors do not purport to shield them from responsibility for their own torts nor do such provisions relate to actions or proceedings except those that are based upon contract liability. Business and Professions Code, §§ 7026, 7031.

6. Licenses ⚷39.43

Where contractor had entered into contract with realty development corporation whereby he advanced money for and made improvements upon the realty, fact that contractor was not a duly licensed contractor during whole term of his performance under contract would not bar his recovery for alleged fraud in inducing him to make such contract, and he could also recover for sums paid by him, under such contract, to an unlicensed company. Business and Professions Code, §§ 7026, 7031.

7. Husband and Wife ⚷214

Where one of two promoters of realty development used $25,000 from an account containing money of his wife and himself to acquire the realty, and title to such realty was taken in name of other promoter and such other promoter's wife, who signed a note for $25,000 in favor of first promoter's wife, in whose favor second promoter and his wife executed a trust deed on such realty, wives were not parties to the joint venture between promoters and were not guilty of any fraud arising from alleged misrepresentations made by one promoter to party contracting with realty development corporation wholly owned by promoters and their wives.

8. Husband and Wife ⚷213

Where contract under which contractor advanced improvement money to realty improvement corporation was with corporation alone, wives of promoters of realty development were merely stockholders in such corporation along with the promoters and did not have any responsibility for corporation's performance of the contract.

9. Appeal and Error ⚷1160

Upon appeal, contractor's statement that he would not urge his right to a judgment on verdict against one defendant in her capacity as administratrix would be deemed to be a consent to reversal of that part of judgment which was against her, and judgment would be reversed regardless of the merits. Probate Code, § 709.

10. Corporations ⚷30(5)

In action by contractor against promoter of realty development, development corporation, and others, for cancellation of trust deed encumbering the realty or for subordination of trust deed lien to amount due contractor and for breach of contract under which contractor advanced money to corporation on ground that one promoter had fraudulently represented the realty to be unencumbered at time contract was made, evidence was sufficient to sustain jury's finding that contractor had been deceived to his prejudice and damaged in amount of his advancements.

11. Joint Adventures ⚷7

Where one joint adventurer, acting within scope of joint venture, and in furtherance of its agreed purposes, is guilty of fraud in procuring benefits which are retained by the joint adventurers, all joint adventurers are liable for the fraud in compensatory damages since liability is imposed under elementary principles of agency.

12. Joint Adventures ⚷1.1, 7

In so far as relations of joint adventurers as between themselves and as to third persons are identical with those of partners, settled principles applicable to partnerships should control.

13. Joint Adventures ⚷7

Where one of two promoters of realty development acted under authority conferred by the joint venture agreement in inducing contractor to advance money to realty improvement corporation, and results of his negotiations were consented to by other joint adventurer, and joint adventurers caused such corporation, which was wholly owned by joint adventurers and their wives, to enter into contract with contractor and to issue stock in exchange for the property, corporation was alter ego of the joint adventurers, and, therefore, joint adventurers would be liable as partners for alleged fraud in inducing contractor to enter into contract.

14. Corporations 🔑30(5)

In action by contractor against promoter of realty development, his wife, wife of other promoter, individually and as deceased promoter's administratrix, and development corporation wholly owned by such persons for cancellation of trust deed encumbering such realty in favor of wife of living promoter or for substitution of trust deed lien to amount due contractor and for breach of contract under which contractor advanced improvement money on ground that one promoter had fraudulently represented realty to be unencumbered, evidence was sufficient to sustain verdict against living promoter.

15. Husband and Wife 🔑133(7)

In action by contractor against promoter of realty development, his wife, and others, for cancellation of trust deed encumbering such realty in favor of wife or for subordination of trust deed lien to amount due contractor and for breach of contract with corporation under which contractor advanced improvement money on ground that one promoter had fraudulently represented the realty to be unencumbered at time of making of contract, evidence was sufficient to sustain finding that purchase price of such realty had been advanced by wife from her separate property.

16. Husband and Wife 🔑121

Where wife of promoter of realty development had advanced purchase price of realty from her separate property, wife acquired and held note and trust deed given in return for advancement as her separate property.

17. Mortgages 🔑186(5)

In action by contractor against promoter of realty development, his wife, wife of other promoter, individually and as deceased promoter's administratrix, and another for cancellation of trust deed encumbering such realty in favor of wife of living promoter or for subordination of trust deed lien and for breach of contract, wherein wife of deceased promoter cross-complained, as administratrix, for injunction against sale of realty under trust deed and cancellation of note and trust deed, evidence was not sufficient to establish that wife of living promoter should be estopped to assert that her trust deed constituted a lien on the realty superior to any rights possessed by contractor or by deceased promoter's wife, individually or as administratrix.

18. Joint Adventures 🔑5(1)

Where wife of deceased promoter was not a party to joint venture which had been dissolved after its assets, in form of realty, were vested in realty improvement corporation, which was wholly owned by the two promoters and their wives, and realty had been sold under trust deed given by deceased promoter and his wife to living promoter's wife, deceased promoter's wife was not entitled to dissolution of joint venture and an accounting in view of fact that corporation would receive proceeds of sale in excess of amount due.

19. Evidence 🔑73

It must be presumed that stockholder's rights will be respected and that there will not be any occasion for intervention by the court.

20. Corporations 🔑1

Mere fact that corporate entity has been disregarded for some purposes does not warrant its being disregarded for all purposes.

21. Corporations 🔑448(2)

In action by contractor against, among others, realty development corporation wholly owned by promoters and their wives for cancellation of trust deed encumbering realty in favor of one wife or for subordination of trust deed lien to amount due contractor and for breach of contract with corporation under which contractor advanced improvement money, where jury impliedly found, upon substantial evidence, that one promoter had made false representations and that contractor had been deceived and damaged thereby, and such promoter was corporation president acting within scope of his authority, corporation, which benefited to the extent of contractor's loss, was liable to contractor.

22. Pleading ⚷369(1)

In action by contractor against realty development corporation wholly owned by other defendants for cancellation of trust deed encumbering such realty in favor of one individual defendant or for subordination of trust deed lien to amount due contractor and for breach of contract with corporation under which contractor advanced improvement money, on ground that another individual had falsely represented realty to be unencumbered at time of making of contract, refusal to compel contractor to elect between cause of action for equitable relief and one for damages for fraud was not error.

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Armond M. Jewell, Los Angeles, for appellant.

William J. Cusack, Los Angeles, for respondents Weatherholt and Palm Springs Holding Corp.

Morris Lavine, Los Angeles, for respondent Herzog, individually and as administratrix.

SHINN, Presiding Justice.

On April 1, 1946, Raymond D. Herzog held a contract for the purchase of 325 acres of mountain land in Palm Springs, Riverside County, for the sum of $25,000. On that date he entered into an agreement with T. E. Weatherholt under and by virtue of which the two became joint adventurers in the purchase of the property, each to have a half interest in the venture. The agreement provided that the purchase price would be raised through a loan on the property or through a syndicate to be organized with capital of $75,000. The property was to be subdivided, improved and sold and it was agreed that the parties would operate as one in the future development and handling of said property. The contract read: "It is finally agreed that both parties hereto will cooperate to the fullest extent for the mutual benefit of both parties in interest." The syndicate was not formed. Mr. Weatherholt drew a check for $25,000 upon an account in which his money and the money of his wife, Annette Weatherholt, was deposited. The money was used to acquire the property, title being taken in the name of Raymond D. Herzog and Carrie E. Herzog, his wife, who signed a note for $25,000, at six per cent interest payable $750 or more each third month commencing July 15, 1946, in favor of Annette Weatherholt and they executed a trust deed on the property to a bank as trustee to secure the note. The trust deed was placed of record April 28, 1946. On or about June 18, 1946, Herzog and Weatherholt caused to be organized a corporation, the Palm Springs Holding Corporation, the stock of which was issued, 1,248 shares to Mrs. Weatherholt, 1,248 shares to Mrs. Herzog, and one additional share each to Mrs. Weatherholt, Mrs. Herzog, Mr. Weatherholt and Raymond D. Herzog. Mr. Herzog was made president, and Mr. Weatherholt secretary, of the corporation.

In the month of January, 1947, Herzog approached plaintiff for the purpose of securing money for development of the property and he represented to plaintiff that title to the property was free and clear of encumbrances. Plaintiff agreed to advance $25,000 for improvement work and on February 7, 1947, plaintiff and Ronald V. Herzog, son of Raymond D. Herzog, entered into a contract with the corporation by which they contracted to do improvement work, and were to advance $25,000 to be used therein; they were to be paid the cost of the work plus 15 per cent, a portion of which was to be applied toward the purchase of a homesite by each of the contractors. Grant and Ronald V. Herzog were to receive salaries of 500 each per month. Grant advanced altogether some $38,000 which was spent pursuant to the contract. The parties ran out of money and the enterprise came to a standstill. In the meantime nothing had been paid upon account of the note and trust deed held by Mrs. Weatherholt, and on or about July 17, 1951, Notice of Default and Intention to Sell under the trust deed was given on behalf of Mrs. Weatherholt. It was then that Grant first learned that the property was encumbered by a $25,000 trust deed. Raymond D. Herzog died July 17, 1950, and his widow, Carrie Herzog, was appointed administratrix of his estate. This action was brought August 17, 1951.

The complaint sought damages for fraud against Raymond D. Herzog, his wife, the corporation and Mr. and Mrs. Weatherholt. The alleged fraud consisted of the representation made by Herzog, senior, that the property was unencumbered. It was alleged that the representation was made by Herzog as agent for the other parties, that plaintiff was deceived thereby, and otherwise would not have entered into a contract with the corporation or advanced any money. It was also alleged that the $25,000 advanced for purchase of the property was community funds of Mr. and Mrs. Weatherholt; that Mr. Weatherholt acted throughout as the authorized agent of his wife; that he also fraudulently concealed the existence of the trust deed; that Mrs. Herzog and Mrs. Weatherholt were joint adventurers in the enterprise; that they fraudulently concealed from plaintiff the existence of the trust deed, and plaintiff sought relief through cancellation of the trust deed or a judgment subordinating the lien of the trust deed to such amount as might be found due plaintiff. Mrs. Herzog filed a cross-complaint for declaratory relief, an injunction against the sale of the property under the trust deed, and for an accounting of the joint venture, and she also sought cancellation of the note and trust deed. She alleged that Mr. and Mrs. Weatherholt were joint adventurers in the enterprise and that the $25,000 advanced for the purchase of the property was to be paid only out of proceeds of sale of the property.

When the action came on for trial a jury was empaneled and the court ruled that the legal issues would be submitted to the jury and that the court would determine the remaining equitable issues. At the close of the evidence plaintiff filed a second amendment to his first amended complaint in which he alleged that the defendants wilfully and intentionally breached their contract with him in that they failed to bring about sales of property or otherwise secure adequate financing for the development thereof to plaintiff's damage in the sum of $47,912.23.

The jury returned a verdict in favor of plaintiff against T. E. Weatherholt, Annette Weatherholt, Palm Springs Holding Corporation and Carrie E. Herzog individually, and as administratrix of the estate of Raymond D. Herzog, deceased, in the sum of $38,000, together with interest thereon from February 7, 1947.

After the verdict was returned the court made findings upon all the issues in the case and entered a judgment notwithstanding the verdict in favor of the plaintiff for $38,000 and interest against Palm Springs Holding Corporation, Carrie E. Herzog as administratrix of the estate of Raymond D. Herzog, and in favor of Carrie E. Herzog, individually, T. E. Weatherholt and Annette Weatherholt upon the complaint. Judgment was also entered against Carrie Herzog, individually and as administratrix, and in favor of Weatherholt and wife and the corporation on the cross-complaint. Thereafter, upon motion duly made, the court granted a new trial to Palm Springs Holding Corporation on the ground of insufficiency of the evidence. Plaintiff appeals from the judgment, except as to that portion thereof which awarded judgment in his favor against the corporation and Carrie E. Herzog as administratrix, and also from the order granting Palm Springs Holding Corporation a new trial. The corporation filed a cross appeal from the judgment on the verdict granted against it. Carrie E. Herzog, individually and as administratrix, appeals from the judgment.

The issues raised by the pleadings may be summarized as follows: Plaintiff sought damages against Herzog and wife, Weatherholt and wife and the corporation, for fraudulent representations that the property of the corporation was unencumbered, and also damages for breach of contract consisting of the failure of the defendants to finance the completion of the improvements of the tract and to sell a sufficient amount of the property to enable the corporation to pay the sums due plaintiff under his improvement contract with the corporation. He was claiming that Mrs. Herzog and Mrs. Weatherholt were parties to the joint venture and that the corporation was the alter ego of the individual defendants. He was also claiming that Herzog, in representing that the property was unencumbered, acted as the agent and representative of the other defendants; also that the $25,000 for which a note and trust deed were given in favor of Mrs. Weatherholt was not her separate property, but property of the community, and he sought to have the trust deed cancelled, and in any event that the amount of his expenditures under the improvement contract be declared a lien upon the property superior to the lien of the trust deed. Mrs. Herzog, individually and as administratrix, was making similar contentions with respect to the trust deed. She also contended that Mrs. Weatherholt was a party to the joint venture and that the Palm Springs Holding Corporation was the alter ego of the joint adventurers. She was contending that T. E. Weatherholt had agreed to provide all the financing for the development, subdivision and sale of the property, and that he failed and refused to do so. Claiming her intestate to have been a party to the joint venture she sought a dissolution thereof and an accounting; also cancellation of the note and trust deed and an injunction to enjoin any sale thereunder.

The legal issues consisted of plaintiff's claims for damages based upon said fraudulent representations and the alleged failure of the Weatherholts and the corporation to fulfill their claimed obligation to complete the financing and sell portions of the property. These issues were submitted to the jury.

From the form of the verdict it is apparent that the jury was required to determine whether plaintiff was entitled to a judgment for damages against Weatherholt and wife, the corporation and Carrie E. Herzog, individually and as administratrix. The verdict against all these defendants indicates that facts were found which would render each of said defendants liable, either on the basis of fraud or breach of contract.

In his original complaint plaintiff alleged that he was at all times mentioned a duly licensed general contractor. In his second amended complaint he omitted this allegation but alleged that he and Ronald V. Herzog were acting only as employees of the corporation, which allegation was denied in the answers. At the time the partnership, consisting of plaintiff and Ronald V. Herzog, entered into the contract with the corporation, neither plaintiff nor Herzog had been licensed by the Contractors State License Board, Business & Professions Code, § 7026.[1] The work was commenced in March, 1947; plaintiff and Herzog were arrested for being unlicensed, pleaded guilty and obtained a license in June. During the construction work on the road on the property, plaintiff paid Phoenix Mining Company $11,303.91. At the time the work was done Phoenix was unlicensed, but later obtained a license.

The first contention to be considered is that plaintiff is suing on a contract which was void because plaintiff was not at all times during the progress of the work the holder of a contractor's license. It is further contended that since Phoenix Mining Company was unlicensed, payments to that company were voluntary, and cannot be considered in the computation of the sums that were expended by plaintiff. It is our opinion that neither of these contentions is sustainable.

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[1] Section 7026. "The term contractor for the purposes of this chapter is synonymous with the term "builder" and, within the meaning of this chapter, a contractor is any person, who undertakes to or offers to undertake to or purports to have the capacity to undertake to or submit a bid to, or does himself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith. The term contractor includes subcontractor and specialty contractor."

[1] So far as concerns plaintiff's cause of action for damages for alleged breach of contract by the defendants, section 7031, Business and Professions Code[2] bars the action. The contract recited that plaintiff and Herzog were duly licensed contractors. They were to supervise the work, be responsible for the payment of all bills, were to carry workmen's compensation, and were to receive in payment the cost of the work plus fifteen per cent, and each was to accept as part payment a building lot in the subdivision. They were not merely employees, nor were they working exclusively for wages. Plaintiff's contract with the corporation was void. He could not recover on the contract, nor for breach of it, nor for the value of work done or for moneys expended thereunder. Holm v. Bramwell, 20 Cal.App.2d 332, 67 P.2d 114; Owens v. Haslett, 98 Cal.App.2d 829, 221 P.2d 252; Sheble v. Turner, 46 Cal.App.2d 762, 117 P.2d 23; Mansfield v. Hyde, 112 Cal.App.2d 133, 245 P.2d 577.

The fact that plaintiff was unlicensed did not operate to bar him from the prosecution of his cause of action for fraud by which he was induced to enter into the contract with the corporation.

[2, 3] The sections of the Business and Professions Code which require the licensing of contractors and declare the contracts of unlicensed persons to be invalid, and bar actions based thereon, relate only to obligations which arise out of contracts under which express promises are made, and to acts which would normally create an implied obligation to render compensation. An unlicensed person may not recover compensation, the right to which rests upon an express or implied promise which the law denounces as invalid.

The first statute which required a contractor to obtain a license was enacted in 1929, Stats.1929, Ch. 790, as an amendment of an act, approved March 24, 1923, relating to street improvements. The word "contractor" was defined in section 3 of the act.[3] By Statutes, 1931, chapter 578, section 3, section 12 was amended to provide: "No person engaged in the business or acting in the capacity of a contractor as defined by section 3 of this act, shall bring or maintain any action in any court of this state for the collection of compensation for the performance of any act for which a license is required by this act without alleging and proving that such person was a duly licensed contractor at the time the alleged cause of action arose."

Section 12 was amended by Statutes, 1935, Chapter 499, to read substantially as section 7031, Business and Professions Code reads. The word "compensation," as used in section 7026 and section 7031, denotes sums claimed as an agreed price, fee or percentage earned by performance, and also sums claimed as the reasonable value of work done under implied contract.

Plaintiff's cause of action for fraud is not "for the collection of compensation for the performance of any act or contract for which a license is required." Plaintiff's right is the outgrowth of the deceit practiced upon him by the defendants. The validity or invalidity of his contract does not affect that right. Proof of the contract under the cause of action for fraud was merely proof of the circumstances under which plaintiff's services were rendered and his money was expended.

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[2] Section 7031. "No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract."

[3] "A contractor within the meaning of this act is a person, firm, copartnership, corporation, association, or other organization, or any combination of any thereof, who for a fixed sum, price, fee, percentage, or other compensation, other than wages, undertakes with another for the construction, alteration, repair, addition to, or improvement of any building, highway, road, railroad, excavation or other structure, project, development, or improvement, other than to personalty, or any part thereof; *provided*, that the term contractor, as used in this act, shall include subcontractor, but shall not include any one who merely furnishes materials or supplies without fabricating the same into, or consuming the same in the performance of, the work of the contractor as herein defined."

[4, 5] Plaintiff's action for fraud is not barred unless by the provision of the above sections of the Business and Professions Code. The sections should be construed and applied so as to accomplish their purpose of protecting the public from dealings with incompetent or untrustworthy contractors. The courts will not impose penalties for noncompliance in addition to those that are provided expressly or by necessary implication. The rule *expressio unius exclusio alterius* has application. Comet Theatre Enterprises v. Cartwright, 9 Cir., 195 F.2d 80, 30 A.L.R.2d 1229; Norwood v. Judd, 93 Cal.App.2d 276, 209 P.2d 24. The sections of the code which shield from liability those who enter into contracts with unlicensed persons do not purport to shield them from responsibility for their own torts, nor do they relate to actions or proceedings except those that are based upon contract liability.

[6] In Ralph v. Lockwood, 61 Cal. 155, plaintiffs, copartners, who did not file a certificate of partnership required by section 2466 and section 2468 of the Civil Code, were claiming title to a crop of barley by virtue of a contract and lease made to them as lessees. They sued for conversion of the crop and recovered. The defense was that plaintiffs were suing on a contract made in their partnership name in the absence of a certificate, and were therefore barred from maintaining the action until a certificate had been filed. The opinion of the court on that point reads: "Section 2468 of the Civil Code does not apply to torts, and as the action is for conversion of personal property, the plaintiff's rights are unaffected by the provisions of that section." The judgment was affirmed. This case was followed in Thompson v. Byers, 116 Cal. App. 214, 2 P.2d 496, holding that the licensing statute did not apply to torts, and pointing out that if the legislature had intended to include torts it would have done so. Reeves v. First Nat. Bank, 20 Cal.App. 508, 129 P. 800, held that an action by partners against a bank for damages for defendant's failure to pay certain checks was an action in tort, and was not barred because of the failure of the copartners to have had on file a certificate as required by section 2468, Civil Code. In re Dennery, 89 Cal. 101, 26 P. 639, brought in question the right of partners to join in an insolvency petition when they had not filed a certificate as required by the code sections. Speaking of section 2468, the court said, 89 Cal. at page 106, 26 P. at page 640: "It does not by express terms include special proceedings, and the court will not by intendment enlarge the inhibition for the purpose of defeating a remedy to which the party otherwise would be entitled." Inasmuch as plaintiff's action for fraud is not for the recovery of compensation under the contract or for breach of it, the fact that he was not licensed at all times does not bar his recovery. He does not sue for any act performed by him, but for acts of the defendants which resulted in his being deceived and damaged. For the same reasons the sums paid to Phoenix Mining Company were properly considered as elements of plaintiff's damage.

[7] We shall consider next the judgment notwithstanding the verdict which was entered in favor of Mrs. Weatherholt and Mrs. Herzog individually. Neither of them made any representation to plaintiff, and unless they were parties to the joint venture they were not responsible for the representations that were made by Mr. Herzog. We think it is clear they were not parties to the joint venture. They were not parties to the agreement. The mere fact that they were respectively the wives of Weatherholt and Herzog did not make them parties to the joint venture. There was no evidence whatever that in organizing the joint venture or in the negotiations with plaintiff the husbands were acting as agents of their wives. The implied finding of fraud upon their part had no support in the evidence.

[8] Neither would the wives have been liable for breach of contract unless they

were parties to it, even if it had been a valid contract. The contract of plaintiff under which he advanced the improvement money was with the corporation alone, and the wives, who were merely stockholders, had no responsibility for its performance by the corporation. There was no basis in the evidence for the award of damages against either Mrs. Weatherholt or Mrs. Herzog, individually.

[9] It is urged by Mrs. Herzog, as administratrix, that the judgment against her in that capacity must be reversed for the reason that no claim was filed against the estate. Probate Code, § 709. In reply plaintiff states that he "will not urge herein his right to a judgment on the verdict against the respondent/cross complainant Carrie E. Herzog in her capacity as administratrix of the Estate of Raymond D. Herzog, Deceased." We deem this to be consent to a reversal of that part of the judgment, and it will be reversed, without regard to the merits of the objection.

[10] On plaintiff's appeal from the judgment notwithstanding the verdict in favor of T. E. Weatherholt the sole question is whether the verdict against him had substantial support in the evidence. Mr. Grant testified that Raymond D. Herzog represented to him that the property was free of encumbrance, that he believed the representation and upon the strength of it advanced some $38,000, for the use and benefit of the corporation. The corporation had no assets other than the land. The improvement work came to a standstill because there was no more money available; the corporation was unable to repay the money which plaintiff had advanced. Its property was subject to the $25,000 trust deed. This was sufficient evidence to support the findings of the jury that plaintiff was deceived to his prejudice and was damaged in the amount of his advancements.

The next question is whether Weatherholt was liable for the fraud of Herzog. The representations of Herzog to Grant were made during the existence of the joint venture, in the interest of the joint adventurers and within the scope of the joint venture. The property which the Weatherholts and Herzogs exchanged for stock in the corporation was improved through use of the money advanced by plaintiff. Although the stock, except for a few shares, was issued in the names of the wives, Herzog and Weatherholt both received and retained benefits which came to them as joint adventurers and stockholders, through the improvement of the property at plaintiff's expense.

[11] Where one joint adventurer, acting within the scope of the joint venture, and in furtherance of its agreed purposes, is guilty of fraud in procuring benefits which are retained by the joint adventurers, all are liable for the fraud in compensatory damages.

Liability is imposed under elementary principles of agency. Rest., Agency, secs. 160–162, 257, 258.

Where the conditions stated above exist the fraud of one partner imposes liability upon his copartners. Siebold v. Berdine, 61 Cal.App. 158, 162, 214 P. 655; Lewis v. McClure, 127 Cal.App. 439, 449, 16 P.2d 166; Russell v. Warner, 96 Cal.App.2d 986, 217 P.2d 43; 68 C.J.S., Partnership, § 170, page 620; 40 Am.Jur., sec. 193, p. 263.

In 48 C.J.S., Joint Adventures, § 1, pages 807, 808, it is said of joint ventures and partnerships: "The divergence between the two relations is still very slight, and is difficult of ascertainment in some circumstances. It has been held that a joint venture is in the nature of a partnership, and that it may be regarded as a limited, special, or quasi partnership. The relation of the parties to a joint adventure is so similar to that in a partnership that their rights and liabilities are usually tested by partnership rules, and in numerous decisions it has been broadly held that both joint adventure and partnership are governed by the same rules of law. This is generally true as regards substantial rights, especially those enforceable in courts of equity."

[12, 13] Although it is recognized that there are distinctions between joint ventures and partnerships, they are distinctions of substance. See Nelson v. Abraham, 29 Cal.

2d 745, 177 P.2d 931, and authorities cited. Insofar as the relations of joint adventurers, as between themselves and as to third parties, are identical with those of partners, the settled principles applicable to partnerships should control. With respect to the questions before us we think the joint adventurers should be held to the liabilities of partners. Herzog and Weatherholt had the rights and owed the duties of partners in the enterprise. In enlisting the assistance of Grant in the development of the property Herzog was acting under authority conferred by the joint venture agreement. The results of his negotiations and oral promises were known and consented to by Weatherholt. Pursuant to the arrangement with Grant for advancement of the money, Herzog and Weatherholt caused the corporation to enter into the contract with Grant and to issue stock in exchange for the property. It is immaterial that they had the stock issued in equal amounts to their respective wives. It was the stock of the joint adventurers by virtue of the original agreement. The wives took the stock in their names only because their respective husbands, for some reason, preferred not to take it in their own names. It cannot be questioned that Herzog and Weatherholt received the benefit of the advances made by Grant. It is true that title to the property stood in the name of the corporation but this was under circumstances which warranted the jury in disregarding the corporate entity. This issue was submitted to the jury under appropriate instructions and the implied finding was that the corporation was the alter ego of the joint adventurers, Weatherholt and Herzog. The evidence was sufficient to support this finding. Hillman v. Hillman Land Company, 81 Cal.App.2d 174, 183 P.2d 730; Conover v. Smith, 83 Cal.App. 227, 231, 256 P. 835.

In January 1947 Herzog and Weatherholt entered into a written agreement which recited that they had theretofore entered into a "partnership agreement" and by their writing they purported to cancel the former agreement. We have referred to the relationship of the parties as that of joint adventurers because the briefs designate them as such, but, as we have stated, it is immaterial whether they be regarded as joint adventurers, or partners, with respect to the fraud issue, and the same is true as to the alter ego issue.

The dissolution agreement could not relieve the parties from existing liability for fraud, and in its further operations the corporation was the agency of the individuals, its fraud their fraud, and its benefits their benefits.

Although Weatherholt was liable for the fraud of Herzog as a joint adventurer the implied finding that the corporation was the alter ego of Herzog and Weatherholt is merely confirmatory of the latter's liability, since it will be developed in our discussion that the corporation, apart from its alter ego status, had primary liability for the fraud of Herzog.

[14] We conclude that the verdict against T. E. Weatherholt was supported by substantial evidence, and that it was error to enter judgment notwithstanding the verdict in his favor.

[15–17] After the legal issues had been determined by the jury there remained equitable issues for determination by the court. Both plaintiff and Mrs. Herzog attacked the validity of the trust deed held by Mrs. Weatherholt. They contended that she was one of the joint adventurers, that the funds which she advanced were community funds, that in all matters her husband acted as her authorized agent, and that the trust deed indebtedness was to be paid only from proceeds of the sales of land. These contentions related to the claims that were addressed to the equity jurisdiction of the court and to issues that were reserved for decision by the court. Specific findings were made upon all these issues in favor of Mrs. Weatherholt. It was found that the funds advanced by Mrs. Weatherholt were her separate property. There was substantial evidence to justify that finding. Although the clerk was drawn by Mr. Weatherholt on a bank account in which both separate and community funds were deposited from time to time, there was undisputed evidence that Mrs. Weatherholt had deposited in the account some $56,000 derived from the sale of her separate property, and that certain portions of these sums were disbursed by her husband only as she directed. The court properly concluded that Mrs. Weatherholt acquired and held the note and trust deed as her separate property. As to the other findings upon the issues which related to the liability of Mrs. Weatherholt for the sums advanced by plaintiff, and to the validity and enforceability of her trust deed it is sufficient to say that we have examined the evidence and find it sufficient to support the findings. Mrs. Weatherholt never con-versed with plaintiff, she was not a party to the joint venture nor to the contract under which plaintiff made his advancements. There was evidence that the stock she held was considered to be additional security for her loan. The fact that this was her husband's stock also indicated that she was loaning her separate funds. If, as contended, she made no demands for payment between June 1947, and July 17, 1951, it was not shown that she had ever been advised of plaintiff's ignorance of the existence of the trust deed, or that she had any duty to inform him of its existence. There was no basis in the evidence for a claim that she should be held estopped to assert that her trust deed was a lien on the property superior to any rights possessed by plaintiff or Mrs. Herzog, individually or as administratrix.

[18–20] We are unable to see wherein Mrs. Herzog, either individually or as administratrix, is prejudiced by the judgment on her cross complaint, insofar as it denies her a decree dissolving the joint venture and an accounting. As we have said, she was not a party to the joint venture. All the assets of the joint venture were vested in the corporation. The joint venture had been dissolved. We must assume, as plaintiff does in his briefs, that the property has been sold under the trust deed, either to Mrs. Weatherholt or a third party. If the property sold for more than the sum due ($25,000, plus interest at six per cent from April 15, 1946) the corporation will have received the amount of the excess. Mrs. Herzog has the rights of a stockholder. It must be presumed that they will be respected, and that there will be no occasion for intervention by the court. The fact that the corporate entity has been disregarded for some purposes does not warrant its being disregarded for all purposes. Whatever redress is due Mrs. Herzog, either individually or as administratrix, may be had within the corporation. If the property brought no more than the amount of the indebtedness against it, the corporation is without assets, nor would there be any assets, other than corporate stock, as outgrowth of the joint venture.

[21] It was error to grant the corporation's motion for a new trial. The jury impliedly found, upon substantial evidence, that Herzog made false representations, as charged, that plaintiff was deceived thereby and was damaged. Herzog was president of the corporation, acting within the scope of his authority and duty to accomplish the improvement of the property and to obtain needed financing. The corporation benefited to the extent of plaintiff's loss. That liability of the corporation existed under these facts is self evident. Judgment against it was properly entered upon the verdict, and its motion for a new trial should have been denied.

Since the order granting the corporation a new trial is to be reversed, the judgment against it will be reinstated, and its appeal from the judgment is to be considered. For the reasons stated, there is no merit in its appeal.

By the verdict and the judgment against the corporation and Carrie E. Herzog as administratrix, interest on the amount of the judgment was allowed from February 7, 1947. Plaintiff consents that the interest award may run from September 30, 1949, instead of from the earlier date.

[22] The Weatherholts and the corporation contend the court erred in refusing their offer of the original complaint in evidence, and in denying their motions to compel plaintiff to elect between the cause of action for equitable relief and the cause of action for damages for fraud, and their motion to dismiss the latter cause of action. They suggest no reason for their offer of the original complaint in evidence nor do they state that they were prejudiced by the ruling. We see no inconsistency, or reason for an election, between the cause of action for damages and the claim that any judgment that might be rendered in favor of plaintiff should be given priority over Mrs. Weatherholt's trust deed. There is no merit in the contention that the cause of action for fraud should have been dismissed.

We mention these claims of erroneous rulings for the reason that if they were erroneous, and if they improperly affected the verdict to the prejudice of T. E. Weatherholt and the corporation, there should be a retrial of the fraud issue as to those defendants. The rulings were not erroneous and there is no occasion for a retrial.

The judgment is reversed as to T. E. Weatherholt with instructions to enter judgment in favor of plaintiff against him for $38,000, with interest from September 30, 1949. The order granting Palm Springs Holding Corporation a new trial is reversed and the judgment as against that defendant is modified so as to award plaintiff the principal sum of $38,000 and interest from September 30, 1949. The judgment insofar as it is against Carrie E. Herzog, as administratrix of the estate of Raymond D. Herzog, deceased, is reversed; insofar as it is in favor of Carrie E. Herzog individually, and Annette Weatherholt, it is affirmed. The judgment insofar as it is in favor of the cross defendants Annette Weatherholt, T. E. Weatherholt, Palm Springs Holding Corporation and Citizens National Trust & Savings Bank of Los Angeles, as trustee, on the cross complaint of Carrie E. Herzog, individually and as administratrix, is affirmed. Plaintiff shall recover costs of appeal only from T. E. Weatherholt and Palm Springs Holding Corporation; Annette Weatherholt and Carrie E. Herzog, individually and as administratrix, are allowed no costs of appeal.

PARKER WOOD and VALLÉE, JJ., concur.

On Petition for Rehearing

PER CURIAM.

From an independent study of the record we conclude that plaintiff advanced in money and services, exclusive of any charges for profits, somewhat more than $30,888.24, the amount prayed for under his cause of action for fraud.

The opinion heretofore filed is modified as follows: From paragraph 2 of the opinion there is stricken "Grant advanced altogether some $38,000 which was spent pursuant to the contract" and there is substituted "Grant advanced in money and services in excess of $31,000"; in the twenty-third paragraph there is added after "$38,000" the words "in money and services"; in the final paragraph wherever "$38,000" appears, "$30,888.24" is substituted, the latter being the amount of plaintiff's demand. Meisner v. McIntosh, 205 Cal. 11, 269 P. 612; Frost v. Mighetto, 22 Cal.App.2d 612, 71 P.2d 932. All petitions for rehearing, and plaintiff's request for modification are denied.

Hearing denied; CARTER and SPENCE, JJ., dissenting.

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122 Cal.App.2d 912

In re HUBBARD'S ESTATE.

SECURITY TRUST CO. et al.

v.

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 8269.

District Court of Appeal, Third District, California.

Jan. 29, 1954.

Hearing Denied March 25, 1954.

Proceeding by trustee under will for instructions as to distribution of trust estate. The Superior Court, San Joaquin County, George F. Buck, J., entered an order of distribution, and an appeal was taken. The District Court of Appeal, Peek, J., held that will providing that if husband of either of testatrix' two daughters should die before his wife, that daughter should receive one-half of trust estate clear and free of trust, and that if either daughter should die before her husband, the other daughter would take all of the estate, and if both daughters should predecease their husbands, then all of the trust estate should go according to other clause of will, meant that trust should terminate at death of last survivor of two husbands, and daughter surviving at that time was entitled to entire trust estate to exclusion of heirs of deceased daughter.

Order affirmed.

1. Wills ⚷448

Statutory rule that interpretation of will is to be preferred which prevents total intestacy is especially true where will evidences an intention on part of testator to dispose of his or her entire estate. Probate Code, § 102.

2. Executors and Administrators ⚷315(6)

Following distribution of probate estate, it is the decree, and not the will which must be interpreted.

3. Trusts ⚷363

Statute providing that when trust created by will continues after distribution of estate, Superior Court does not lose jurisdiction of estate by final distribution but maintains jurisdiction for determining final distribution, extends Superior Court's jurisdiction over practically all controversies which might arise between trustees and those claiming as beneficiaries under the trust. Probate Code, § 1120.

4. Executors and Administrators ⚿315(6)

In view of statute providing that when trust created by will continues after distribution under will, the Superior Court retains jurisdiction for purpose of final determination of trust to extent that such determination is not concluded by the decree of distribution, trustee's request for interpretation of terms and conditions contained in a decree of distribution of probate estate which were identical to provisions of will was not a collateral attack upon the decree, as the Superior Court had jurisdiction to construe will pursuant to request of trustee with respect to distribution of the trust estate. Probate Code, §§ 102, 1120.

5. Wills ⚿478

The mere fact that a testamentary instrument may be incomplete in one particular does not nullify an intention which is clearly shown.

6. Wills ⚿687(1)

Will providing that if husband of either of testatrix' two daughters should die before his wife, other daughter should receive one-half of trust estate clear and free of trust, and that if either daughter should die before her husband the other daughter would take all of the estate, and if both daughters should predecease their husbands, all of the trust estate should go according to other clause of will, meant that trust should terminate at death of last survivor of two husbands, and daughter surviving at that time was entitled to entire trust estate to exclusion of heirs of deceased daughter.

◆

Smith & Zeller, Stockton, for appellant.

Jones, Lane, Weaver & Daley, and Rutherford, Jacobs, Cavalero & Dietrich, Stockton, for trustee.

Mazzera, Snyder & DeMartini, Stockton, for respondent.

PEEK, Justice.

This is an appeal from an order of distribution following termination of the trust created by the decedent.

At the time of her death in 1917 decedent was survived by two adult married daughters, Maria Cronise and Eliza Middlecoff, her only heirs at law. Both of their husbands were then living. Following the administration of her estate the court, in its decree of final distribution, stated that the "* * * property should be distributed pursuant to the terms of said Last Will and Testament, the language of which for the purposes of this Decree, is adopted by the Court as its own and used herein." The court then decreed distribution in the identical language of clauses (a), (b), (c), (d), Fourth, Fifth, Sixth, Seventh, Eighth and Ninth of the will. Each year thereafter the trustee filed its annual account, and at various times during the course of its administration of the trust estate made distributions in accordance with the provisions of the will.

At the time of filing its annual account in November, 1951, the trustee alleged that by reason of the happening of certain events, and by reason of the particular wording of the will and the decree of distribution, the trustee could not safely determine whether the trusts referred to in said decree terminated, and if such were the case, it could not safely determine the persons to whom the property should be distributed or the amounts or proportions thereof. Following the hearing on said petition, the court made its order that all of the property remaining in said trust was distributable to Eliza. It is from that order that the present appeal is taken.

The evidence is not in conflict. It is agreed that the sole question raised is one of law and relates to the interpretation of the Fourth clause and paragraph (d) of the Third clause of the decree of distribution in the probate estate. It is further agreed that said clauses pose five situations, upon the fulfillment of any one of which termination of the trusts in whole or in part is decreed. They are as follows:

1. If Adelbert Cronise (husband of Maria) dies before Maria, and Eliza or her issue are then living, Maria receives one-half of the trust estate free and clear of the trusts.

2. If W. W. Middlecoff (husband of Eliza) dies before Eliza, and Maria or issue are then living, Eliza is to receive one-half of the trust estate free and clear of the trusts.

3. If Maria dies without issue before her husband, Adelbert, then upon the death of Middlecoff, Eliza takes all of the estate if living, or if dead, it goes to her (Eliza's) issue.

4. If Eliza dies without issue before her husband, Middlecoff, then upon the death of Cronise, Maria takes all.

5. If both Eliza and Maria die without issue while Cronise and Middlecoff are living, then all of the trust estate goes according to clause Fourth of the decree.

Situation number 1 occurred by reason of the death of Adelbert during the lifetime of Maria, and while Eliza was still living. Maria thereupon received distribution of one-half of the trust estate. It is the remaining one-half thereof with which the parties are now concerned.

It is the respondent's contention in support of the order that when the decree of distribution of the probate estate, which adopted in its entirety the language of the will including the trust provisions in its distribution order, is construed by its four corners, the intention is clearly shown that Eliza is to receive the property, and accordingly there is a gift to her by necessary implication. Appellants, however, contend that the situation posed in item 2 did not technically occur, because at the time of the death of Middlecoff, although he was then survived by Eliza, Maria had previously died without issue and that, by reason of her death prior to his, the trust failed and an intestacy resulted. Furthermore they contend that the probate court was without jurisdiction to construe the will and to find therefrom a gift by implication. In other words that the decree of 1918 was final and precludes further inquiry.

Probate Code section 1120 provides in part that, "When a trust created by a will continues after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction for the purpose of determining to whom the property shall pass and be delivered upon final or partial termination of the trust, to the extent that such determination is not concluded by the decree of distribution * * *."

[1] It is the statutory rule that an interpretation of a will "* * * is to be preferred which will prevent a total intestacy", Probate Code section 102, either in whole or in part. See In re Sewall's Estate, 14 Cal.App.2d 554, 58 P.2d 744. Especially is this true where the will evidences an intention on the part of the testator to dispose of his or her entire estate. In re Lawrence's Estate, 17 Cal.2d 1, 108 P.2d 893.

The first consideration before this court then must be as to whether or not the San Joaquin County court had jurisdiction to construe the will pursuant to the request of the petitioning trustor with respect to the distribution of the trust estate.

In the case of Thomas v. Superior Court, 17 Cal.App.2d 40 at page 41, 61 P.2d 496, 497, it was sought to prohibit the court from hearing or determining a petition for distribution of a testamentary trust and from determining the various beneficial interests involved therein. The court, in denying the petition said, "It will be observed that under said section [Probate Code section 1120] the court does not lose jurisdiction of the trust estate by the final distribution of the probate estate, but that the superior court 'shall retain jurisdiction for the purpose of determining to whom the property shall pass and be delivered upon final or partial termination of the trust,' * * *."

[2-4] The present proceeding is not a collateral attack as appellants further argue, nor an attempt to impeach the 1918

decree as they contend. It is a request for an interpretation of the terms and conditions contained in the decree of distribution of the probate estate which were identical to provisions of the will. Following distribution of the probate estate, it is the decree and not the will which must be interpreted, Society of California Pioneers v. McElroy, 63 Cal.App.2d 332 at page 338, 146 P.2d 962, or as was stated in Estate of White, 69 Cal.App.2d 749, 160 P.2d 204, 208, quoting from McAdoo v. Sayre, 145 Cal. 344, 78 P. 874: "'* * * in a proceeding of this character the court has the power, and it is its duty whenever the power is invoked, to ascertain who is entitled to the trust estate already delivered by the trustee, and also that which yet remains to be delivered, and make such orders as may be necessary to enable the trustee to make final settlement with the beneficiary in safety, and secure a final settlement of his account, which will entitle him to a discharge.'" In the Estate of Smead, 12 Cal.2d 20 at page 24, 82 P.2d 182 at page 183, the Supreme Court approved the conclusion in the Smith Estate [4 Cal.App.2d 548, 41 P.2d 565] and further held: "* * the language employed in the present section [1120] of the Probate Code was intended to broaden the jurisdiction of the probate court so as to give that court jurisdiction over practically all controversies which might arise between the trustees and those claiming to be beneficiaries under the trust." Both the Smead and Smith cases were cited with approval in the recent case of Wells-Fargo, etc., v. Superior Court, 32 Cal.2d 1 at page 5, 193 P.2d 721 at page 723, where the court observed that, "Except for the statute, the superior court, sitting as a probate court, would have no jurisdiction over trusts after the final decree of distribution. * * *"

[5, 6] Under the conditions disclosed in the present proceeding it would have been useless for the probate court in the first instance to have attempted to anticipate or to have endeavored to construe the will in all of the conceivable situations which might have arisen under it. However, the fact remains that the testatrix did make a will in which she devised all of the residue of her property in trust. This fact negatives the end result of the contention of appellants that she intended to die intestate. It is evident from even a cursory reading of the will, that the testatrix, as the trial judge observed in the course of the hearing, attempted a complete disposition of all of her property, and in so doing to treat her two daughters with equality. The mere fact that an instrument may be incomplete in one particular does not nullify an intention which is clearly shown. Illustrating the inequality that would result if it were held that there was an intestacy, the trial court observed: "* * * that the daughter who died first would under certain contingencies have the power of disposition of three quarters of the estate. The daughter who died first could by her own will dispose of her own vested half interest that would vest in her under certain contingencies and by her own will could have the power of disposing of one quarter of the estate. If we regard the Hubbard will as speaking at the time of death three quarters of the estate could have gone into the hands of strangers. * * * viewing the entire will it was the intention of Mrs. Hubbard that the trust should terminate at the death of the last survivor of the two husbands, Mr. Middlecoff. Furthermore, that the trust estate should vest in Mrs. Middlecoff."

It necessarily follows that there is ample basis for the conclusion of the court that there was a gift by implication from the testatrix to her daughter, Eliza. In the recent case of Brock v. Hall, 33 Cal.2d 885 at pages 887 and 889, 206 P.2d 360 at page 362, 11 A.L.R.2d 672, where a comparable situation was presented, the Supreme Court held that: "The implication of gifts in wills rests upon the primary rule of construction that the duty of the court in all cases of interpretation is to ascertain the intention of the maker from the instrument read as a whole and to give effect thereto if possible, and it is well settled that, where the intention to make a gift clearly appears in a will, although perhaps imperfectly expressed, the court will raise a gift by implication. [Citing cases.] * * * Gifts by implication have been sustained from remote times where no direct language is found to support them, and the tendency is rather to extend than narrow the rule raising such gifts."

The order is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

* * *

123 Cal.App.2d 124

PEOPLE v. RICE.

Cr. 5107.

District Court of Appeal, Second District, Division 3, California.
Feb. 9, 1954.

Defendant was convicted of possession of heroin preparation. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., entered judgment and an order denying motion for new trial, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Criminal Law 🔑1159(2, 4)

The District Court of Appeal could not, on appeal from conviction for possession of heroin preparation, reweigh credibility of witnesses or their testimony. Health and Safety Code, § 11500.

2. Poisons 🔑9

Evidence sustained conviction for possession of heroin preparation. Health and Safety Code, § 11500.

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John H. Marshall, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James D. Loebl, Dep. Atty. Gen., for respondent.

SHINN, Presiding Justice.

Defendant was informed against and convicted in a nonjury trial of the possession of a preparation of heroin, in violation of section 11500, Health and Safety Code. He appeals from the judgment and from an order denying his motion for a new trial.

The ground of the appeal is the claimed insufficiency of the evidence to prove defendant had possession of the narcotic, or that he knew it was a narcotic. We are of the opinion that both the fact of possession and the fact of knowledge were reasonably inferred from the testimony of the arresting officers.

There was testimony of the following facts: Officer Conrad, in company with officers Northrop and Nichols, arrested defendant on East Fifth Street in Los Angeles at about 5 a. m. Defendant was on the sidewalk leaning into a car talking to one Frank Freeman, a known narcotic addict. From a distance of 30 feet the officer recognized defendant. From a distance of 5 or 6 feet he saw defendant drop a cellophane wrapped package which fell on the sidewalk about 3 feet from defendant's feet. The officer picked up the package and said: "We have got you this time, Shorty." The package contained heroin. Defendant, who had been arrested previously by the same officer, for the same offense, accused the officer of attempting to "plant" evidence against him. He denied that the package belonged to him and claimed the officer had dropped it. Defendant was searched. He had in his possession a package in which two pillow cases were wrapped in newspaper. No narcotic was found in the large package or on defendant's person, but he had in a pocket a piece of cellophane which was the same size as the one in which the heroin was wrapped.

[1, 2] The trial judge weighed the testimony of the officer against that of the defendant and concluded that the former had testified to the truth. Consideration was no doubt given to the facts in evidence that defendant had been a user of narcotics and had suffered a previous narcotic conviction. We cannot reweigh the credibility of the witnesses or their testimony. There was no insufficiency of evidence that defendant had possession of the narcotic and dropped it to the sidewalk. There is a

mere possibility, but nothing more, that defendant did not know what was in the package, but there was no escape from the inference that defendant endeavored to get rid of the package because he knew it contained a narcotic.

Defendant cites People v. Cole, 113 Cal. App.2d 253, 248 P.2d 141, where it was held error to give an instruction under which one might be convicted of possession of a narcotic even though he held the honest belief that it was not a narcotic. The case is not at all in point. Nor are we at all impressed to learn that the deputy attorney general who briefed the present case is of the opinion that the Cole case was incorrectly decided. The opinion in that case is one which the authorities should understand and respect.

The judgment and the order denying motion for a new trial are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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123 Cal.App.2d 60

BETTENCOURT v. STATE et al.

Civ. 15668.

District Court of Appeal, First District, Division 1, California.

Feb. 4, 1954.

Action against state for personal injuries allegedly sustained because of negligence in maintaining and operating a bridge. The Superior Court, San Mateo County, A. R. Cotton, J., entered judgment sustaining the state's demurrer without leave to amend, and plaintiff appealed. The District Court of Appeal, Bray, J., held that the operation of Dumbarton Bridge by state, through California Toll Bridge Authority, is a governmental function, and hence an action based on negligence in performance of such function could not be maintained, in absence of sovereign's consent.

Judgment affirmed.

1. Evidence 🔑23(1)

Court properly took judicial notice of character of operation of Dumbarton Bridge by state. Code Civ.Proc. § 1875, subd. 3; Streets and Highways Code, §§ 30000 to 30506.

2. Evidence 🔑5(1)

Courts may take judicial notice of what is, or ought to be, generally known within their jurisdiction, the prerequisites being that the matter must be a matter of common and general knowledge, well established and authoritatively settled, and known within limits of jurisdiction of court.

3. Highways 🔑187(1)

The management, control, construction and maintenance of public highways is a governmental function as distinguished from any proprietary undertaking or business carried on by the public body.

4. Navigable Waters 🔑20(2)

The power to construct bridges over navigable streams is included in power to construct highways.

5. Navigable Waters 🔑20(7)

The duty to provide and maintain a bridge as a part of a public highway, and to operate a suitable draw in the bridge for the benefit of the public highway up and down the stream, are governmental functions, and fact that tolls are charged does not change character of state's functions.

6. States 🔑191(1.12)

Statute prescribing that any one having claim against state for negligence shall present his claim as prescribed, presupposes a claim permitted by law and necessarily applies only where consent of state has been provided elsewhere, and statute is merely procedural and is not itself a consent section nor a waiver of sovereign immunity. Government Code, § 16041.

7. States 🔑191(1.25)

Operation of Dumbarton Bridge by state, though California toll bridge authority, is a governmental function, and, hence, an action against state based on negligence in performance of such function could not be maintained, in absence of sovereign's consent. Streets and Highways Code, §§ 30000 to 30506.

8. States ⚷**191(1)**

When acting in its governmental capacity, a sovereign may not be sued except where doctrine has been specifically departed from by constitutional or statutory law.

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Jacobsen & Tobin, San Francisco, for appellant.

Ropers & Majeski, Redwood City, Edmund G. Brown, Atty. Gen., John E. Fourt, Deputy Atty. Gen., Robert E. Reed, Harry S. Fenton, Sacramento, for respondent.

BRAY, Justice.

Plaintiff, in an action for personal injuries, appeals from a judgment sustaining defendant State of California's demurrer without leave to amend.

Questions Presented.

1. Can the court take judicial notice of the character of the operation of the Dumbarton Bridge by the State of California?

2. Is that operation governmental or proprietary?

Complaint.

The complaint alleged that defendant State of California, together with the other defendants, operated and maintained "that certain bridge and highway" between the counties of Alameda and San Mateo, commonly known as Dumbarton Bridge. It then alleges that defendants carelessly maintained the bridge in a defective and dangerous manner known to all defendants; that on a certain day when the lift span was raised no warnings were given or barriers raised, causing plaintiff's car to smash into the steel and concrete center roadway, injuring plaintiff. Defendant State of California demurred primarily on the ground that the operation of the bridge was a governmental function and that the state is not liable in tort for negligence in the discharge of such function in the absence of the state's consent to such liability, and California has given no such consent.

Operation of Toll Bridge Governmental?

The trial court took judicial notice of the fact that although originally the Dumbarton Bridge was a matter of private enterprise under franchise, at present it is operated for tolls, by the state, through its Toll Bridge Authority, and the character of its operation is governmental and not proprietary. Plaintiff contends that the trial court erred in taking such judicial notice.

[1] "Courts take judicial notice of * * * 3. Public and private official acts of the * * * executive * * * departments of this state * * *." Code Civ.Proc. § 1875. Dumbarton Bridge was purchased and is maintained and operated by the California Toll Bridge Authority under the provisions of the California Toll Bridge Authority Act, sections 30000–30506, Streets and Highways Code. "* * * the Authority is in reality the State of California." Fowler v. California Toll-Bridge Authority, D.C., 46 F.Supp. 299, 301, affirmed, 9 Cir., 128 F.2d 549. Thus, it is obvious that the court may take judicial notice of the character of the operation. Such operation is the official act of the Toll Bridge Authority as specified in the act.

[2] Moreover, the fact that the toll bridge is operated by the authority is a matter of such general common knowledge that the court may take judicial knowledge of it under the well-known rule that courts may take judicial knowledge of what is, or ought to be, generally known within their jurisdiction. See People v. Tossetti, 107 Cal.App. 7, 289 P. 881. In Varcoe v. Lee, 180 Cal. 338, 181 P. 223, in a well-reasoned discussion of the rule, the court lays down three material requisites: (1) The matter must be a matter of common and general knowledge. (2) It must be "known," that is, well established and authoritatively settled. (3) It must be known within the limits of the jurisdiction of the court, 180 Cal., at page 345, 181 P. at page 226. The operation of the Dumbarton Bridge meets all three requisites.

Dumbarton Bridge Governmental?

The character of the operations of the California Toll Bridge Authority has already been determined in Fowler v. California Toll-Bridge Authority, supra, 46 F.Supp. 299, 301: "In all its functions, the Authority is representing and assisting the State in the performance of a traditional governmental function, that of building, operating and maintaining bridges and highway crossings as a part of the government system of state highways. The Authority is not a distinct and separate entity embarked upon a profit making commercial enterprise in competition with private citizens. The Authority owns no property. * * * The Authority does not act in any proprietary capacity. All of its acts are done for and on behalf of the State of California in the performance of a traditional governmental function."

[3-5] Yonker v. City of San Gabriel, 23 Cal.App.2d 556, 73 P.2d 623, pointed out that all authorities agree that the management, control, construction and maintenance of public highways is a governmental function as distinguished from any proprietary undertaking or business carried on by the public body. To the same effect, Fowler v. California Toll-Bridge Authority, supra, 46 F.Supp. 299, 301; Kansas City Bridge Co. v. Alabama State Bridge Corp., 5 Cir., 59 F.2d 48. "Highway" includes "bridges." Sts. & Hy. Code, § 23. The power to construct bridges over navigable streams is included in the power to construct highways. Southlands Co. v. City of San Diego, 211 Cal. 646, 664, 297 P. 521. The enforcement and administration of the California Toll Bridge Authority Act is a part of the highway program of the state and all necessary expenditures therefor are payable out of the state highway fund. Sts. & Hy. Code, § 30809. The duty to provide and maintain a bridge as a part of a public highway, and to operate a suitable draw in the bridge for the benefit of the public highway up and down the stream are governmental functions. Daly v. City and Town of New Haven, 69 Conn. 644, 38 A. 397; Sylvester v. City of Milwaukee, 236 Wis. 539, 295 N.W. 696; Evans v. City of Sheboygan, 153 Wis. 287, 141 N.W. 265, 45 L.R.A.,N.S., 98; Mettet v. City of Yankton, 71 S.D. 435, 25 N.W.2d 460; Bremer v. City of Milwaukee, 166 Wis. 164, 164 N.W. 840; Arkansas State Highway Comm. v. Southwestern Bell Telephone Co., 206 Ark. 1099, 178 S.W.2d 1002, 1005; Groenewold v. Board of County Com'rs, 195 Okl. 526, 159 P.2d 258; Berglund v. Spokane County, 4 Wash.2d 309, 103 P.2d 355; Lyons v. Bottolfsen, 61 Idaho 281, 101 P.2d 1; Price v. Sims, 134 W.Va. 173, 58 S.E.2d 657. In Naumburg v. City of Milwaukee, 7 Cir., 146 F. 641, 650, contrary to the above decisions, a divided federal court held that the operation of a draw bridge by the city was "not a governmental, but a corporate, duty" and therefore the city was liable for negligence in its operation. In Evans v. City of Sheboygan, supra, 153 Wis. 287, 141 N.W. 265, also a Wisconsin case, the court discussed the Naumburg case, approved the minority opinion and refused to follow the majority decision. Sylvester v. City of Milwaukee, supra, 236 Wis. 539, 295 N.W. 696, followed the ruling in the Evans case and completely ignored the Naumburg case.

Nor does the fact that tolls are charged change the character of the state's function. In Sears v. Tuolumne County, 132 Cal. 167, 64 P. 270, it was held that a toll bridge is a part of the public highway. In Talley v. Northern San Diego County Hosp. Dist., 41 Cal.2d 33, 257 P.2d 22, it was held that the fact that the district charged fees for hospital service did not make the operation of the district's hospital a proprietary function. "The imposition of a charge for service is not inconsistent with the exercise of a governmental function. [Citations.] Neither is the profit or nonprofit phase of the activity engaged in determinative of either a proprietary or a governmental function. [Citations.] The test is whether the particular activity in which the governmental agency is engaged at the time of the injury is of a public or a private nature. [Citations.]" Talley case, 41 Cal.2d at page 39, 257 P.2d at page 26.

Other than Naumburg v. City of Milwaukee, supra, 146 F. 641, which as we have heretofore pointed out has been rejected by succeeding decisions of the state to which it applied, plaintiff has cited no case holding that the operation of a toll bridge by a public agency is a proprietary function. His contention seems to be that because prior to its acquisition by the state it was operated as a private enterprise and would be competing with other privately owned toll bridges if any there are, its operation ought to be considered proprietary as in the case of the State Belt Railroad, which in People v. Superior Court, 29 Cal.2d 754, 178 P.2d 1, was held to be operated by the state in a proprietary capacity. In that case the court discussed at some length the doctrine of sovereign immunity, and held that the facts that the expense of operation was primarily a burden on industry and commerce, and that the business of transportation for hire is usually undertaken by private individuals or corporations and not by government, support the conclusion that the operation of a railroad is not in the exercise of a governmental function but constitutes a commercial or business enterprise. These facts are not true of a toll bridge operated as part of our state highway system. Bridges have always been regarded in California as a part of our highways. There is no resemblance between their operation and that of a state operated railroad. Maintenance and operation by public agencies of publicly owned bridges, toll and otherwise, have always been regarded as a governmental function.

Plaintiff urges that as this is a first case in which a California court has been called upon to determine the status of the operation of toll bridges by the Toll Bridge Authority, and as the tendency in modern times is to narrow and even eliminate the doctrine of sovereign immunity, we should establish a rule denying such sovereignty to such toll bridge operation. While there is much to be said for the fairness of holding the state, and its agencies, to liability for negligence in such operation, the matter is one for the action of the Legislature rather than of the courts, particularly in view of the fact that operation of bridges is a "traditional governmental function." Fowler v. California Toll-Bridge Authority, supra, 46 F.Supp. 299, 301.

The latest discussion concerning the difference between governmental and proprietary functions occurs in Guidi v. State of California, 41 Cal.2d 623, 262 P.2d 3, where the court considered most of the California cases on the subject, and held that the state, although possibly immune from negligence in connection with agricultural and educational activities at the State Fair, was not immune for negligence in the course of setting off fireworks and maintaining the horse arena there, for the reason that the latter activities do not differ from those of private enterprise in the entertainment industry, and hence the state as to these activities was acting in a proprietary capacity. There is nothing in the Guidi case contrary to our holding here. Obviously there is no resemblance between the state operating a toll bridge as a part of its highway system and setting off fireworks or operating a horse arena.

[6] Section 16041, Government Code, prescribes that anyone having a claim against the state for negligence shall present his claim as prescribed. This section presupposes a claim permitted by law. It is merely procedural and is not itself a consent section nor a waiver of sovereign immunity. It necessarily applies only where the consent of the state has been provided elsewhere.

[7, 8] The fact that the state in its operation of the Dumbarton Bridge is acting in its governmental capacity brings the case within the doctrine set forth in Talley v. Northern San Diego County Hosp. Dist., supra, 41 Cal.2d 33, 257 P.2d 22, as there is no statutory departure from the doctrine. "It is generally recognized that when acting in its governmental capacity a sovereign may not be sued except where the doctrine has been specifically departed from by constitutional or statutory law." 41 Cal.2d at page 36, 257 P.2d at page 24. See also People v. Superior Court, supra, 29 Cal.2d 754, 178 P.2d 1; Gillespie v. City of Los Angeles, 114 Cal.App.2d 513, 250 P.2d 717.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

123 Cal.App.2d 943

BETTENCOURT
v.
CALIFORNIA TOLL BRIDGE AUTHORITY et al.

Civ. 15755.

District Court of Appeal, First District, Division 1, California.

Feb. 4, 1954.

Action against California Toll Bridge Authority and Department of Public Works, for personal injuries allegedly sustained through negligence in maintenance and operation of a bridge. The Superior Court, San Mateo County, A. R. Cotton, J., entered judgments sustaining demurrers to complaint without leave to amend, and plaintiff appealed. The District Court of Appeal, Bray, J., held that defendants are agencies of state, to which the state's immunity from claims for negligence extends.

Judgments affirmed.

States 🔑191(2)

California Toll Bridge Authority and Department of Public Works are agencies of state, to which the state's immunity from claims for negligence extends. Government Code, §§ 14000–14005; Streets and Highways Code, § 30000 et seq.

◆

Jacobsen & Tobin, San Francisco, for appellant.

Ropers & Majeski, Redwood City, Edmund G. Brown, Atty. Gen., John E. Fourt, Deputy Atty. Gen., Robert E. Reed, Harry S. Fenton, Sacramento, for respondent.

BRAY, Justice.

Plaintiff appeals from judgments in favor of defendant California Toll Bridge Authority and defendant Department of Public Works sustaining demurrers without leave to amend to the complaint described in Bettencourt v. State of California, Cal. App., 266 P.2d 201. These appeals are companion appeals to the one there considered.

Defendants Toll Bridge Authority and Department of Public Works are agencies of the State of California. Gov.Code, §§ 14000–14005; Sts. & Hy. Code, § 30000 et seq. Such agencies are really the State of California and if the state is immune from claims for negligence the agencies likewise are immune. Fowler v. California Toll-Bridge Authority, D.C., 46 F.Supp. 299; Talley v. Northern San Diego County Hosp. Dist., 41 Cal.2d 33, 257 P.2d 22.

On the authority of the companion appeal to the effect that the State of California enjoys sovereign immunity as to claims for negligence in the operation of the Dumbarton Bridge, the judgments are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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123 Cal.App.2d 120

PEOPLE v. KOSTAL.

Cr. 5072.

District Court of Appeal, Second District, Division 3, California.

Feb. 9, 1954.

Rehearing Denied Feb. 24, 1954.

Hearing Denied March 10, 1954.

Prosecution for robbery while armed with a deadly weapon. The Superior Court, Los Angeles County, Charles W. Fricke, J., entered judgment of conviction and defendant appealed from judgment and an order denying motion for new trial. The District Court of Appeal, Shinn, P. J., held that testimony of defendant's witness that witness and another had committed the robbery and defendant was not one of the robbers was to be weighed by jury with contrary evidence introduced by the state and it furnished no ground for disturbing the judgment.

Judgment and order denying new trial affirmed.

1. Criminal Law 🔑1159(4)

Where witness for defendant testified that it was he and another who had committed the robbery for which defendant was convicted but the State's witnesses testified that defendant's witness was not one of the robbers, the testimony of defendant's witness was to be weighed by the jury with the contrary evidence introduced by state and it furnished no ground for disturbing the judgment.

2. Robbery ⚷24(3)

Evidence was sufficient to sustain finding that defendant was one of the robbers.

3. Criminal Law ⚷1037(1)

Objection that district attorney was guilty of misconduct in asking leading questions of identifying witnesses could not be made on appeal, where no objection to the questions and no assignment of misconduct had been made.

4. Criminal Law ⚷706

Even if questions asked State's identifying witnesses were leading this did not establish misconduct in absence of any indication that the questions were not asked in good faith and without intention to take an unfair advantage.

5. Criminal Law ⚷1036(4)

In prosecution for robbery while armed with a deadly weapon, the objection that gun and money taken from automobile in which defendant allegedly had been seen riding were improperly introduced in evidence could not be raised for the first time on appeal.

◆

Albert Joseph Kostal, in pro per.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Dep. Atty. Gen., for respondent.

SHINN, Presiding Justice.

Appellant Kostal was accused of robbery while armed with a deadly weapon by indictment which alleged that he had previously been convicted of robbery and had served time therefor. He pleaded guilty to the former conviction and, in a jury trial, was found guilty of armed robbery. He appeals from the judgment and an order denying his motion for a new trial.

Defendant was represented by counsel at the trial, but represents himself on the appeal. His principal contention is that he was not sufficiently identified as one of the two men who committed the robbery. His other points relate to matters as to which no objection was registered during the trial.

There was testimony of the People's witnesses of the following facts: At about 11:20 on the morning of November 21, 1952, Harry LaVogue, accompanied by Wendell Miller, parked a car behind the Kozy Korner Kafe in Los Angeles where LaVogue was manager and bartender. As they started to get out of the car a man walked around the corner of the building and accosted Miller and LaVogue. He drew a revolver, demanded money, and ordered them to unlock the back door and go into the office. He wore dark glasses, a nautical-type hat with a bill, and a tan suede or khaki jacket, the collar of which was turned up. Miller and LaVogue said they had no money. The man tore open LaVogue's jacket and removed $4,129 from his shirt. The cook for the establishment then began to emerge from the back door. The robber pointed the revolver at him and ordered him back inside. He then backed away from Miller and LaVogue and went to a green 1940 Chevrolet sedan parked in the street about 60 feet from the rear of the cafe. Another man was waiting at the wheel of the Chevrolet. Defendant got in the car and the two men drove away. LaVogue hailed a passing police car which unsuccessfully gave chase. At about 11:30 the same morning, one Franklin and defendant, who still wore the described cap and jacket, but not the dark glasses, parked the Chevrolet near 2330 Griffin Avenue, trotted a short distance down the street, entered defendant's green 1948 Cadillac sedanette, which was parked at the curb, and drove away. On the trial defendant did not dispute the fact that he owned a green 1948 Cadillac sedanette.

On the day of the robbery the sun shone brightly. The evidence tending to identify defendant as the man who robbed LaVogue of his money was as follows: LaVogue testified that he had been shown pictures of defendant following the robbery and had been told that defendant was the man who robbed him, but that nevertheless he could identify defendant from his own recollection. Miller, LaVogue's companion, identified defendant as the man who robbed La-

Vogue. A waitress who looked through a rear window of the cafe as the robber was leaving testified that he was no more than ten feet from the window at one time and that defendant resembled the man she saw leaving the scene. The cook, who was standing behind a screen door at the rear of the Kozy Korner Kafe when the robber ordered him back inside, identified defendant as the robber. Mrs. Wandalyn Raich testified that she saw defendant and another man drive a green Chevrolet sedan to the curb near 2330 Griffin Avenue, get out and trot over to a green Cadillac and drive away in it. The men passed her on the sidewalk as they made their way to the car, and she was about ten feet from it when they entered it. She testified that defendant wore a cap the description of which coincided with that given by Miller and LaVogue and that the jacket worn by defendant when she saw him was khaki. She testified that defendant was not wearing dark glasses. When the police located the Chevrolet about a half hour later they found inside it a pair of dark glasses, a loaded .38 revolver, three shotgun shells and several paper coin wrappers. When defendant was arrested on December 24th he had on his person $435, $300 of which was in fifty dollar bills. In his car was found approximately $300, almost entirely in the form of packets of one and five dollar bills. Defendant had been released from the State Prison in July, 1952, and during the months between July and the time of his arrest the highest wage he had earned was $65 per week and meals. Defendant explained his possession of this money by stating that in his spare time he bought watches at wholesale and sold them in bars, ice cream parlors and lunch stands, and that he had needed the cash to finance his business.

[1] One John Leon Crane testified on behalf of defendant that it was he and Franklin who committed the robbery. Witnesses Miller, LaVogue, Sydow and Williams testified Crane was not one of the robbers. Mrs. Raich testified he was not one of the men she had seen get out of the Chevrolet. The testimony of Crane was to be weighed by the jury with the contrary evidence. It furnishes no ground for disturbing the judgment. People v. McClain, 115 Cal.App. 505, 1 P.2d 1085.

[2] The contention that the testimony of the identifying witnesses was incredible is unfounded. People v. Lindsey, 90 Cal. App.2d 558, 563, 203 P.2d 572. Also untenable is the claim that the testimony of those witnesses was legally insufficient to prove that he was one of the robbers. People v. Whitson, 25 Cal.2d 593, 604, 154 P.2d 867.

[3, 4] It is claimed that the deputy district attorney was guilty of misconduct in asking leading questions of the identifying witnesses. No objection was made to the questions, nor was there any assignment of misconduct. The objection may not be made for the first time on appeal. People v. Farrington, 140 Cal. 656, 74 P. 288. Moreover, even if some of the questions were leading, this would not establish misconduct in the absence of any indication that they were not asked in good faith and without intention to take an unfair advantage.

[5] There is no merit in the point that the gun and the money were improperly introduced in evidence. No objection was made when they were offered. The point may not now be raised. People v. Louie Foo, 112 Cal. 17, 44 P. 453; People v. Boyd, 67 Cal.App. 292, 227 P. 783.

There are no other assignments of error which merit discussion.

The judgment and the order denying defendant's motion for a new trial are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

BADELLA et al. v. MILLER et al.*

Civ. 15360.

District Court of Appeal, First District, Division 2, California.

Feb. 10, 1954.

Rehearing Denied March 12, 1954.

Hearing Granted April 7, 1954.

Death action by husband and father of decedent against defendants who allegedly had some part of ownership, arrangement, or control of horse which caused decedent's fatal injuries. The Superior Court in and for the City and County of San Francisco, Clarence W. Morris, J., granted motion for change of venue but, on same day, ex parte, and upon its own motion, ordered former order set aside and denied motion, and defendants appealed. The District Court of Appeal, Nourse, P. J., held that, where all but one defendant moved for change of venue to county in which fatal injury occurred and in which moving defendants resided, and showing was not made that other defendant or his employees had or exercised any power to manage or control horse which caused fatal injury nor had any connection therewith, change of venue should have been granted.

Order reversed with directions to grant motion.

Dooling, J., dissented.

1. Judgment ⚷297

A court has power to correct mistakes in its proceedings and to annul, within a reasonable time, orders and judgments inadvertently made.

2. Courts ⚷488(1)

Generally, jurisdiction of original court to proceed with its normal functions in case ceases as soon as order for transfer of case to another court is regularly made and filed, but some special powers may continue until conditions for actual acquisition of jurisdiction by other court have been fulfilled, papers have been transmitted, and maybe fees have been paid, and, among such special powers, could be power to set aside the order as inadvertently made. Code Civ. Proc. §§ 399, 581b.

3. Judgment ⚷356

A trial court has inherent power to vacate its orders which were not result of a mistake or error of law but which were entered prematurely as a mistake of fact or accepted procedure.

4. Venue ⚷76

Where, in death action, which arose in Sonoma County but which was brought in San Francisco County, all defendants except one moved for change of venue to Sonoma County, which was place of residence of movants, trial court, which had granted motion after plaintiffs had failed to appear, had jurisdiction to set aside such order after plaintiff's counsel appeared before court ex parte and gave reasonable excuse for his failure to appear in response to notice of motion. Code Civ.Proc. §§ 399, 581b.

5. Venue ⚷70

Where, in death action, theory of unverified complaint was that all defendants had some part in ownership, management, or control of horse which had caused fatal injuries to decedent, unverified complaint and affidavits, which were made by plaintiffs' counsel and which contained conclusions of law, not facts, were not sufficient, as against verified affidavits of eight responsible parties, to warrant reversal of order which had originally transferred venue to county in which injury occurred and in which all but one of the defendants resided. Code Civ.Proc. §§ 399, 581b.

6. Venue ⚷70

Upon motion for change of venue, unverified complaint could not be used to controvert verified affidavits of defendant movants.

7. Venue ⚷46

Where, in death action, nonresident defendants moved for change of venue to county in which fatal injury occurred and in which they resided, and showing was not made that resident defendant or his employees had or exercised any power to manage or control horse which caused fatal injury nor had any connection therewith, change of venue should have been granted.

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* Subsequent opinion 275 P.2d 5.

Cooley, Crowley & Gaither, San Francisco, for appellants.

Fitz-Gerald Ames, San Francisco, for respondents.

NOURSE, Presiding Judge.

Damages for the death of the husband and father of the plaintiffs in Sonoma County were sought by them in an unverified complaint filed in San Francisco County. All the named defendants except Earl George, a resident of San Francisco, moved for a change of venue to Sonoma County which was admittedly their place of residence. Their motion was supported by eight verified affidavits which were not controverted by verified affidavit or pleading. On the day and hour set for the hearing the defendants presented their motion along with their uncontroverted affidavits and, the plaintiffs failing to appear, the motion was granted. A minute order was thereafter entered and in the afternoon of the same day the court signed a formal order granting the motion and this was duly filed. Thereafter, and on the same day, plaintiffs' counsel appeared before the court ex parte and gave a reasonable excuse for his failure to appear at the morning session in response to the notice of motion. The court thereupon "on its own motion" ordered the former order vacated and set aside on the ground that plaintiffs' failure to appear was excusable and that the order made in their absence was inadvertent. Later a full hearing was had on defendants' motion and that was denied. On this latter order defendants' appeal is founded.

The first point raised by appellants is that the court had no jurisdiction to set aside ex parte its former order.

[1] The only Supreme Court case directly in point is not cited by the parties nor in Refrigeration Discount Corp. v. Superior Court, 91 Cal.App.2d 295, 204 P. 2d 932. It is Baker v. Fireman's Fund Ins. Co., 73 Cal. 182, 14 P. 686. In that case the lower court had first granted a motion for change of venue and the next day had set it aside on the ground that it "was inadvertently made" and had denied the motion. On appeal it was urged that by the first order the case was actually transferred and pending in the court to which it was transferred and that the original court had lost jurisdiction to set its order aside. The Supreme Court upheld the second order relying on Wiggin v. Superior Court, 68 Cal. 398, 9 P. 646, 648, which case states the general rule that "the court has power to correct mistakes in its proceedings, and to annul, within a reasonable time, orders and judgments inadvertently made."

In the Refrigeration case, supra, the lower court had also made an order changing venue (after full hearing) and then on a motion to reconsider held a second hearing and vacated the first order on the ground that it was "void upon its face". The appellate court held that the first order was not void on its face and that when a court makes and enters its order transferring the cause to another county "the latter court immediately acquires sole jurisdiction, and the court which grants the motion 'has no power to make any further order in the premises.'" 91 Cal.App.2d at page 297, 204 P.2d at page 933. As main authority the Refrigeration case cites Chase v. Superior Court, 154 Cal. 789, 792, 99 P. 355. In the Chase case the court below had made an order changing venue. The defendant refused to pay the costs of filing the papers in the new court which he was required to do under section 399, Code of Civil Procedure as it then read. After more than a year the plaintiff made a motion to set aside the first order and to recall the papers on the ground of said nonpayment. The lower court granted the motion and the Supreme Court reversed on the ground that the action was transferred when the order was finally made and entered. "There must be a moment of time when the court transferring the case loses jurisdiction, and the court to which it is transferred acquires jurisdiction. When the court to which the action is transferred acquires jurisdiction, the court which made the order transferring it has no power to make any further order in the premises * * *. The code makes no provision as to inserting a condition in the order, nor does it provide that the order becomes void for a failure to pay the costs. * * * The order changing the place of trial having been made and entered in the clerk's office of the superior court of San Francisco, and the custody of the papers and records having passed from the clerk of the city and county of San Francisco to the clerk of Santa Clara County, the superior court of San Francisco had no further duty to perform, and no authority to compel the payment of costs in Santa Clara County."

It should be noted that the Chase case does not expressly overrule the Baker case, and the main question therefore seems to be whether it overrules the Baker case implicitly, a question not treated in the Refrigeration case. There was in the Refrigeration case possibly somewhat less necessity to discuss the Baker case because the order changing venue was not set aside as inadvertently made but as void. It would seem that there is not necessarily an overruling by implication. The Chase case related solely to the consequences of the nonpayment of costs for filing in the court to which the case was transferred. A quotation at page 793 of 154 Cal. at page 357 of 99 P.2d, from People v. Suesser, 142 Cal. 354, 75 P. 1093, seems to indicate that the Supreme Court did not consider revocation of a change of venue by the court which granted it as excluded under all circumstances. Said quotation reads in part: " 'The statute provides that an order must be made transferring the action, and when such an order is legally made the court making it has no jurisdiction to proceed further in the cause so long, at least, as that order remains unrevoked.' "

The later statutory development of the problem of payment of fees in the court to which trial has been changed is of some interest. Section 399, Code of Civil Procedure was amended to provide that when the action is transferred because it was brought by plaintiff in the wrong court, plaintiff must pay the costs and fees and section 581b now provides that if such costs and fees have not been paid for one year after the entry of the order of transfer the action must be dismissed by the court in which the action was originally commenced. This shows that said court at least for one purpose keeps jurisdiction of the case transferred so long as the conditions for actual proceedings in the court to which the transfer has been ordered have not been fulfilled. In London v. Morrison, 99 Cal.App.2d 876, 222 P.2d 941, it was held that during the one year period the court which ordered the transfer had no power to dismiss the case for other reasons (voluntary dismissal). It was said that the order of transfer divested the original court of all jurisdiction except to dismiss the action under section 581b, Code of Civil Procedure but that the court to which transfer was ordered "does not acquire jurisdiction until the transfer fee has been paid and the papers filed in that court." 99 Cal.App.2d at page 879, 222 P.2d at page 944. Clearly although the court in the London case uses very general language the matter of setting aside an order inadvertently made was not involved.

[2] All decisions can be harmonized if we accept the sensible solution that in general the jurisdiction of the original court to proceed with its normal functions in the case ceases as soon as the order for transfer is regularly made and filed, but that some special powers may continue until the conditions for the actual acquisition of jurisdiction by the court to which transfer was ordered have been fulfilled, the papers have been transmitted and maybe the fees have been paid. Among these special powers could be the power to set aside the order as inadvertently made.

[3] This seems to be the basis for the general run of cases which at first glance appear to be conflicting. Though we do not find in the cases any clear definition of what constitutes "inadvertence" the accepted rule is that the trial court has inherent power to vacate its orders which were not a result of a mistake or error of law but which were entered prematurely as a mistake of fact or accepted procedure.

[4] We conclude that the trial court had jurisdiction to set aside the order for

the reasons stated. It should be added, however, that if plaintiffs' counsel had appeared at the time set the court could not have avoided an order granting the motion since there was then no evidence by verified complaint or affidavit contradicting the facts alleged by the defendants.

[5] But the order must be reversed on the merits. The theory of the unverified complaint was that all the defendants had some part in the ownership, management or control of the horse which caused the injuries. At the time of the first hearing this was supported by the unverified complaint signed by counsel for plaintiffs alone. At the time of the second hearing it was supported by the affidavits of plaintiffs' counsel and his son, both of which were based on their information and belief acquired partly from an unidentified source and both of which contained mere conclusions of law. Thus, on the hearing of the second motion the court had before it the verified affidavits of eight responsible parties confronted by the unverified complaint and the affidavits of plaintiffs' counsel which contained no facts upon which the denial of the motion could be based.

Briefly the theory of the complaint is that some undesignated person owned a horse named "Saltie"; that defendant George leased some stables and a horse corral "at or near Guerneville" from Mr. and Mrs. Miller; that two of the other defendants borrowed "Saltie" and kept him in the pasture behind the barns or at the corral. No allegation of negligence is made as to defendant George and nothing is alleged as to any connection he might have had with the horse or the stable or with those who had possession and control of the horse and the stable at the time of the accident. His affidavit states that the horse "was never at any time stabled in any stable with which affiant was at any time connected in any way whatever;" that neither he nor any employee of his "at any time * * *, assumed, possessed or exercised any power to manage or control said horse", or had any connection with him. As we have said this statement was verified and was not controverted by any denial express or implied, except by the affidavit of Ames, Jr. that George told him that: "It is probable that on some occasions at or about that time Dick Miller kept the horse known as 'Saltie' in one of the stalls which I leased from him." This does not controvert the statements in defendants' affidavits that at no time did defendant George have or assume power to manage or control said horse.

This qualified statement of the probability as to where the horse was stabled does not controvert the positive assertions of the defendants as to the ownership, care and control of the horse at the time of the accident. We quote from the affidavit of Mrs. Richard Miller:

"That the horse which is the subject of this action was, on August 10, 1950, owned by affiant's son, Tom Miller; that on August 10, 1950, and for approximately two years prior thereto, said horse was pastured and stabled on land leased by affiant outside Guerneville; and that neither the defendant Earl George nor any employee of said defendant had any connection whatever with said land; and that said horse was never at any time stabled in any stable with which said defendant Earl George and/or any employee of said defendant were connected in any way whatsoever; that neither said Earl George nor any employee of said Earl George at any time mentioned in the complaint in this action, or at any time at all, assumed, possessed or exercised any power to manage and control or manage and control said horse; and that neither said Earl George nor any employee of said Earl George at any time mentioned in the complaint in this action or at any time at all had any connection whatever with said horse."

On the other hand the affidavit of plaintiffs' counsel, emphasized by him in the oral argument, discloses that the real purpose of joining George is the convenience of plaintiffs' witnesses who reside in San Francisco and the fear that because defendant Miller is a member of the Board of Supervisors of Sonoma County he would illegally influence the selection of jurors in that county so that plaintiffs would thereby be denied a fair trial. Now the primary question in motions of this type is whether the plaintiffs joined the nonresident defendant in good faith. This is not met by the affidavit of plaintiffs' counsel that, long after the complaint was filed, and after the motion to transfer had been made, he then learned of a probability that the horse might at some time have been kept in one of the stables which George leased from its owner. The affidavit merely confirms George's contention that he was made a party to the action for the sole purpose of venue.

[6] It is settled beyond question that on a motion of this kind the unverified complaint cannot be used as controverting the verified affidavits of the defendants. The issue presented is whether the defendant George has been properly joined. When the affidavits show that he has no connection with the case and this showing is not controverted by a verified pleading or by counter affidavits the affidavits of the defendants "constitute the evidence upon which the validity of the order depends." Woods v. Berry, 105 Cal.App. 90, 92, 286 P. 1073, 1074.

[7] Since there is here no evidence controverting defendants' showing that neither defendant George nor any employee of his at any of the times mentioned had or exercised any power to manage or control the horse and at no time "had any connection whatever with said horse" the motion for a change of venue should have been granted.

Order reversed with directions to grant the motion.

KAUFMAN, J., concurs.

DOOLING, J.

I dissent.

The question before the trial court was whether the defendant George was made a defendant "solely for the purpose of having the action tried in the * * * city and county * * * where he resides * * *." Section 395, Code Civ.Proc.

In deciding this question "the real issue for determination by the trial court was whether plaintiff, in joining the resident defendant as a party, had reasonable grounds for the belief in good faith that plaintiff had a cause of action against the resident defendant." Gottesfeld v. Richmaid Ice Cream Co., 115 Cal.App.2d 854, 856, 252 P.2d 973, 975 and cases there cited.

The trial court decided this question in favor of plaintiffs, from which we must assume that the trial court believed that the admission of George as set out in Ames Jr.'s affidavit was made, and decided that that admission furnished "reasonable grounds for the belief in good faith" that plaintiffs had a cause of action against George. If this inference can be reasonably drawn from the admission made by George we should affirm the court's order.

The complaint counts on injuries inflicted by a horse. The complaint alleges as to George: that George possessed and exercised the power to control the horse (par. VI), that said horse was left unattended and improperly tethered by said defendants (par. VIII), that defendants knew, or in the exercise of ordinary care should have known, that said horse was dangerous when unattended (par. IX) and that as a proximate result of the negligence of defendants said deceased received injuries which caused his death (par. X).

In the investigation to determine who actually had control of the horse at the time it was so left unattended Ames Jr. interviewed George and George told him: "It is probable that on some occasions at or about that time Dick Miller kept the horse known as 'Saltie' in one of the stalls which I leased from him."

With this admission what would an ordinarily prudent attorney do in framing his complaint? He could certainly in good faith conclude that George should be joined as a defendant and that there were reasonable grounds for believing that it would develop that George did have control of the horse at the time that it was left unattended and that plaintiffs had a cause of action against him. That is all that is necessary to support the trial court's order.

The court should not try the case on its merits on a motion for change of venue. Gottesfeld v. Richmaid Ice Cream Co., supra, 115 Cal.App.2d 854, 856, 252 P.2d 973 and cases there cited. The question is not whether plaintiffs actually have a cause of action against George. The determination of that question must await the trial of the action on its merits. The only question is: At the time George was joined did the plaintiffs have reasonable grounds for the joinder and did they act in good faith? If, as we must assume, the trial judge found that at the time the action was filed relying on George's admission they did act in good faith and on reasonable grounds, it is quite immaterial that the affidavits of defendants if believed negative George's actual liability.

Questions of fact are traditionally for the trial court to decide and appellate courts have no power to reweigh the evidence. In my judgment the order should be affirmed.

NEVIS
v.
PACIFIC GAS & ELECTRIC CO. *

Civ. 15507.

District Court of Appeal, First District, Division 2, California.

Feb. 1, 1954.

Rehearing Denied March 3, 1954.

Hearing Granted March 31, 1954.

Action by operator of hay loading derrick for injuries sustained when derrick came in contact with high voltage wire. From adverse judgment of Superior Court in and for the City and County of San Francisco, Frank T. Deasy, J., electric company appealed. The District Court of Appeal, Dooling, J., held instruction that if evidence showed common practice of using such hay loading derricks in community, electric company had a duty of ascertaining such fact and of using reasonable care in mounting its wires at such height as to avoid contact with derrick booms, was not erroneous under the evidence.

Judgment affirmed.

1. Appeal and Error 🔑882(12)

In action by operator of hay derrick against electric company for injuries sustained when boom of derrick contacted electric wire during loading operations, instruction given at company's request that at place of accident it was permitted to maintain wires at distance of 22 feet above ground was in effect a concession that rule of Public Utility Commission requiring clearance of 22 feet for wires crossing private roads, rather than rule permitting 18-foot clearance over agricultural land, was applicable.

2. Appeal and Error 🔑882(1)

Litigant who assumes one position in trial court cannot on appeal assume a contrary and inconsistent position.

3. Electricity 🔑19(6)

In action by hay derrick operator against electric company for injuries sustained when boom of derrick contacted electric wire during loading operation, under evidence, jury was entitled to infer that ranch road about hay lot was in existence at time wires were changed six or seven years before the injury.

4. Electricity 🔑19(5)

In action by hay derrick operator against electric company for injuries sustained when boom of derrick contacted electric wire during loading operations, evidence was sufficient to support finding of jury that wire which contacted boom was less than 22 feet above ground in violation of Public Utility Commission regulation.

5. Electricity 🔑14(1)

Nonnegligent ignorance of facts which bring a regulation into operation is sufficient to support finding that violation of the regulation is excusable.

6. Electricity 🔑19(12)

In action by operator of hay derrick against electric company for injuries sustained when boom of derrick contacted electric wire during loading operations, whether operator, who was working on unfamiliar farming land and who allegedly was ignorant of existence of electric wire, which was in his direct line of vision during loading operation, was guilty of contributory negligence was question for jury.

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* Subsequent opinion 275 P.2d 761.

7. Negligence ⚷136(9)

Courts can say that plaintiff was guilty of contributory negligence as a matter of law only where from the evidence reasonable minds can draw one conclusion which points unerringly to plaintiff's negligence.

8. Electricity ⚷19(9)

Where hay derrick operator was injured when boom of derrick contacted electric wire in area where such wires were required to be 22 feet above ground and electric company failed to abide by regulation, it was question for jury, in negligence action, whether company's negligence was proximate cause of injuries.

9. Electricity ⚷19(13)

In action by hay derrick operator against electric company for injuries sustained when boom of derrick contacted electric wire, instruction that, if evidence showed common practice of using such hay-loading derricks in community, electric company had duty of ascertaining such fact and of using reasonable care in mounting its wires at such height as to avoid contact with derrick booms, was not erroneous under the evidence.

10. Electricity ⚷16(4)

If electric company should in the exercise of reasonable care have foreseen that hay derricks while in actual use on private farming land would be moved from one position to another with boom raised, it had duty to use ordinary care to guard against contact with its wires.

◆

Robert H. Gerdes, John J. Briare, J. J. Quill, Dana, Bledsoe & Smith, San Francisco, for appellant.

M. F. Hallmark, Wm. J. Thorburn, Oakland, for respondent.

DOOLING, Justice.

Defendant appeals from a judgment for $40,000 based upon a jury's verdict. Plaintiff and respondent was so seriously injured, when a hay derrick that he was operating came in contact with a high-voltage electric wire installed over the farming land of one Amen by appellant, that it was necessary to amputate one of his legs. The hay derrick is admitted to be of a kind in common use in the area for many years and this particular derrick had been operated by its owner, Fernandez, for 15 years. The derrick was mounted upon a carriage fitted with wheels and was drawn about and operated by a jeep. The hay which was being loaded onto a truck on the day in question was baled and had been stacked beneath the high-voltage wires. The derrick was equipped with a boom which could be raised and lowered and when raised was held in position by a chain. When in use the boom was raised and fastened in this manner.

Respondent had never been on Amen's ranch before and testified that he did not notice the wires with which the boom came in contact until after his injury. After loading the front end of the truck without incident respondent moved the boom to another position to load the rear and in doing so made contact with the wires. He testified that after his injury he looked up and saw that the wire was in contact with the boom about nine inches below its top.

Appellant argues (1) that the evidence was insufficient as a matter of law to establish appellant's negligence; (2) that under the evidence the respondent was guilty of contributory negligence as a matter of law; (3) any claimed negligence on the part of appellant was not shown to be the proximate cause of respondent's injuries; and (4) alleged errors in the giving of certain instructions.

The court instructed the jury: "At the time and place of the accident in question, the defendant Pacific Gas & Electric Company was required to maintain its power lines at least 22 feet above the ground."

This instruction was based upon a portion of General Order 95 of the Public Utilities Commission, which reads:

"Rule 54.4–A (2) In Rural Districts, Conductors of 750–20,000 Volts: (a) Crossing Roads or Driveways: In rural districts the minimum clearance of 25 feet specified in Table 1, Case 3, Column E may be reduced to 22 feet above ground for conductors crossing or overhanging traversable portions of public or private roads or driveways * * *.

"(b) Above Agricultural Areas and Along Roads: In rural districts the minimum clearance of 25 feet specified in Table 1, Case 4, Column E may be reduced to 18 feet above ground for lines across areas capable of being traversed by agricultural equipment and along roads where no part of the line overhangs any traversable portions of a public or private roadway * *."

[1, 2] Appellant argues that it was a question of fact whether the wires crossed or overhung a private road or driveway. Amen, the owner of the land, testified that his ranch road made a loop about the place where the injury occurred and ran under the wires on both sides of it. Not only was this testimony not contradicted or questioned in any way but at appellant's own request the following instruction was given by the court:

"At the time and place of the accident in question, the defendant Pacific Gas & Electric Company was permitted to maintain its power wires at a distance of 22 feet above the ground."

It is true, as appellant points out, that an instruction that appellant was permitted to maintain its wires 22 feet above the ground is not equivalent to an instruction that it was required to do so; but it is significant that no proposed instruction is included in the record referring in any way to the height limit of 18 feet over agricultural lands where no part of the line overhangs any portion of a public or private roadway. By limiting its instruction to the 22-foot provision of the rule appellant in effect conceded that that was the portion of the rule applicable in this case and, under the settled rule, having assumed that position in the trial court appellant may not now change its position on appeal. Not only does the uncontradicted evidence support the questioned instruction, but appellant's conduct in the face of that evidence does so as well.

[3] Appellant argues that there is no showing that the ranch road ran under the wires when they were installed. Amen testified that these wires were changed six or seven years before and the jury was entitled to infer, as appellant impliedly conceded at the time of trial, that the road about Amen's hay lot was in existence at the time of this change in the wires.

[4] Appellant also claims that there is no substantial evidence to support a finding that the wires were in fact less than 22 feet above the ground. Respondent testified that after the accident he was present when Fernandez measured the height of the top of the boom above the ground when the boom was raised to its maximum height and that that measurement was 23 feet 2 inches. He further testified that the boom dropped from 1 foot to 1½ feet below its maximum height after he adjusted it on the day of the accident and that the point of contact with the wire was 9 inches below the top of the boom. This evidence was clearly sufficient to support a finding by the jury that the wire which the boom contacted was less that 22 feet above the ground. There were inconsistencies in respondent's testimony as to the height of the boom but the weight and effect of his testimony was for the jury. If the jury in fact found that the wire was less than 22 feet above the ground appellant's negligence appears as a matter of law.

[5] Appellant's claim that respondent was guilty of negligence as a matter of law is based partly on the claim that respondent violated section 385, Penal Code and section 2603, Electrical Safety Orders of the Industrial Accident Commission, both of which prohibited operating the derrick in proximity to these high-voltage wires. Respondent testified that while he had seen some wires about the buildings on first entering the premises he did not see the wires above the hay lot or know that they were there until after he was electrocuted. If he

was in the exercise of ordinary care and operated the derrick in ignorance of the presence of the wires he cannot be charged with negligence as a matter of law in that regard. Non-negligent ignorance of the facts which bring a regulation into operation is sufficient to support a finding that the violation of the regulation is excusable. Ornales v. Wigger, 35 Cal.2d 474, 480, 218 P.2d 531; Graf v. Garcia, 117 Cal.App.2d 792, 797–798, 256 P.2d 995.

[6, 7] It is pointed out that the wires were in respondent's direct line of vision as he looked up toward the man on the truck during the loading operations and relying on the doctrine that "to look is to see" appellant asks us either to disbelieve respondent's testimony that he did not see them or to hold him guilty of negligence as a matter of law in not seeing them. Under the facts of this case we may not do so. With his eyes and mind focused on his work we cannot say that he testified falsely when he said that he did not see the wires, nor that in the exercise of ordinary care he should have looked for wires in that place, i. e., in the middle of a hay lot directly above the point where the farmer had stacked his hay. It was for the jury to determine as a question of fact whether respondent was guilty of contributory negligence. It is only where reasonable minds can draw only one conclusion from the evidence, and that conclusion pointing unerringly to plaintiff's negligence, that courts can say that the plaintiff was guilty of contributory negligence as a matter of law. Dwelly v. McReynolds, 6 Cal.2d 128, 133, 56 P.2d 1232. The situation of a man working on unfamiliar farming land is not similar to that of one about to cross a highway or a railroad track where the absolute duty is imposed to look for approaching vehicles or trains before crossing. We are satisfied that it was properly left to the jury as a question of fact in this case to determine whether or not respondent was guilty of contributory negligence. Polk v. City of Los Angeles, 26 Cal.2d 519, 159 P.2d 931; McCormick v. Great Western Power Co., 134 Cal.App. 705, 26 P.2d 322; Howell v. San Joaquin Light & Power Corp., 87 Cal.App. 44, 261 P. 1107; Neel v. Mannings, Inc., 19 Cal.2d 647, 122 P.2d 576.

[8] Nor can we say as a matter of law that the appellant's negligence was not the proximate cause of the respondent's injuries. The 22-foot height regulation over traversable portions of private roads or driveways is designed solely for the protection of persons using equipment of such height that it might otherwise come in contact with the wires. When the very sort of casualty which the regulation is designed to prevent occurs because of its violation it cannot logically be said that it was not proximately caused by the violation. Meincke v. Oakland Garage, Inc., 11 Cal.2d 255, 256, 79 P.2d 91.

[9] Complaint is also made of the following instruction:

"If you find from the evidence that it was a common practice in the community where defendant was maintaining the power lines involved in this action, of persons loading hay to use derricks such as the one used by the plaintiff in this case, then you are instructed that it was the duty of the defendant to have ascertained such fact and to use reasonable care in maintaining its wires across the agricultural lands and private roads in said community at such height that there was no likelihood that such derricks would come in contact with its power lines, and if you find that defendant failed in this case to maintain the power lines in question according to this requirement, defendant is guilty of negligence."

[10] Hereon it is argued that even though hay derricks of the type in question were in common use in this area, they were all equipped with booms which could be dropped to a horizontal position, as was the derrick involved here. The evidence shows that in traversing public roads, "carrying them from one ranch to the other", it was customary to drop the boom, and appellant argues from this that it could not reasonably anticipate that the derrick would be moved in an upright position. We cannot say that the jury could not find that appellant should have foreseen that such derricks while in actual use on private farming land would

be moved from one position to another, without lowering the boom. If it should in the exercise of reasonable care have foreseen this its duty to use ordinary care to guard against such danger is clear. Fairbairn v. American River Electric Co., 179 Cal. 157, 175 P. 637.

Judgment affirmed.

NOURSE, P. J., concurs.

123 Cal.App.2d 113

SUMMERS et al. v. RANDALL et al.

Civ. 19857.

District Court of Appeal, Second District, Division 3, California.

Feb. 9, 1954.

Action for death of mother of plaintiffs when she was hit by truck driven by one defendant and owned by a second. The Superior Court of Los Angeles County, Walter R. Evans, J., denied motion for new trial after judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Shinn, P. J., held that evidence required the giving of an instruction on the last clear chance doctrine, and failure to so instruct was prejudicial error.

Judgment reversed.

1. Negligence 🔑83.4

Where plaintiff's negligence has placed him in a position of danger from which he cannot escape by exercise of ordinary care, including not only case in which it is physically impossible for him to escape, but also case in which he is totally unaware of his danger, and defendant has knowledge that plaintiff is in such situation, and knows or in exercise of ordinary care should know that plaintiff cannot escape from such situation, and has clear chance to avoid accident by exercising ordinary care, and fails to exercise such care, and accident results thereby, and plaintiff is injured as proximate result of such failure, last clear chance doctrine is applicable.

2. Appeal and Error 🔑928(1)

Where plaintiffs contended on appeal in wrongful death action arising out of automobile collision, that last clear chance doctrine should have been applied, Appellate court would view the evidence in the light most favorable to the application of the doctrine, and would indulge in every reasonable inference in support thereof.

3. Appeal and Error 🔑1067

Automobiles 🔑245(91), 246(58)

In action for death of plaintiffs' mother as result of being struck by truck owned by one defendant and driven by second, wherein it appeared that automobile in which plaintiffs' mother was riding had stalled crossways and unlighted in three lane highway, and that defendant driver had observed the automobile, and had thereafter observed people in roadway, but that he had attempted to find a safe lane in which to travel instead of stopping, evidence warranted submission to jury of last clear chance doctrine, and failure to so instruct was prejudicial error.

4. Trial 🔑203(1)

Where there is substantial evidence to support a recovery upon a theory of liability advanced by a plaintiff, instructions must be given on that theory.

Howard C. Velpmen, Los Angeles, for appellants.

Charles H. Lynch and Arthur M. Reilly, Los Angeles, for respondents.

SHINN, Presiding Justice.

In this action for the wrongful death of plaintiffs' mother, Katherine Louise Summers, judgment after verdict was rendered in favor of defendants, and plaintiffs appeal.

The accident which resulted in the death of Mrs. Summers occurred at about 3:00 a. m. on U. S. Highway 101 about fifteen miles south of Oxnard when Mrs. Summers was struck by a truck-trailer combination owned by Elmer Randall and driven by Wesley McGhee. We shall refer to the latter as defendant.

Looking north from this point the highway curves to the east. A vehicle traveling south would become visible from the scene of the accident when it was some 400 feet away. The east side of the roadway lay against a cliff; on the west was a 6-foot shoulder, beyond which the land descended steeply toward the ocean. The roadway consisted of three marked lanes. Shortly before the accident Mrs. Summers was riding on the right side of the front seat of a two-door Chevrolet sedan being driven by one Richard Berry northwards towards Oxnard. One Charlene Metcalf occupied the center of the front seat. In the rear seat were three soldiers whom Berry had picked up along the highway. While attempting to pass another northbound vehicle Berry lost control of his car which skidded and came to rest in the middle of the westerly, or southbound lane, facing northeast, with the engine stalled. The lights of the vehicle were extinguished. Berry busied himself by trying to start the engine. Defendant Randall's tractor and trailer, driven by his employee, defendant McGhee, entered the north end of the curve, traveling south in the westerly lane. The tractor and trailer rig was 50 to 60 feet in length, and was fully loaded. There was no evidence as to the mechanical condition of the equipment. McGhee was familiar with this portion of the highway. As he rounded the curve his headlights reflected some object in the westerly lane. At this point he was about 400 feet from the Berry car. He immediately switched the headlights to high beam, enabling himself to recognize the object as an automobile, and almost simultaneously began to guide the truck and trailer into the center passing lane, at the same time applying the brakes lightly. At about the same time he observed that there were people in the Chevrolet. He also observed another car coming north more than 800 feet from him. When he reached a point about 200 feet from the Chevrolet he had brought the tractor and trailer fully into the center lane and had slowed to between fifteen and twenty miles per hour. Then he saw women get out of the Chevrolet, run into the center lane and stop there. At the same time he observed that a car was coming north in the northbound lane 500 or 600 feet from him. When he observed the women in the center lane he began to guide the tractor and trailer back to his right into the west lane. At the same time he momentarily increased the pressure on the brakes intending to proceed and run into the car, but he immediately released all pressure and did not thereafter apply the brakes for the reason that he observed there were people remaining in the Chevrolet, which caused him to head the tractor and trailer farther to the right in an effort to pass to the right of the car. The left front, or driving wheel, of the tractor collided with the left rear portion of the car. As the tractor came abreast of the Chevrolet McGhee saw a soldier run west across the path of the truck and dive off the roadway. He also saw "someone else" running in the same direction as the soldier. Immediately after the drive wheel of the tractor collided with the car McGhee heard a thud, which may have been caused by a body being struck by the tractor. McGhee brought the tractor and trailer to a stop 500 or 600 feet south of the point of impact. When officers of the Highway Patrol arrived, the car was standing about 12 feet south of its original position. Mrs. Summers lay beneath the car, between the wheels, and a sergeant was lying on the west shoulder of the highway about 50 feet south of the car. Until the collision occurred Berry had remained in the car trying to start the motor. It is not clear how many of the passengers remained in the car. It may fairly be inferred that at least three passengers, including Mrs. Summers, alighted from the car and attempted to reach a place of safety. McGhee gave testimony as to his actions, as related above, and also testimony tending to show that the trailer was swaying and that it was possible that an attempt to stop the truck and trailer within 200 feet would have caused it to capsize. He also testified that he could have stopped the truck and trailer within 100 feet at 15 miles per hour and within 200 feet at 40 miles per hour, and that at 15 miles per hour with the trailer loaded, as it was at the time, he could move from one lane to another and stop the equipment if he had to.

There was a minimum of evidence as to the circumstances of the accident. Of the six persons who were in the car only Berry appeared as a witness, and he displayed amazing ignorance of what had happened. He did not know on which side of the car the truck passed, or who got out of the car, or when anyone left it. There was no evidence as to the time the car remained in the west lane before the truck appeared. There was no testimony as to the movements of the truck, and the conduct of McGhee, other than that of McGhee.

[1] The only ground of appeal which requires decision is the claim that the court erred in refusing to give an instruction requested by plaintiffs on the doctrine of last clear chance. In its refusal to give the requested instruction the court decided there was not substantial evidence from which the jury could find the existence of the factual elements of the doctrine which are: " 'That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure.' " Daniels v. City and County of San Francisco, 40 Cal.2d 614, 619, 255 P.2d 785, 788.

[2] In deciding whether we agree with the trial court as to the legal sufficiency of the evidence to support affirmative findings upon the above issues, had such findings been made, we should view the evidence in the light most favorable to the application of the doctrine, and indulge in every reasonable inference in support thereof. 40 Cal.2d 614, 255 P.2d 785, supra.

Had Mrs. Summers remained in the car it could have been argued that she was guilty of negligence in doing so, but, since she left it, the question as to the first element of the rule, namely, whether she was in a position of danger through her negligence, was related to her having left the car and taken up a position in the middle lane of traffic. As it turned out, she would have been safer if she had remained in the car, which was a circumstance for a jury to consider in deciding whether she was negligent in alighting onto the middle lane of traffic. It could have been inferred that she left the car after observing defendant's truck approaching. As it was approaching at 40 miles per hour Mrs. Summers had mere seconds in which to act. Either course she chose was fraught with danger. Unless we can assert, dogmatically, that any reasonably prudent person would have left the car, as Mrs. Summers did, we cannot say that a finding of negligence on her part would have been unreasonable. It was a factual question for the jury whether it was the part of prudence for her to leave the car, which the truck driver would probably endeavor to avoid, and to step out into the middle lane, which would be the natural course for him to take. A jury would not be compelled to find that she exercised ordinary care. We conclude, therefore, that the evidence was sufficient to establish the first element of the last clear chance doctrine.

The next element of the rule relates to the ability of Mrs. Summers to extricate herself from her position of danger in the exercise of ordinary care. It is no answer to say that if she had stood still in the highway she would not have been injured. That would have been a most extraordinary, if not foolish, thing for her to do. Ordinary prudence would not have suggested to one in her position that there was no need to leave it. The plain inference is that Mrs. Summers acted promptly and with good judgment in making an effort to escape injury. And yet she failed. She ran behind the car. Perhaps she went a little beyond it, and was struck by the truck. Or it may be that she was struck by the car, which was moved some twelve feet by the collision. She had to act impulsively, and we do not see how she could have known which way the defendant would go when he, himself, turned first one way and then another. It is clear to us that had the question been submitted to the jury a finding that Mrs. Summers could not have escaped from her danger in the exercise of ordinary care would have been a reasonable deduction from the evidence and the reasonable inferences.

Our views are the same with respect to the next element, namely, whether it would have been reasonable to conclude that defendant knew, or in the exercise of ordinary care, would have known that Mrs. Summers could not, in the exercise of ordinary care, extricate herself from her position of danger. Defendant first intended to travel the middle lane, then he decided to run into the car, but when he saw someone in it he decided to pass to the right of it. Whatever there was to be known as to the danger Mrs. Summers was in, and her ability to escape from it, was known to the defendant. It could even be said that since he knew he was not going to stop his truck his knowledge of the situation was superior to that of any of the occupants of the car. Inasmuch as we hold that the jury would have had reasonable grounds for believing that defendant's intention to pass by the car without stopping, or attempting to stop, made Mrs. Summers' position on the highway one of danger, from which she could not escape in the exercise of ordinary care, it follows that it would also have been reasonable for them to conclude that defendant knew, or, in the exercise of ordinary care, should have known that fact.

The next question is whether defendant, with the knowledge last mentioned, could have stopped his truck before it reached the car, or otherwise have avoided the accident. His own testimony was sufficient to warrant a finding that in the exercise of ordinary care he could have stopped his truck in the space he had. His excuse for not stopping was that his equipment was heavily loaded, and he feared a sudden stop would be likely to overturn the trailer. This testimony did not prove that he could not have stopped. It was only something to be considered with his testimony that at 40 miles per hour he could have stopped in 200 feet, and at 15 or 20 miles per hour he could have stopped in 100 feet. It was undisputed that he could have stopped his truck after he saw the car and people in it.

[3] Whether McGhee had the last chance but also a *clear* chance to avoid the accident depends not so much upon his ability to stop his truck as upon the findings which we hold could have been made upon the other elements of the doctrine. When he was 200 feet away from the car he decided he should leave the middle lane because he saw people standing there. It would have been reasonable for a jury to conclude that he believed at that time that it was necessary to either stop or turn aside and that he had ample opportunity to stop. There was therefore evidence that defendant had the last clear chance to avoid the accident in the exercise of ordinary care sufficient to support a finding to that effect.

It was clearly a question for the jury whether defendant exercised ordinary care in endeavoring to go around the car, instead of coming to a stop.

[4] It follows from the views hereinabove expressed that the failure of the court to instruct on the doctrine of last clear chance was prejudicial error. Where there is substantial evidence to support a recovery upon a theory of liability advanced by a plaintiff instructions must be given on that theory. Stickel v. Durfee, 88 Cal.App.2d 402, 199 P.2d 16.

The principles of the last clear chance doctrine have long since been settled by the decisions, and are well known to all informed lawyers. To extend this opinion into a discussion of the manner in which the doctrine has been applied or refused application in other factual situations would be an idle act. In final analysis the question always is whether there was substantial evidence of facts which would warrant application of the doctrine in a manner that would be likely to affect the verdict on the issue of liability. This, in our opinion, is clearly a case in which there was evidence which required the court to give the instruction requested by plaintiffs. And this is true even though it might be equally reasonable to conclude from the evidence that the elements of the last clear chance doctrine had not been established. It is unnecessary to consider a further claimed error in the refusal of another instruction requested by plaintiffs.

The judgment is reversed. The purported appeal from the order denying motion for new trial is dismissed.

PARKER WOOD and VALLÉE, JJ., concur.

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123 Cal.App.2d 143

WATERMAN
v.
LOS ANGELES COUNTY GENERAL HOSPITAL et al.

Civ. 19811.

District Court of Appeal, Second District, Division 3, California.
Feb. 11, 1954.

Malpractice action against county hospital for damages sustained by patient with a fractured leg, because of hospital's employees' alleged negligence in not setting the fractured leg properly and for rebreaking his leg while removing a cast. Plaintiff's verified claim, which was filed within one year after the injury with the Board of Supervisors, was denied. The Superior Court, Los Angeles County, Ellsworth Meyer, J., dismissed plaintiff's complaint, on an order sustaining the demurrer of the hospital, without leave to plaintiff to amend, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that a county, which operates a general hospital and imposes a charge for care and treatment, is immune from liability in tort for the negligence of its agents.

Affirmed.

1. Counties 🔑142

A county which operates a general hospital does so in a governmental capacity.

2. Counties 🔑142

The imposition of a charge for services rendered by a county hospital is not inconsistent with its operation as the exercise of a governmental function.

3. Counties 🔑146

A county is not liable for the negligence of its employees in a county hospital toward patients therein.

4. Constitutional Law 🔑70(3)

Whether the doctrine of the immunity of the sovereign for torts of its officers and employees should be abolished or modified is a question for the Legislature.

◆

Elbert E. Hensley and Allan M. Carson, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, and Lloyd S. Davis, Deputy County Counsel, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment of dismissal entered on an order sustaining the demurrer of defendant County of Los Angeles to the complaint without leave to amend in an action for damages for malpractice.

The complaint alleges: the corporate capacity of the County of Los Angeles; it operates the Los Angeles County Hospital, referred to as "the hospital"; about November 4, 1951, plaintiff, by accident, sustained an injury to his right leg by which the lower third of the tibia and fibula were fractured; immediately after the accident, he entered and was received into the hospital for care and treatment of his leg; he engaged a room, agreed with the agents of defendant county to pay for it and for care and treatment, and defendant county, by its agents, pursuant to the agreement, received him as a patient in the hospital; he remained in the hospital until November 23, 1951; as a proximate result of the negligence of defendant's employees, he was caused great pain and suffering, the fractures were not set properly, in removing a cast the leg was broken again, infection set in,—all to his damage; within one year of the injury he filed a verified claim with the board of supervisors, which was denied.

The demurrer was sustained on the ground the complaint does not state facts sufficient to constitute a cause of action. The question is whether a county which operates a general hospital and imposes a charge for care and treatment is immune from liability in tort for the negligence of its agents.

[1-3] The law is firmly established in this state that a county, in operating a general hospital, does so in a governmental capacity; that the imposition of a charge for service by such a hospital is not inconsistent with the exercise of a governmental function; and that a county is not liable for the negligence of its employees toward patients therein. The Supreme Court has decided the point too recently to make discussion profitable. Talley v. Northern San Diego County Hosp. Dist., 41 Cal.2d 33, 257 P.2d 22. See, also, Davie v. Board of Regents, etc., 66 Cal.App. 693, 700, 227 P. 243.

[4] The briefs are largely given to arguments pro and con on the desirability of abolishing or modifying the doctrine of the immunity of the sovereign for the torts of its officers and employees.[1] Whether the doctrine should be abolished or modified is a question for the Legislature. Talley v. Northern San Diego County Hosp. Dist., supra, 41 Cal.2d 33, 257 P.2d 22.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

122 Cal.App.2d 826

REYNOLDS v. ROLL.

Civ. 19590.

District Court of Appeal, Second District, Division 3, California.

Jan. 26, 1954.

Hearing Denied March 25, 1954.

Action by manager of business establishment against District Attorney to recover money seized from business premises without warrant because allegedly being used in violation of lottery laws. The Superior Court, Los Angeles County, Samuel R. Blake, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Parker Wood, J., held, inter alia, that the evidence was sufficient to support a finding that plaintiff's claim for return of the money was based upon an illegal transaction.

Affirmed.

1. Action 🔑4

The courts will not lend assistance to persons whose claim for relief rests on illegal transaction.

2. Searches and Seizures 🔑5

In action by manager of business establishment to recover from district attorney money which had been seized from the business premises without warrant, evidence was sufficient to support finding that manager's claim was based upon transaction which violated lottery laws. Pen.Code, §§ 319, 320, 322, 323, 325, 326, 337a.

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[1] The old maxim that the King can do no wrong—immunity of the sovereign for the torts of its officers and employees when acting in a governmental capacity—an unjust relic of the dark ages, is rapidly passing into oblivion. See "Should California Accept Tort Liability?" by Thomas H. Kuchel, State Controller of California, now United States Senator, XXV Cal. State Bar J. 146; 22 So.Cal.L.Rev. 78; 34 Yale L.Jour., 1-45, 129-143, 229-258; 35 Yale L.Jour. 150; 36 Yale L.Jour. 1; 56 Yale L.Jour. 534; 30 Harv. L.Rev. 20; 4 Ill.L.Quar. 28; 4 Wyo.L.Jour. 96; 11 Am.Bar Assn.Jour. 495; Federal Tort Claims Act of 1946, 28 U.S.C.A. §§ 2671-2680, 60 Stat. 843, as amended; United States v. Yellow Cab Co., 340 U.S. 543, 71 S.Ct. 399, 95 L.Ed. 523, 530, particularly footnote 8.

3. Searches and Seizures ⚷5

In action by manager of business establishment against district attorney to recover money seized from business premises without warrant, instruction to effect that plaintiff could not recover unless he could establish his case without showing that he had broken the law was proper. Pen.Code, §§ 319, 320, 322, 323, 325, 326, 337a.

4. Searches and Seizures ⚷5

In action by manager of business establishment against district attorney to recover money seized from business premises without warrant because allegedly being used in violation of lottery laws, instruction as to effect of presumption arising from manager's possession of the money was proper.

◆

Morris Lavine, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, William E. Lamoreaux, Deputy County Counsel, Los Angeles, and Edward Sumner, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

The complaint herein alleged that on February 3, 1949, and thereafter the plaintiff was the owner and entitled to the possession of $24,990.91; on said day William Simpson, the District Attorney of Los Angeles County, entered the premises occupied by plaintiff and took into his possession said sum of money; the defendant Roll herein, who succeeded Mr. Simpson as district attorney, took possession of said money and detains the same without the consent of plaintiff; the said money had not been taken for a tax, assessment, or fine pursuant to a statute or seized under an execution or attachment; plaintiff is informed that said defendant Roll seized said money purportedly pursuant to section 325 of the Penal Code, which provides that all money and property offered for sale or distribution in violation of any of the provisions of this chapter [entitled "Lotteries"] are forfeited to the state and may be recovered by information filed or by action brought by the attorney general or district attorney in the name of the state; no information or action has been filed for the recovery of the money; the money was not seized by virtue of a search warrant or other legal process; the People of the State of California claim some title to said money, but said claim is without right. The prayer was for the recovery of possession of the money.

The answer alleged that on said date, about 12:30 a. m., Mr. Simpson as district attorney caused the plaintiff to be arrested by representatives of his office and by deputy sheriffs at 5143 Whittier Boulevard, Los Angeles, upon charges of violation of, and conspiracy to violate, sections 319, 320, 322, 323, 326 [regarding lotteries], and 337a [bookmaking] of the Penal Code on said premises; at said time and as a part of the arrest, said officers took from said premises $24,990.91, which was used in the conduct of the overt acts constituting a violation of said sections and constituted the money offered for distribution in violation of the provisions thereof; on June 24, 1949, said plaintiff was convicted in the Superior Court of Los Angeles County of the crime of conspiracy to violate said sections of the Penal Code; said judgment has become final. As a second and affirmative defense, the answer alleged that plaintiff's action is barred by the statute of limitations, particularly by section 340, subdivision 6, of the Code of Civil Procedure.

In a trial by jury the verdict was for defendant. Plaintiff's motion for judgment notwithstanding the verdict was denied, and judgment was entered in accordance with the verdict. Plaintiff appeals from the judgment.

On May 19, 1949, one Kersh, the owner of the "Club Algiers" which was operated at the said address on Whittier Boulevard referred to in the answer, also filed a claim and delivery action against District Attorney Roll wherein he sought to recover possession of $6,900 of said amount of $24,990.91. On December 17, 1951, the People of the State of California filed a petition for a writ of mandate requiring said district attorney to deliver to the state said $24,990.91. The said two cases, last referred to, and the action herein by plaintiff Reynolds were consolidated for trial. Kersh obtained judgment, in a trial by jury, for $6,900. (No appeal was taken therein.) The petition for a writ of mandate was denied by the court. (An appeal is pending in that matter—No. 19784.)

Appellant contends that the judgment is contrary to the law and the evidence.

As above stated, Kersh was the owner of the Club Algiers. Plaintiff (Reynolds) was the manager of the club and his compensation was a percentage of the profits. The club was operated in a building consisting of a large entertainment room, two storage rooms, the manager's office, and a kitchen. In the large room there were dining tables, chairs, a bar, a dance floor, and an orchestra platform. Among its activities the club sold beer, liquor, and meals, and it maintained an orchestra of five or six members, and it conducted dancing and a radio broadcast. Plaintiff hired the employees and bought the food, beer and other supplies. He also took care of the money received, made the bank deposits, signed all the checks, and paid some bills in cash. Each Saturday and Sunday there were five hundred to eight hundred persons or customers at the club and on other days two hundred to three hundred were there. When drinks were ordered at the bar by a customer he would hand the money to a bartender, and when they were ordered at a table the waitress would pay for them at the bar and then collect at the table. When food was ordered from a waitress, she would pay for it before it left the kitchen and then she would collect at the table. There was no charge for dancing. There was no cover charge except on occasions when there was special entertainment.

Miss Scalph, called as a witness by plaintiff, testified that she was a waitress at the club; that in the latter part of January and the early part of February, 1949, people were sitting at the tables, and lines of people were at the tables; "there was a pyramid"—she "knew there was money going somewhere"; she participated in one of the pyramid clubs.

Mr. McCrilles, when called as a witness by plaintiff, testified that he was a salesman for a radio station; in the first part of 1949 his station broadcast the entertainment for the Club Algiers; during that time he was in the club two or three times a week; it was a busy place. When he was called as a witness by defendant, he testified that he gave a donation of $2 to Mrs. Reynolds for some kind of a club at the Club Algiers; about a week later—during the first of the year 1949—when he was at the Club Algiers, they brought a big plate covered with dollar bills and said it was a donation from the East Los Angeles Social Workers Club; then $1,024 was given to him; he believed that the money was handed to him by plaintiff.

Mr. Morris, called as a witness by plaintiff, testified that he was a band leader at Club Algiers; on February 2, 1949, he saw people making donations at the Club Algiers; he had been instructed to keep the dance floor as clear as possible and to try to keep the people who were making donations more or less in line and clear of the dance floor; he made an announcement telling the people who were making donations to keep off the dance floor; he saw Officer Stanley (chief investigator for the district attorney) there that night; about 12:30 a. m. or 1:30 a. m. he received instructions to shut the place down; then he quit playing music and the lights were dimmed. On cross-examination he testified that he joined one of the pyramid clubs—he paid $1 to Mrs. Reynolds and she wrote his name on one of the charts; a chart was a large sheet of paper with a group of names in blocks, in the shape of a pyramid, on the sheet; he did not know how many parts of the pyramid club might be termed one club—there might be ten pieces of paper to make one club or there might be one hundred; he collected a prize of $512; it was his custom to play a fanfare when a prize was awarded to a winner; he played three or four fanfares on such occasions in January and February, 1949; on the same day that he won a prize the hat check girl

(Miss Grady) also won a prize of $512—he had joined the part of the club which she had joined; six tables were located along the wall in the rear of the main room where money was received from people who wanted to join the pyramid club; plaintiff's office is about 30 feet from the nearest table—a door to the main room is about 20 feet from the tables, and the office is down a hallway about 10 feet from that door; on said day, in that office, plaintiff introduced him to "Mr. and Mrs. Lakhugus," the winners of the award of $2,500, and then he (witness) went to the band stand and announced the names of the winners; the money was awarded to them and then they went toward plaintiff's office.

Mr. Roll, the district attorney, who was called as a witness by plaintiff under section 2055 of the Code of Civil Procedure, testified that on February 2, 1949, he was chief deputy district attorney; about noon of said day two men, who said they had been working at the Club Algiers, came to the district attorney's office and made oral complaints of the activities of the Club Algiers; he went to the club about 10 p. m. of said day and at that time there were two hundred or three hundred persons there; there was a large placard on the wall which had on it something about a pyramid club and donating or a dollar contribution; Officer Stanley, the chief investigator of the Bureau of Investigation, and other members of that bureau, and men from the sheriff's office, were there; he saw people giving dollars to people where tables were set up; he saw some of that money being put into large envelopes; he saw a large sum of money brought out from the rear on a tray; they announced that it was $2,500 and that someone had won it; after the members of the sheriff's office and members of the Bureau of Investigation had gone into the office, which was in the rear, and had made the arrest, he (Mr. Roll) went into the office; there was no search warrant, writ of attachment, or writ of execution, or any written process in the possession of any of the officers; the arrest was made upon the basis of violation of certain sections of the Penal Code which occurred in the presence of the officers; he saw money in several places—in a desk drawer that was filled with silver half dollars and dollars; "there was money all over inside and outside the desk"; he saw numerous envelopes with money in them; the envelopes were the same type they were using "on the outside on these one dollar Pyramid Club transactions"; names were on the envelopes; in a storage room he saw a box in which there was at least one hundred dollars in dollar bills; plaintiff and a representative of plaintiff were there when the money was counted; the money came from various places; he gave no receipt for the money; the money was not taken for a tax or assessment. On redirect examination he testified that toward the back of the large room there were some persons behind tables; people would go to them, give their names and a dollar bill to them, and the persons behind the tables would put the names on a piece of paper; on one or two occasions he saw persons pick up envelopes and take them to the rear of the premises; he saw someone go to the microphone at 11 o'clock and say that the drawing would be postponed until 11:30 and that the ones "who put their money in" would please get in line and put their dollars in; the people would go over and put their dollars in; the "carriers would come back" and later they announced that "Mr. Lakhugus" was the winner—"Lakhugus" being investigator Cimino of the district attorney's office; he (Cimino) went to the platform and was introduced; one or two men from the rear—toward the office—came out with a tray of money; the tray of money was presented to him and then he and the men went toward the rear, taking the money with them.

Officer Stanley, called as a witness by plaintiff under section 2055 of the Code of Civil Procedure, testified that he was the chief of the Bureau of Investigation of the district attorney's office; on said February 2 about 8:30 p. m. he went to the Club Algiers and at that time about one hundred persons were there; about six tables were upon the dance floor; he saw persons taking what they called donations; during the fifteen or twenty minutes he was there (the first time) he saw fifty or sixty persons making $1 donations; he did not hear any conversation between the persons who made the donations and the persons to whom the money was given; he returned to the club about 11:30 p. m. and at that time about 400 persons were there; he arrested plaintiff at 12:30 a. m.; plaintiff said that he was in charge of the place; eight men from the Bureau of Investigation were there; he (officer) took about $6,900 out of the safe, $260 from a box in a storeroom, over $17,000 in unopened envelopes in the office—some of the envelopes were in a carton under the desk in the office and others were in and on the desk and all over the office; he also took a box of silver coins from a desk drawer; he told plaintiff that if the safe was not opened he would have it hauled away; the officer's secretary and an investigator, in the presence of the plaintiff, counted the money which was taken from the safe; the envelopes were not opened at that time; that money, except the box of coins, was taken to the district attorney's office; the box of coins was left at the club; the money was counted at the district attorney's office in the presence of plaintiff and several other men; he believed that the total amount was $24,990.91; the money was placed in a safe in his office for several hours and then it was placed in a safe deposit box in a bank. On redirect examination he testified that some two hundred envelopes with money in them were taken from the club office, and that the envelopes had names on them; some of the envelopes were used as exhibits in the criminal trial.

Officer Stanley, when called as a witness by defendant, testified that he saw girls at tables taking money from persons who went to the tables; that the girls put the money in envelopes; the envelopes were delivered to plaintiff's office; he (officer) assigned an investigator, Nick Cimino, to the Club Algiers case; when he (Officer Stanley) was at the club on the night of February 2 about 12:30, the band leader announced that a payment of $2,500 would be made; then Cimino and a girl went up to the platform; a tray full of currency was presented to them; then Cimino, accompanied by the girl and two bodyguards, carried the tray of money to the club office; within about two minutes thereafter Officer Stanley went into the office and found that Cimino had plaintiff in a corner; then Officer Stanley took a gun away from plaintiff and put handcuffs on him; there was a little over $1,000 on the tray; he asked plaintiff why he had so much money lying around in the office; he replied that he had started this pyramid club as a rib and that it got so big it got away from him and the money came in so fast he could not handle it; he said that he had not had time to open the envelopes; he (officer) did not take any money from the cash register behind the bar; all the money he took came from the club office except $160 ($260) that was in a storeroom adjoining the office.

Mr. Yessian, called as a witness by defendant, testified that he had been employed at the club about ten days before the arrest; he collected money from the six or seven tables where girls were writing names and taking money for the pyramid club; before the girls put the money in an envelope, he would check the amount of money with the lists; then they would put the money in the envelope, write the amount and their names thereon, and give the envelope to him; after a few envelopes accumulated he took them to plaintiff's office and gave them to plaintiff; there were lines at the tables, in the evenings, which at times would extend outside and around the corner; $3,000 was taken into the office during the last day he was there; on the morning of February 2 he told plaintiff that the people were demanding that the $2,000 prize be given and he asked plaintiff if he was going to give it; plaintiff replied that he had not found anybody to take the donation; he (witness) said that he would find somebody to take the place of Lakhugus, "that phony name he had up there"; thereafter Yessian went to the district attorney's office and had a conversation with Officer Stanley; he told the officer that there was going to be a $2,000 pay off at the club if they could find somebody to receive the money in the name of Lakhugus; the officer introduced him to Cimino; later Cimino introduced him to Rose, his sister-in-law; then Yessian took

Cimino to plaintiff's office and introduced him as Cimino, the brother-in-law of Yessian; Yessian told plaintiff he had found somebody to take the phony pay off; plaintiff asked if he knew the score, and Yessian replied that he had told him all about it; just before the pay off Yessian, Cimino, and Rose were in plaintiff's office; she was introduced as Cimino's wife; plaintiff gave Cimino the name "Lakhugus" and told him to remember it—that he would call him to the band stand and he would receive the money, and after that he should bring the money to the office and plaintiff would fix him up; then he gave Cimino $20; the name was called and it was said that Mr. and Mrs. Lakhugus should come to the stand and receive $2,000; Cimino and Rose went up and received the money and then there were a few speeches; when they returned to the office with the tray of money and put it on plaintiff's desk, plaintiff gave Cimino $10. Yessian testified further that he had pleaded guilty in 1937 to larceny from the person and was sentenced to the penitentiary.

Nick Cimino, called as a witness by defendant, testified that he was an investigator for the district attorney; pursuant to an assignment by Officer Stanley, he went to the Club Algiers on the evening of said February 2; he was introduced to plaintiff by Yessian as Nick Cimino, his brother-in-law, who was ready to accept the phony pay off; plaintiff asked if Cimino knew what was going to happen; Cimino told plaintiff that he did not have to worry; plaintiff said that Cimino and his wife would receive a $2,048 pay off with the understanding that the money was to be returned to him; he also said that he would fix Cimino up for his trouble. He testified further that on said February 2, six tables were in the rear of the main or large room, and ladies were sitting behind the tables; on the tables there were sheets of paper with squares thereon which were in the shape of a pyramid; also on the tables were long envelopes and pencils; in front of the tables people were lined up and were holding money in their hands; as the ladies received the money they would make notations in the squares on the paper, and the money was placed in an envelope; when a certain amount of money had been accumulated in an envelope, the envelope was sealed and handed to an employee who would then take it to the office of plaintiff. He testified further that about 11:30 p. m. he, the lady who posed as Cimino's wife, and Yessian went into plaintiff's office; plaintiff said that Cimino was not to be known as Cimino and he wrote the name Lakhugus on a paper and asked him to remember the name; then he told them that the band leader would call Mr. and Mrs. Lakhugus as the lucky winners; he also said that after they had been handed a tray full of money, they would be escorted back to his office where they were to return the money to plaintiff; then he gave Cimino $20 and said that was for his trouble; after said names were called, they went to the stand and Yessian handed them a tray full of money; when they returned to the office plaintiff allowed them to enter and Cimino returned the money to plaintiff, and plaintiff handed him $10; then Cimino arrested plaintiff; a moment later Officer Stanley entered the office. He also testified that he was present on February 3, 1949, when Deputy District Attorney Barnes asked plaintiff questions, and at that time plaintiff said that the money that had accumulated for the pyramid clubs did not belong to him, that it belonged to an organization known as the East Los Angeles Social Club which he permitted to use the Club Algiers.

Officer Graham, a deputy sheriff, called as a witness by defendant, testified that on January 31, 1949, about 5 p. m. when he went to the club, there were four lines at tables where donations and names were taken; he had to stand in line about thirty minutes before he got to a table; he gave $1 to a girl at a table and she placed his name, address, and telephone number in a square on a paper; she stated that it would take about two weeks for his name to reach the top of the pyramid and that he would be notified when his name approached the top; she placed the money in a box; he saw other persons contributing a dollar; later there were six tables in operation; he saw a person take the collections and sheets of paper to the office of plaintiff; he was present on the night of February 2 when plaintiff was arrested; after the arrest plaintiff told him that he had not left his office for two weeks—shortly after the pyramid club started, that he had too much money in the office and he could not leave it, that he felt that the growth of the club was about to crush him, and that his arrest took a great weight off his shoulders.

This action was commenced on January 31, 1952—about three years after the money was taken.

Appellant argues that since it is undisputed that he was in possession of the money and since possession creates a presumption of ownership, he was entitled to rest his case upon that presumption. He argues further that such presumption was not overcome by evidence to the contrary; that the evidence introduced by defendant relating to the manner in which plaintiff acquired possession did not constitute a defense; that appellant established his right to possession (except as to $2,500 given as a prize) without relying upon any illegal transaction; that defendant took the money without any right thereto and without any warrant or other legal process therefor; that the money was not used as evidence in a criminal trial; that since no action to forfeit the money was commenced and since such an action was barred by the statute of limitations, defendant was not entitled to judgment upon the basis of a forfeiture. Appellant therefore asserts that he is entitled to possession of the money, except as to $2,500 (given as a prize) and the $6,900 (taken from the safe—for which Kersh obtained judgment).

There was no action by defendant to declare a forfeiture, and it is conceded that a forfeiture is not involved herein.

[1] Appellant did not testify. He rested his case upon a presumption of ownership of the money. The jury could have found that the presumption of ownership on the part of appellant was overcome by the evidence that Kersh was the owner of the Club Algiers and that appellant was the manager whose compensation was based upon a percentage of profits; and that plaintiff said, at the time of the arrest, that the money did not belong to him. If the jury so found (that appellant was not owner of the money), then the presumption of ownership was dispelled and the only remaining basis for appellant's claim to a right of possession was that he as manager or agent for Kersh (the owner) had the right to possession. In view of the issues presented, there is an implied finding in the verdict of the jury that the claim of appellant for the return of the money was based upon an illegal transaction. It is a "settled principle that the courts will not lend assistance to persons whose claim for relief rests on an illegal transaction". Lee On v. Long, 37 Cal.2d 499, 500, 234 P.2d 9, 10. It was also said in the case just cited, 37 Cal.2d at page 502, 234 P.2d at page 11, in quoting from 17 C.J.S., Contracts, § 272, p. 656: " 'No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim.' " In said case of Lee On v. Long, supra, a sheriff had seized dice, playing cards, lottery tickets, and money from tables at which the plaintiffs were seated. Two cases therein were tried upon the same evidence—in one case the county sought an order authorizing the confiscation of the gambling paraphernalia and the forfeiture of the money, and in the other case the persons seated at the tables (plaintiffs) sought a return of the money. The trial court therein ordered the confiscation of the paraphernalia but, with respect to the money, it denied both the county's petition for a forfeiture and the other plaintiffs' prayer for a return of the money. The judgment therein was affirmed. It was said further in that case, 37 Cal.2d at page 502, 234 P.2d at page 11, in quoting from other cases, that " 'the test * * * is whether the plaintiff can establish his case otherwise than through the medium of an illegal transaction to which he himself is a party' ", and " 'If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him,

whatever his claim in justice may be upon the defendant.' "

[2] In the present case the evidence was sufficient to support a finding that plaintiff's claim for a return of the money was based upon an illegal transaction. It is conceded that $2,500, the sum which allegedly was on the tray and purportedly was awarded as a prize, is not recoverable by plaintiff. Approximately $17,000 of the money which plaintiff is claiming was in envelopes upon which names and amounts were written. The evidence shows that the persons who were at the tables, receiving the $1 and $2 donations from persons who were in the lines at the tables, placed the money in envelopes and wrote names and amounts thereon. Those envelopes, which were of the same appearance as the envelopes containing the money involved here, were taken to plaintiff's office. Envelopes containing the $17,000 (approximately) involved here were found, by the officers at the time of the arrest, under, in, and upon the desk in the office and all over the office. The evidence was sufficient to prove that the receipt of the sums of $1 and $2, the registering of names of the persons from whom the sums were received, and the awarding or purported awarding of prizes in approximate sums of $500, $1,000, and $2,500 to a few of the persons whose names allegedly were so registered constituted a lottery, and such transaction was illegal under provisions of the Penal Code. The evidence supports a finding that the claim of appellant was based on an illegal transaction.

The case of People v. Grant, 52 Cal. App.2d 794, 127 P.2d 19, upon which plaintiff relies, is distinguishable from the present case. In that case the plaintiff sought a forfeiture of money, and the defendant sought a return of the money. The court said that the trial proceeded on the theory that defendant's ownership of the money was admitted. In the present case the ownership of the money was an issue.

The evidence would support a finding that appellant was arrested and the money was seized by officers of the district attorney's office upon the basis of violations by appellant, in the presence of the officers, of sections of the Penal Code which denounce lotteries and various activities in connection therewith as crimes. The evidence would also support a finding that the money was taken for the purpose of using it as evidence in a trial of appellant upon criminal charges, and for the purpose of having it available as the subject matter of a forfeiture action. Also the evidence would support a finding that the officers who arrested appellant and took the money did not unlawfully enter the Club Algiers or appellant's office therein. They entered the main room of the club during the time when it was open and operating as a place where the public was invited, and Officer Cimino, who arrested appellant in appellant's office, entered the office at the direction and invitation of appellant (when he was directed by appellant to return the tray of money to the office). Officer Stanley went into the office within a minute or two after Officer Cimino had entered.

[3] Appellant contends that an instruction given, on the court's motion, was erroneous.[1]

He argues that the statement in the instruction to the effect that the rule is not limited in its application to the parties to

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[1] "You are instructed that one of the defenses set up by the pleadings in this case by the defendants in their answers to both cases, the case of Ralph L. Reynolds, Plaintiff, v. E. Ernest Roll, Defendant, and Cosma C. Kersh, Plaintiff, v. E. Ernest Roll, Defendant, separate, distinct and apart from any forfeitures, is that the moneys taken into legal custody by the District Attorney and his agent on February 3, 1949, were seized and held and still are in the custody of said District Attorney, which moneys were actually offered for an in a lottery and were used in the conduct of overt acts constituting a violation of the Penal Code section, to wit: the crime of conspiracy and violation of Sections 319, 320, 322, 323, 326 and 337a of the Penal Code of the State of California and said money used actually engaged in illegal gambling activity at the time of the raid and their arrest.

"These are the affirmative allegations of the answers as hereinbefore given to you and more particularly in these instructions. The burden of the proving of the illegal transaction could not have been understood by the jury as meaning other than that a third party in possession of the property could defend upon the ground that plaintiff had obtained it as a result of an illegal transaction. He argues further that the statement therein to the effect that the test of the rule is whether the plaintiff can establish his case otherwise than through the medium of an illegal transaction could not have been clear to the jury. He argues further that the statement therein that in such cases the illegal nature of the transaction if any creates a disability in plaintiff meant that the burden was on plaintiff to show that he had come by the property lawfully. It appears that the instruction was based upon the opinion in the case of Lee On v. Long, supra, 37 Cal.2d 499, 234 P.2d 9. The instruction was not erroneous.

[4] Appellant contends that another instruction given, on the court's motion, was erroneous.[2] He argues that, by the instruction, it was intimated that a presumption alone is not sufficient to sustain the burden of proof. That instruction was not erroneous. Furthermore, it is to be noted that the court gave an instruction, requested by plaintiff, as follows: "If you believe from the evidence that at the time of the seizure of money here concerned Ralph Reynolds was managing the Club Algiers, that fact standing alone is sufficient to create a presumption that he was entitled to the possession of all of the money in the building occupied by Club Algiers except such as was upon the person of customers or employees therein, and unless that presumption is overcome by evidence, you must find in accordance with it."

Appellant asserts further that the court erred in giving and refusing other instructions. He refers generally to various instructions. It is not necessary to set forth those instructions and discuss them in detail. Considering all the instructions together, it appears that the jury was instructed adequately.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; CARTER, TRAYNOR and SCHAUER, JJ., dissenting.

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these affirmative allegations of the answers by a preponderance of the evidence are upon the defendant. Testimony has been produced by the defendants in support of their affirmative allegations of their answers.

"You are instructed in this connection that the law is as follows:

" 'No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim.'

"It is the law that this rule is not limited in its application to parties to the illegal transaction as distinguished from an attempt to set up a claim against a third party based on the law's violation. And you are instructed that the test of the application of this rule is whether the plaintiff can establish his case otherwise than through the medium of an illegal, unlawful transaction to which he, himself, is a party. It is the law that if the plaintiff cannot establish his case without showing that he has broken the law, the court will not assist him whatever his claim of justice may be upon the defendant. And in such cases the illegal or unlawful nature of the transaction if such exists, creates a disability in the plaintiff."

[2] "Whenever in these instructions I refer to a presumption, I mean one that may be rebutted. The fact that such a presumption arises must never be taken to mean any change in the rule of burden of proof. To explain this point more fully: A party against whom such a presumption is directed, if he intends to deny it, must, of course, present evidence to the contrary, but if the burden of proof on the issue to which the presumption relates does not rest on him, it is not necessary for him to overcome the presumption by a preponderance of the evidence. In that case, with the burden of proof resting on the party in whose favor the presumption is invoked, the presumption, together with any other evidence supporting it, to justify a finding in accordance therewith, just [must] have more convincing force than the contrary evidence."

123 Cal.App.2d Supp. 948

SAUSSER v. BARRACK et al.

Civ. 184023.

Appellate Department, Superior Court,
San Diego County, California.

Jan. 15, 1954.

Action by selling partner against original copartner for balance due on note. From an adverse judgment of Municipal Court, South Bay Judicial District, San Diego County, Howe, J., selling partner appealed. The Superior Court, San Diego County, Appellate Department, Burch, J., held that where partner's attempted sale of partnership interest merely conveyed right to participate in partnership profits and purchaser transferred his rights to original copartner who assumed purchaser's obligation on note to selling partner, and no partnership accounting was had, original partner could not assert sum owed by selling partner to the partnership as a counterclaim.

Judgment reversed.

1. Limitation of Actions ⚿63

In former partner's action on note against copartner who asserted set-off based on former partner's indebtedness to partnership, where there had been no accounting of partnership affairs, the rule, that cross-demands which compensate each other abate the running of statute of limitations, was inapplicable. Code Civ.Proc. § 440.

2. Set-Off and Counterclaim ⚿35(1)

Counterclaim may be based upon an unliquidated demand.

3. Partnership ⚿334, 344

Where partner's attempted sale of partnership interest merely conveyed right to participate in partnership profits and purchaser transferred his rights to original copartner who assumed purchaser's obligation on note to selling partner, a several judgment between the parties could be had only after partnership affairs were wound up and under statute original copartner could not assert as a counterclaim the sum owed the partnership. Code Civ.Proc. § 438.

4. Partnership ⚿277

Dissolution of partnership operates only with respect to future transactions, and the partnership continues until all preexisting matters are terminated.

5. Partnership ⚿344

The assets of a partnership must be converted into cash and partnership debts paid before a personal judgment for one partner against another can be had.

6. Partnership ⚿334

Where partner's attempted sale of partnership interest merely conveyed right to participate in partnership profits and purchaser transferred his rights to original copartner who assumed purchaser's obligation to selling partner, and there had been no accounting of partnership affairs, an action for balance due in which set-off was asserted on the note could not be treated as one for final determination of the rights of the partners themselves.

* * *

Merideth L. Campbell, National City, for appellant.

Ralph W. Squier, San Diego, for respondents.

BURCH, Judge.

Plaintiff brings this action to recover a balance of $2,600 alleged to be due and payable on a promissory note for $15,000 dated December 8, 1948, payable at $300 per month, principal and interest. Defendant Turgon admits his obligation on the note but claims the right of setoff for the $2,600 balance. Defendants had judgment in the court below and plaintiff appeals.

Plaintiff Sausser and defendant Turgon were equal partners in a furniture business in Chula Vista on December 8, 1948. On that date Sausser, without written notification to Turgon and in violation of the partnership agreement, attempted to sell his interest to defendants Barrack, and received from them the note in question.

Plaintiff filed a previous action against these same defendants in Superior Court of this County and State, numbered 150,980, seeking reformation, declaratory relief, and recovery of the assets of the partnership he had previously attempted to convey to defendants Barrack. Judgment was entered June 21, 1949 and has become final. In that judgment the court found that the attempted sale of Sausser to the Barracks conveyed nothing more than the right to participate in the partnership profits and that no partnership rights of administration or control or interest in partnership assets were conveyed. The court further found that defendant Turgon purchased from defendants Barrack what they had received from Sausser, and in consideration thereof bound himself to meet the obligations of the note.

In the present action the trial court further found that on said date of December 8, 1948 the books of the partnership were closed and showed Sausser's indebtedness thereon of some $2,600. It was further found that defendant Turgon regularly paid the $300 a month on the note until there remained a balance of $2,724 unpaid, and Turgon then tendered $124 and the asserted setoff of $2,600 in full payment. Sausser refused, declared the whole amount due and brought this suit. Sausser pleaded the statute of limitations against Turgon on the setoff. Judgment went for Turgon.

[1] In support of the judgment it is suggested that cross-demands existed between Sausser and Turgon to the extent of $2,600 which each canceled the other, citing Section 440 of the Code of Civil Procedure, Jones v. Mortimer, 28 Cal.2d 627, 170 P.2d 893, and Sunrise Produce Co. v. Malovich, 101 Cal.App.2d 520, 225 P.2d 973. The difficulty we have with this argument is that what Sausser may have owed to the partnership did not belong to Turgon individually in the absence of an accounting and a judgment for his distributive share following an accounting.

While it was held in Jones v. Mortimer, 28 Cal.2d 627, 633, 170 P.2d 893, that cross-demands which compensate each other abate the running of the statute of limitations, and to the extent that they do compensate each other they are discharged, that rule cannot be applied to these facts.

[2–4] It is also true as held in Sunrise Produce Co. v. Malovich, 101 Cal.App.2d 520, 524, 525, 225 P.2d 973, and Terry Trading Corp. v. Barsky, 210 Cal. 428, 438, 292 P. 474, 478, that it is not "* * * a valid objection to a counterclaim that it is based upon an *unliquidated* demand." However, Section 438 of the Code of Civil Procedure provides explicitly that a counterclaim "* * * must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had * * *." A several judgment between these partners could only be had after the partnership affairs were wound up. No accounting was sought or had here, and we cannot assume it in support of the judgment. A dissolution of a partnership operates only with respect to future transactions; as to everything past, the partnership continues until all pre-existing matters are terminated. Cotten v. Perishable Air Conditioners, 18 Cal.2d 575, 116 P.2d 603, 136 A.L.R. 1068. Its pre-existing obligations must be satisfied and it continues in existence for that purpose. Yahr-Donen Corp. v. Crocker, 80 Cal.App.2d 675, 182 P.2d 209.

[5] Consistent with these principles, it has been held that the assets must be converted into cash and the debts paid before a personal judgment can be had. Olmo v. Olmo, 56 Cal.App.2d 590, 133 P.2d 866; Hooper v. Barranti, 81 Cal.App.2d 570, 184 P.2d 688. See, also, Lagares v. Kappas, 82 Cal.App.2d 569, 186 P.2d 471. It is, therefore, clear that Turgon has not yet acquired a cross-demand against Sausser, nor, until the partnership affairs have been settled according to the requirements of law, has he any claim against the partnership assets for any portion of the $2,600.

[6] The trial court found in this action that there had been no accounting of the partnership affairs. This precludes the possibility of treating the present action as a final determination of the rights of the partners themselves. See Brown v. Barnett, 111 Cal.App. 456, 295 P. 579, and Mosher v. Helfend, 7 Cal.App.2d 48, 44 P.2d 1050.

It is equally clear that Turgon's claim by reason of his purchase from the defendants

Barrack, which only carried Sausser's right to future profits, in no way improved Turgon's claim to the $2,600.

We hold it was improper to allow the setoff and the judgment must be reversed.

TURRENTINE, P. J., and GLEN, J., concur.

122 Cal.App.2d Supp. 962

PEOPLE v. GARCIA.

No. 181764.

Appellate Department, Superior Court,
San Diego County, California.
Nov. 19, 1953.

Defendant was convicted of wilfully and unlawfully using narcotics. The Municipal Court, San Diego Judicial District, Eugene Daney, J., entered judgment of conviction, and defendant appealed. The Superior Court, San Diego County, Appellate Department, Burch, J., held that evidence was insufficient to establish that the possible use of narcotics by defendant occurred in county of prosecution and hence venue over offense charged was not established.

Remanded for new trial.

1. Criminal Law 🔑406(1)

In prosecution for wilfully and unlawfully using narcotics, testimony of police officer that defendant when arrested had stated that he had quit using "stuff" and that he had his last "fix" about two months ago, was properly received. Health and Safety Code, § 11721.

2. Criminal Law 🔑564(1, 2)

Sufficient proof of venue is necessary in every criminal case, though it need not be proved beyond a reasonable doubt.

3. Criminal Law 🔑97(1)

Where statute makes no reference to the place of performance of an act defined as a crime, it will be assumed that the Legislature did not intend to regulate conduct taking place outside borders of the state.

4. Criminal Law 🔑737(2)

Question of local jurisdiction is a fact question to be resolved on the evidence.

5. Criminal Law 🔑564(1)

In prosecution for wilfully and unlawfully using narcotics, evidence was insufficient to establish that the possible use of narcotics by defendant occurred in county of prosecution and hence venue over offense charged was not established. Health and Safety Code, § 11721.

◆

Edgar G. Langford, San Diego, for appellant.

James Don Keller, Dist. Atty., by Luther L. Leeger, Dep. Dist. Atty., San Diego, for respondent.

BURCH, Judge.

Defendant was prosecuted and found guilty in the Municipal Court of San Diego Judicial District under a complaint charging that on or about the 9th day of April, 1953, in San Diego Judicial District in the said County of San Diego, State of California, he did "* * * wilfully and unlawfully use narcotics; * * *.", in violation of the provisions of Section 11721 of the Health and Safety Code. A jury having been waived, the trial was had before the court. Defendant was found guilty. His contentions on appeal are as follows:

1. That the trial court committed prejudicial error in admitting, over defendant's objection, the purported extrajudicial statements of the defendant in the absence of proof of the *corpus delicti.*

2. That the evidence was and is insufficient to sustain the conviction, for the following reasons:

a. That the evidence fails to establish that the defendant used any narcotic within the State of California.

b. That the evidence fails to establish that the defendant ever unlawfully used any narcotic at any time or in any place.

From the settled statement of facts it appears:

The evidence for the People consisted of the testimony of one doctor and a police officer. Doctor Robert L. Williams testified that he was a physician licensed to practice in the State of California, and that on April 9, 1953, he had examined the arms of defendant and found thereon certain scabs, scars, and discolorations which in his opinion resulted from punctures in and about the veins by a needle-like object; that the scars and discolorations, in his opinion, were caused by frequent punctures of the veins in that area over a long period of time; that inexpert injections with unsterile instruments and/or injections of an overly strong solution on various occasions would tend to cause such scars and discolorations; that there were several scabs in the same area which had resulted from punctures within approximately 24 hours of the time of the examination; that in his experience he had seen the foregoing pattern of scabs, scars, and discolorations only on the arms of narcotic users and addicts. Doctor Williams testified further that at the time of the foregoing examination the defendant stated to him that he had used habit-forming drugs on one occasion only, to wit, in June, 1952, when he smoked one marijuana cigarette, and that he had never used a drug by injection, but that the marks on his left arm were caused by brush scraping his arm years ago.

The police officer testified that when arrested the defendant stated: "I have quit using stuff, I had my last 'fix' about two months ago." He also testified that the term "fix" as used by narcotic addicts means an injection of narcotics.

Defendant took the stand and confirmed the doctor's testimony as to the statement of defendant of one use of habit-forming drugs, adding that that one use was committed in the State of New Mexico. He denied making the statement attributed to him by the police officer. He accounted for the wounds on his left forearm by an old brush scar which had been irritated afresh shortly before his arrest (12 to 24 hours) in carrying rough crates in and about his employment.

[1] We think the expert testimony of Doctor Williams was sufficient to warrant the court's implied finding that the defendant was a user of narcotics and that the use was both wilful and unlawful, and triable by the court below if it was a use committed within the County of San Diego, State of California, and, further, that the officer's testimony as to the defendant's extrajudicial admission was properly received. People v. Powell, 34 Cal.2d 196, 203, 208 P.2d 974.

However, we are unable to find in the record any evidence of the venue of the offense. Viewing the evidence in the light most favorable to the judgment, it may be said to have been proved that the scars, scabs, and discolorations observed by the doctor and testified to by the defendant had been brought to the condition observed by the doctor within 12 to 24 hours of the arrest and physical examination, but there is no evidence whatever that this use of the narcotic occurred in San Diego County. Just as likely could it have occurred in a neighboring county, state, or country.

[2, 3] Sufficient proof of the venue is necessary in every criminal case, People v. Pollock, 26 Cal.App.2d 602, 80 P.2d 106, though it need not be proved beyond a reasonable doubt. People v. Bastio, 55 Cal.App.2d 615, 131 P.2d 614.

In 14 Am.Jur. 921, § 221, Criminal Law, it is said:

> "It is fundamental that jurisdiction in criminal matters rests solely in the courts of the state or country in which the crime is committed (Huntington v. Attrill, 146 U.S. 657 [13 S.Ct. 224, 36 L.Ed. 1123]) and that the laws of each state or country exclusively govern the nature of the offense. (Huntington v. Attrill, supra) * * * He is subject in all respects to the law of the country within which the crime is committed and as that law existed at the time the crime was committed."

And further (§ 224, page 924):

> "It is a universally accepted rule of law that the courts of one state or country will not execute the penal or criminal laws of another state or country, * * * A local statute has no extraterritorial operation, * * * (United States v. Nord Deutscher Lloyd, 223 U.S. 512 [32 S.Ct. 244, 56 L.Ed. 531].)"
>
> "Note 19: A conspiracy in the United States to do acts in another jurisdiction does not draw to itself those acts and make them unlawful if they are permitted by the local law. (American Banana Co. v. United Fruit Co., 213 U.S. 347 [29 S.Ct. 511, 53 L.Ed. 826].)"

Where, as here, the statute makes no reference to the place of performance of an act defined as a crime, it will be assumed that the Legislature did not intend to regulate conduct taking place outside the borders of the State. People v. Buffum, 40 Cal.2d 709, 715, 256 P.2d 317.

[4] In People v. Megladdery, 40 Cal.App.2d 748, 106 P.2d 84, it was held on an extensive review of the authorities that the question of local jurisdiction is a ques- of fact to be resolved on the evidence. Pertinent principles may be quoted from that case 40 Cal.App.2d at page 762, 106 P.2d at page 92:

> "While it is true that a defendant does not have a constitutional right to have his case determined by the jury of any particular county (People v. Richardson, 138 Cal.App. 404, 32 P.2d 433), it is also true that our statutory law has determined, with certain exceptions, that an accused person is answerable only in the jurisdiction where the crime, or some part or effect thereof, was committed or occurred. People v. Wilson, 86 Cal.App. 160, 260 P. 330; secs. 777, 781, Pen. Code. It is an elementary principle of our jurisprudence that the question of jurisdiction over the subject matter can never be waived nor conferred by consent. It seems quite clear to us, that, from the standpoint of logic, the question of jurisdiction, whether it be local or general jurisdiction, is fundamentally and necessarily a question of fact, and that in a criminal case, the burden of proving that fact rests on the prosecution. * * * Where this fact is not proved, the verdict is contrary to the evidence within subdivision 6 of section 1181 of the Penal Code and a new trial may be granted."

After reviewing many authorities and citing others, the court continues, 40 Cal.App.2d at page 764, 106 P.2d at page 93:

> "From these cases it would appear that it is a settled principle of criminal law in this state (and the same rule exists elsewhere—16 Cor.Jur., p. 530, sec. 997) that venue is a question of fact for the jury, and that the burden rests on the prosecution to prove this fact not beyond a reasonable doubt but by a preponderance of the evidence. People v. Carter, 10 Cal.App.2d 387, 52 P.2d 294. Since this is so, it follows that failure to prove local jurisdiction falls directly within the meaning of subdivision 6 of section 1181 of the Penal Code."

[5] The People concede the rule and offer in support of the judgment that the defendant took the stand and failed to produce evidence of absence from the State of California or from the County of San Diego at the time when the marks were made, and, moreover, that his explanation of how the marks occurred evidenced a guilty mind. We do not agree. A careful consideration of the settled statement reveals no evidence whatever that the possible use of narcotics by the defendant occurred in San Diego County.

The case is remanded for a new trial.

TURRENTINE, P. J., and GLEN, J., concur.

121 Cal.App.2d Supp. 874

PEOPLE v. DALZELL.

Cr. A. 16.

Appellate Department, Superior Court,
San Bernardino County, California.
Nov. 30, 1953.

Defendant was found guilty of violating Vehicle Code provision that driver of vehicle approaching any entrance of highway or intersection signposted with stop sign shall stop before entering such highway or intersection. The lower court entered judgment adverse to defendant, and defendant appealed. The Superior Court, Appellate Department, Coughlin, P. J., held that alleged failure of motorist to stop at stop sign placed within intersection and immediately prior to second roadway of highway consisting of two roadways did not constitute violation of Vehicle Code.

Judgment reversed.

1. Automobiles ⚷11

Where intersecting highway consists of two roadways, the boundaries of such intersecting highway constitute the boundary of the "intersection" contemplated by the Vehicle Code. Vehicle Code, § 577.

See publication Words and Phrases, for other judicial constructions and definitions of "Intersection".

2. Automobiles ⚷335

Alleged failure of motorist to stop at stop sign placed within intersection and immediately prior to second roadway of highway consisting of two roadways, did not constitute a violation of Vehicle Code provision that driver of any vehicle upon approaching any entrance of a highway or intersection signposted with stop sign shall stop before entering highway or intersection. Vehicle Code, § 577.

3. Automobiles ⚷352

Even if stop sign placed within intersection and immediately prior to second roadway of highway consisting of two roadways was validly placed and motorist's failure to stop before entering second roadway constituted violation of city ordinance, motorist charged with violating Vehicle Code provision requiring driver of vehicle approaching entrance of highway or intersection signposted with stop sign to stop before entering highway or intersection and not with violating ordinance, could not be found guilty of violation of such ordinance. Vehicle Code, § 577(a).

Lowell E. Lathrop, Dist. Atty., San Bernardino, by Robert M. Castle, Deputy Dist. Atty., San Bernardino, for the people.

William Campbell Dalzell in pro. per.

COUGHLIN, Presiding Judge.

The complaint in this matter charges the defendant with "violation of Sec. 577, Vehicle Code". It is further alleged that the defendant drove "upon a public highway in the City of Upland, to-wit: 19th Street and Euclid Avenue, West Drive, a vehicle * * * said Highway was then and there sign posted with a sign located at and near the entrance to said highway, having the word 'Stop' printed thereon in the manner prescribed by law, and that said defendant did wilfully and unlawfully fail and neglect to stop such vehicle at said sign before entering and crossing said highway and intersection."

The following statement appears in the docket maintained by the judge of the trial court:

> "Defendant admits under oath, the fact that he did not stop at the West Drive of Euclid Avenue and Nineteenth Street and contends that the sign is not placed according to law, if placed pursuant to a City Ordinance and that Euclid Avenue is one but one highway."

The Court found the defendant "guilty as charged".

Section 577 of the Vehicle Code provides:

> "The driver of any vehicle upon approaching any entrance of a highway or intersection * * * signposted with a stop sign * * * shall stop:

> "(a) Before entering the crosswalk on the near side of the intersection or, if none, then at a limit line when marked, otherwise before entering such highway or intersection".

From the statement contained in the docket it is apparent that the only stop which the defendant failed to make was that required by a stop sign directing traffic going easterly along 19th Street at its intersection with the west roadway of Euclid Avenue.

[1] Euclid Avenue consists of two roadways but is only one highway. The boundaries of an intersecting highway constitute the boundary of the intersection contemplated by the Vehicle Code. Blanton v. Curry, 20 Cal.2d 793, 129 P.2d 1.

[2] Under the law, as applied to the facts in this case, when the defendant, traveling west on 19th Street, arrived at the west roadway of Euclid Avenue he already was within the intersection and his failure to stop at some point within the intersection cannot be held to constitute a violation of Vehicle Code, Sec. 577 which contemplates a failure to stop before entering the intersection.

Under the circumstances, there is no reason to determine whether or not the stop sign which was placed within the intersection, but immediately east of the west roadway of Euclid Avenue, was validly placed and required motorists intending to cross the west roadway to stop before doing so.

[3] Assuming that the stop sign under consideration was validly placed and that the defendant's failure to stop before entering the west roadway of Euclid Avenue constituted a violation of Ordinance 354 of the City of Upland, the fact remains that the defendant was not charged with violating said Ordinance and, under the complaint filed against him, could not be found guilty of such a violation.

The judgment is reversed.

HILLIARD, J., concurs.

42 Cal.2d 200

PEOPLE v. BYRD.

Cr. 5487.

Supreme Court of California.
In Bank.
Feb. 4, 1954.
Rehearing Denied March 3, 1954.

Defendant was convicted of first degree murder without recommendation. The Superior Court, Ventura County, Walter J. Fourt, J., entered judgment, denied defendant's motion for new trial, and imposed death penalty, and appeal to the Supreme Court was automatic. The Supreme Court, Spence, J., held that evidence was sufficient to sustain conviction.

Judgment and order denying new trial affirmed.

Carter, Traynor and Schauer, JJ., dissented.

1. Indictment and Information 🔑10

Where member of grand jury which indicted defendant had sat on previous grand jury, but such member was not present when indictment was returned, such irregularity did not affect validity of indictment. Code Civ.Proc. § 199.

2. Homicide 🔑311

In murder prosecution, it was proper for the court to inform jury concerning possible consequences of imposition of a sentence of either death or life imprisonment.

3. Criminal Law 🔑1037(1, 2)

Where, in murder prosecution, defendant had not objected to district attorney's argument relative to effect of punishment on defendant and had not requested court to instruct jury to disregard district attorney's remarks, defendant could not complain of such argument since any harmful effect could have been obviated by timely instruction to jury, and evidence did not present grave doubt concerning defendant's guilt.

4. Homicide 🔑22(2)

Killing which is committed by lying-in-wait is first-degree murder, and question of premeditation is not further involved. Pen.Code, § 189.

5. Homicide 🔑286(3)

In murder prosecution, evidence was sufficient to warrant giving of instruction based upon contention that killing had been perpetrated by means of lying-in-wait. Pen.Code, § 189.

6. Descent and Distribution 🔑63
Divorce 🔑255

Interlocutory decree of divorce, which made family home separate property of defendant's wife, was a final adjudication of issues therein determined, but, since defendant and wife remained husband and wife until entry of final decree, defendant would be entitled, as surviving spouse, to share in his wife's estate unless he was convicted of murdering her. Probate Code, §§ 221, 258.

7. Criminal Law 🔑304(9)
Homicide 🔑287

Fact that defendant would be entitled, as surviving spouse, to share in his wife's estate unless he was convicted of murdering her was matter for court's judicial notice in prosecution of defendant for wife's murder, and, in such prosecution, instructions regarding defendant's interest in his wife's estate was properly given. Probate Code, §§ 221, 258; Code Civ.Proc. § 1875.

8. Homicide 🔑311

In murder prosecution, giving of instruction that, if jury found defendant guilty of first-degree murder and did not find extenuating facts or circumstances to lighten punishment, jury had duty to find verdict of murder in first degree and fix penalty at death was not error. Pen.Code, § 190.

9. Criminal Law 🔑517(1)
Witnesses 🔑390

An involuntary confession may not be used either for purpose of proving the crime confessed or for purpose of impeaching defendant.

10. Criminal Law 🔑698(1)

In murder prosecution, tape recordings of conversations between defendant and deputy district attorney, in presence of police officers, were properly admitted in evidence in view of fact that (1), at time of offering, defendant did not object on ground that a proper foundation had not been laid or that contents of recording had been given involuntarily and that (2) there was ample support in record that such conversations were voluntary.

11. Criminal Law ⚷781(1)

In murder prosecution, trial court properly refused to give defendant's requested instruction defining involuntary confession and his requested instruction of necessity that confession must be voluntary in view of fact that only rational conclusion to be drawn from evidence was that confessions were free and voluntary.

12. Criminal Law ⚷526

Even if defendant was under influence of intoxicating liquor at time he made confessions, such condition would not make such confession inadmissible in subsequent murder prosecution.

13. Criminal Law ⚷517(1)
Witnesses ⚷390

Where confessions contained in tape recordings are voluntary, the various aspects thereof can be used for impeachment of defendant or as affirmative evidence of guilt.

14. Criminal Law ⚷680(1)

In murder prosecution allowing district attorney to offer portions of tape recordings quoted by him to defendant on witness stand in cross-examination for purposes of impeachment and remainder for purpose of showing nature of defendant's voice and his physical and nervous condition as revealed by his voice in recording, rather than in case in chief, was not an abuse of trial court's discretion in absence of showing of prejudice.

15. Criminal Law ⚷829(3)

In murder prosecution, refusal to instruct jury that, to constitute deliberate and premeditated killing, slayer must weigh and consider question of killing and reasons for and against such choice and, having in mind the consequences, decide to and commit the unlawful act causing death was not error in view of other instructions given. Pen. Code, §§ 187, 189.

16. Homicide ⚷147

Direct evidence of a deliberate and premeditated purpose to kill is not required to sustain a conviction of first-degree murder, but deliberation and premeditation may be inferred from proof of such facts and circumstances as will furnish a reasonable foundation for such an inference.

17. Homicide ⚷253(1)

Evidence was sufficient to sustain conviction for first-degree murder. Pen.Code, § 1239(b).

18. Homicide ⚷347

Where evidence was sufficient to sustain conviction for first-degree murder, the Supreme Court would not be authorized to reduce degree of crime or to reduce penalty from death to life imprisonment. Pen. Code, §§ 189, 1181, subd. 6, 1239(b), 1260.

◆

Morris Lavine, Los Angeles, and Waite & Drapeau, Ventura, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., Roy A. Gustafson, Dist. Atty., Ventura, and James E. Dixon, Dep. Dist. Atty., Ventura, for respondent.

SPENCE, Justice.

Defendant Walter Thomas Byrd was charged by indictment with the murder of his wife, Susan. He pleaded not guilty and not guilty by reason of insanity. The jury returned a verdict of guilty of murder in the first degree without recommendation, and he was found sane. His motion for a new trial was denied, and the death penalty was imposed. The appeal is automatic. Pen.Code, § 1239, subd. (b).

As grounds for reversal, defendant urges these points: (1) invalidity of the indictment because of incompetency of the grand jury; (2) errors in the charge to the jury, both in giving and refusing to give certain instructions; and (3) insufficiency of the evidence to sustain the verdict. There is no merit to any of these objections, and the judgment must be affirmed.

Defendant, a man 41 years of age, was a chronic alcoholic. He and his wife had been married about seventeen years, and they had two children—Gracelee, aged sixteen, and Connie Sue aged six. On December 31, 1952, Mrs. Byrd obtained an interlocutory decree of divorce, in which she was awarded all the community property. Both prior to and after the divorce decree, defendant and his wife had frequent quarrels. Before their divorce, Mrs. Byrd had defendant arrested for an assault upon her, for which he served a sixty-day jail sentence; and she also had him committed to the Camarillo State Hospital as an alcoholic, where he stayed for ninety days. In the course of the divorce action, defendant and his wife had several heated arguments relative to a property settlement; and during the few weeks following the divorce, particularly just preceding Mrs. Byrd's death, they quarreled violently over defendant's refusal to sign a quitclaim deed to certain property.

During December, 1952, and January, 1953, defendant was drinking heavily. Then deciding to "sober up" and taking some "nerve tablets," defendant on February 3, 1953, went to his wife's home in Santa Susana Knolls to see his family. Mrs. Byrd spoke to him about signing the quitclaim deed to the property. At first, after some argument, he agreed to sign the deed, but when they went to a notary public for that purpose, he again refused to sign. Defendant then left his family and went to his sister's home in Van Nuys, where he spent the night. While there he drank some rubbing alcohol and wine, and took some sleeping pills. The next night about 10 p. m. defendant stole two guns and some shells from a gunshop in Van Nuys. After walking the rest of the night to Santa Susana Knolls, some 25–30 miles, defendant found some friends and he spent the day, February 5, drinking with them. While there, he showed one of the men his guns, and they practiced firing shots. Then, after dozing awhile, defendant started for his wife's home, where he arrived between 7 and 7:30 p. m. A Buick car and his wife's car, a 1947 Chevrolet, were parked in front of the house. He sat in a vacant lot for a time, and then got into his wife's car, drank some more wine, and dozed from time to time. The owner of the Buick car drove off shortly after defendant's arrival. Almost immediately thereafter a second visitor arrived in a Ford pick-up truck, and he stayed until about 11:30 p. m. Mrs. Byrd retired to her bedroom about 9:00 p. m., leaving the visitor and her two daughters watching television.

After this visitor left in his Ford pick-up truck, defendant went into the house. Gracelee testified that she heard footsteps and her father's voice say "Sue, is that you?" Her mother answered "Yes" and then something like "Get out of here!" Then she heard a shot and her mother said "Oh, Lee" (as the mother called defendant). She then heard another shot. Gracelee testified that she did not see her father but she recognized his voice, which didn't sound normal but had a high pitch, more like he had been drinking. One shot went through Mrs. Byrd's head causing her death, and another through her shoulder. Defendant testified that after the shooting he walked about a mile, where he found a shack and spent the balance of the night. The next morning he was found by deputies from the sheriff's office and was placed under arrest.

Defendant first challenges the validity of his indictment. The People and defendant stipulated that the 1953 Grand Jury which indicted defendant had as one of its members a juror who had sat on the 1952 Grand Jury; but it was further stipulated that this juror was not present when the indictment was returned against defendant. Section 199 of the Code of Civil Procedure provides that "a person is not competent to act as a grand juror" if he has served as such within a year and been discharged. Defendant contends that the deviation here from the statutory provision rendered the entire proceeding void. He relies on Bruner v. Superior Court, 92 Cal. 239, 28 P. 341, where the competency of a grand jury was successfully attacked because it was summoned by an elisor without first showing that the sheriff was disqualified to perform that duty. Under those circumstances, it was held that the grand jury was a body without semblance of authority, and that any indictment returned by it was a nullity and failed to confer jurisdiction upon the superior court to try the defendant. Concerning this point it was said in Fitts v. Superior Court, 4 Cal.2d 514, at page 521, 51 P.2d 66, at page 69, 102 A.L.R. 290: "A reading of the Bruner Case indicates that it was not decided upon any theory of error or irregularity in the proceedings leading to the impanelment of the grand jury, but that it was based upon the admitted total absence of an essential jurisdictional fact (a finding that the sheriff was disqualified) requisite to the organization of a valid grand jury through the instrumentality of an elisor. * * * Mere irregularities, as distinguished from jurisdictional defects, occurring in the formation of a grand jury, will not justify a court declaring an indictment a nullity. People v. Murphy, 71 Cal. App. 176, 180, 235 P. 51. The true distinction lies between the acts of a body having no semblance of authority to act, and of a body which, though not strictly regular in its organization, is, nevertheless, acting under a color of authority. (Citing cases.)"

[1] In the Fitts case certain indictments were claimed to be void and of no effect because found and returned by "an invalid and unconstitutionally organized grand jury." 4 Cal.2d 517, 51 P.2d at page 67. It was argued that the grand jury list was not prepared in substantial compliance with the statutory provisions in that it was not the act of a majority of the judges of the respondent court and the names appended thereto were not apportioned among the several wards and townships as required by law; that the judges were biased and prejudiced as to the type of person who should be selected for service and as to the legal requirement that the grand jury be selected by lot. In line with its distinction of the Bruner case, supra, the court in the Fitts case held that accepting the claimed errors in the method of impaneling the grand jury "at their face value," such irregularities did not amount to a jurisdictional defect depriving the respondent court's power to proceed with a trial on the indictments, and that the grand jury was at least a *de facto* grand jury, with its acts and proceedings deemed valid and entitled to full credit. In re Gannon, 69 Cal. 541, 11 P. 240. Likewise here, accepting defendant's claim of error, such irregularity did not affect the validity of the indictment found against defendant. See People v. Hunter, 54 Cal. 65; People v. Simmons, 119 Cal. 1, 50 P. 844; McFarland v. Superior Court, 88 Cal. App.2d 153, 160, 198 P.2d 318.

Defendant next challenges the correctness of certain instructions. The jury was instructed: "You may not consider the matter of punishment in determining whether or not the defendant is guilty, or if you find him guilty, in determining the crime or degree of crime of which he is guilty. However, if you find the defendant guilty of murder of the first degree, you may then consider the consequences of the two possible sentences in determining what punishment the defendant should receive. *A prisoner sentenced to either death or life imprisonment may be pardoned or may have his sentence reduced by the Governor. A prisoner serving a life sentence may be paroled, but not until he has served at least seven years."* (Emphasis added.) It is contended that this instruction, following certain argument by the prosecutor, seriously prejudiced defendant before the jury. The district attorney first stated that life imprisonment would not be a satisfactory punishment for the crime committed, although it might be if it meant that defendant would actually be imprisoned for life. But he added, "in California the law is that a man under a life sentence is eligible for parole after seven years * * * and * * * any [imprisonment] short of life is not punishment" for defendant "because he is accustomed to being in jail. * * * That is no punishment for him. * * * He will go out and do something right away again in five months later, six months later, or a year later. * * * When he comes out, who knows what resentment he is going to bear and against whom? It can be anybody. Maybe it will be one of his family; maybe it will be Gracelee; it might be the judge, might be me, might be you, you can't tell."

[2] In People v. Barclay, 40 Cal.2d 146, 252 P.2d 321, the matter of enlightening the jurors on the consequences of the penalties which they may impose in the event of a verdict of guilty of murder of the first de-

gree was considered. There it was said, 40 Cal.2d at pages 157–158, 252 P.2d at page 327: "When a defendant is convicted of murder in the first degree, the jury determines his punishment as well as his guilt. Pen.Code, § 190; People v. Sainz, 162 Cal. 242, 246–247, 121 P. 922 * * *. Since the issues of punishment and guilt are determined at the same time, there is danger that evidence or instructions offered on the former issue may influence the verdict on the latter issue. Accordingly, to avoid prejudice to either the People or the accused by injection of collateral issues into the case, evidence of the good or bad habits and background of the accused is generally held inadmissible * * * and the consideration of the jury is limited to the facts and circumstances attending the commission of the offense itself. (Citing authorities.) For similar reasons of policy the jury is not allowed to weigh the possibility of parole or pardon in determining the guilt of the defendant, and it is therefore error to give an instruction that allows the jury to take into consideration the consequences of a recommendation of life imprisonment in arriving at that determination. See People v. Letourneau, 34 Cal.2d 478, 494, 211 P.2d 865. To aid the jury in fixing the punishment of the defendant, however, the court may instruct the jury as to the consequences of the different penalties that may be imposed so that an intelligent decision may be made. (Citing authorities.)" The instruction here challenged was expressly concerned with defendant's punishment *if* defendant was *first* found *guilty of murder of the first degree,* and in line with the above-noted distinction between the two issues, the court properly informed the jury as to the possible consequences of the imposition of a sentence of either death or life imprisonment. 40 Cal.2d 158, 252 P.2d 321.

[3] Defendant's counsel made no objection to the district attorney's argument relative to the effect of punishment on defendant nor was the court requested to instruct the jury to disregard his remarks. People v. Kirkes, 39 Cal.2d 719, 726, 249 P.2d 1. While the district attorney may have been overly zealous in his statements, defendant may not now complain. This is not a case where the comment was of such character that any possible harmful effect would not have been obviated by a timely admonition or instruction to the jury, People v. Podwys, 6 Cal.App.2d 71, 76, 44 P.2d 377, or where the evidence was closely balanced, presenting grave doubt as to defendant's guilt, so that the assailed argument of prosecuting counsel may have contributed materially to the verdict. People v. Berryman, 6 Cal. 2d 331, 337, 57 P.2d 136; see People v. Sampsell, 34 Cal.2d 757, 764, 214 P.2d 813.

[4, 5] Defendant next contends that an instruction on the killing as perpetrated by means of lying-in-wait was improperly submitted to the jury. He does not claim that it misstates the law. People v. Tuthill, 31 Cal.2d 92, 99, 187 P.2d 16. But he takes the position that the facts did not warrant such a premise of guilt, and the instruction removed from the jury the right to consider whether or not the killing was wilful, deliberate and premeditated. If the killing was committed by lying-in-wait, it was murder of the first degree by force of the statute, Pen.Code., sec. 189; People v. Sutic, 41 Cal.2d 483, 261 P.2d 241 and the question of premeditation was not further involved. People v. Tuthill, supra, 31 Cal. 2d 92, 99, 187 P.2d 16. Defendant argues that the evidence showed only that he was in his wife's parked automobile drinking wine and dozing, and not that he was waiting near his wife's house for the purpose of taking her unawares. But the jury was not required to believe defendant's story. The evidence showed that defendant was armed with a .32 Colt pistol during the four hours that he waited near his wife's house; that immediately upon departure of the last visitor, defendant entered the house and, according to his own admission, fired the gun at the bed in which his wife was lying. The elements of waiting, watching and concealment were all present as a basis for the instruction on lying-in-wait, People v. Sutic, supra, 41 Cal.2d at page 483, 261 P.2d 241, and the jury might well have based its verdict on that theory of the case.

[6, 7] Defendant next argues that the court improperly instructed the jury regarding his interest in his wife's estate as

the result of her death without leaving a will. He claims that the instruction incorrectly stated the law and also operated to his prejudice in suggesting a possible motive for his having killed her. According to the evidence, defendant's wife was awarded the family home by the interlocutory decree of divorce, which had become final at the time of the trial. Such decree was a final adjudication of the issues thereby determined, Leupe v. Leupe, 21 Cal.2d 145, 148, 130 P.2d 697, and the family home thereby became the separate property of defendant's wife. But inasmuch as the parties remained husband and wife until entry of the final decree, defendant was entitled as the surviving spouse to share in his wife's estate, Prob.Code, § 221, unless he was convicted of murdering her, Prob.Code, § 258. These were matters for the court's judicial notice. Code Civ.Proc. § 1875. As a recital of defendant's property interest which continued to exist until defendant's final conviction, the instruction correctly stated the law and was properly given. Estate of Agoure, 165 Cal. 427, 428, 132 P. 587.

[8] Defendant also attacks the court's instructions on the matter of fixing the penalty. After telling the jury that upon a conviction of murder of first degree, it was within its discretion to impose either the death penalty or life imprisonment, the court continued: "The discretion which the law invests in you is not an arbitrary one and is to be employed only when you are satisfied that the lighter punishment should be imposed. *If you find the defendant guilty of first degree murder and do not find extenuating facts or circumstances to lighten the punishment, it is your duty to find a verdict of murder in the first degree and fix the penalty at death.*" (Emphasis added.) Defendant contends that such instruction placed on him the burden of showing extenuating facts or circumstances as the basis for the jury's imposition of the lighter punishment whereas the statute contains no such proviso purporting to control the jury's exercise of discretion in the matter of fixing the penalty. Pen.Code, § 190. This precise question was presented in People v. Williams, 32 Cal.2d 78, 85–86, 195 P.2d 393, and after a review of the earlier cases, it was concluded that such instruction has been consistently held "not erroneous" inasmuch as "the discretion conferred upon the jury by section 190 of the Penal Code should not be arbitrarily exercised for or against a defendant, but should be influenced by the evidence in the case * * * controlled by reason and justice under the facts of the particular case." 32 Cal.2d at page 86, 195 P.2d at page 397. The decision in the Williams case is a complete answer to defendant's contention.

Defendant further contends that certain tape recordings of conversations between himself and a deputy district attorney, in the presence of police officers, constituted confessions and were admitted in evidence without any foundation being laid concerning the voluntary character thereof, and without thereafter giving defendant's requested instructions concerning the necessity that such confessions be voluntary.

[9, 10] The portion of defendant's argument which is directed to the point that an involuntary confession may not be used either for the purpose of proving the crime confessed or for the purpose of impeaching the defendant is sustained by authority. People v. Raucho, 8 Cal.App.2d 655, 670, 47 P.2d 1108; People v. Bateman, 80 Cal. App. 151, 158, 251 P. 335; see, also, People v. Clifton, 186 Cal. 143, 149, 198 P. 1065. But when these tape recordings were offered in evidence defendant made no objection that a proper foundation had not been laid or that the contents thereof were made involuntarily; and on this appeal defendant has been unable to support such a claim by any evidence in the record. It would appear that a proper objection at the time of trial could have been met by the prosecution, for there is ample support in the record before us that the confessions were voluntary, and there is no evidence which would justify a contrary finding.

[11, 12] Defendant's requested instruction defining an involuntary confession and his requested instruction on the necessity that the confession must be voluntary were properly refused. The first instruction dealt with involuntariness induced by violence, threats, promised immunity or other

inducements but, as above indicated, there is no evidence in the record which could support a conclusion of such improper conduct. Defendant's counsel now asserts that the statements in the tape recordings were involuntarily made because they were made while defendant was under the influence of intoxicating liquor. Even if such a condition did exist, it did not make the confessions inadmissible. This court has declared that intoxication at the time of making confessions does "not deprive the confessions of the required spontaneity to make them free and voluntary." People v. Dorman, 28 Cal.2d 846, 854, 172 P.2d 686, 691. We conclude that the trial court properly refused to give either of the requested instructions here because no rational conclusion could be drawn from the evidence other than that the confessions were free and voluntary.

[13] Since it appears that the confessions in the tape recordings were voluntary, the various aspects thereof could have been used for impeachment or as affirmative evidence of guilt. People v. Southack, 39 Cal. 2d 578, 585, 248 P.2d 12. However, at the time the recordings were offered in evidence the district attorney stated: "I am offering these portions of the recording which were quoted by me to the defendant on the witness stand in cross-examination for the purposes of impeachment and the remainder of the recording for the sole and limited purpose of showing the nature of the defendant's voice, his physical condition as revealed by his voice, and his nervous condition, or lack thereof, as revealed by the voice on the tape recording." This evidence was objected to as "inadmissible" but solely on the theory that "it is not proper to save any portion of the case in chief to be introduced at this time." The district attorney then stated that he could not have impeached the defendant until after he had testified.

[14] Defendant's objection that the evidence should have been presented in the prosecution's case in chief and not subsequently in the guise of impeachment is similar to the objection made in People v. Avery, 35 Cal.2d 487, 491, 218 P.2d 527, and in People v. Rodriguez, 58 Cal.App.2d 415, 418, 136 P.2d 626. While the practice by the prosecution of withholding such evidence for the purpose of using it later for impeachment was condemned in the cited cases, it was recognized that the order of proof rests in the sound discretion of the trial court. People v. Avery, supra, 35 Cal. 2d at page 491, 218 P.2d 527. Under the circumstances presented here, we find no abuse of discretion in the ruling admitting the tape recordings. Furthermore, defendant has failed to show any prejudice resulting from the alleged procedural error.

[15] Defendant also argues that the court erred in not giving the "statutory definition" of first and second degree murder, and in not fully defining the term "deliberation." The following portion of one of defendant's proposed instructions was omitted: "To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, decide to and commit the unlawful act causing death." Contrary to defendant's assertion, these words are not part of any statutory definition although the omitted words would have constituted a proper portion of an instruction. People v. Carmen, 36 Cal. 2d 768, 778, 228 P.2d 281. The record shows, however, that the instructions given fully and fairly advised the jury concerning the distinction between first and second degree murder, and also regarding the meaning of deliberation and premeditation. Thus, after giving the statutory definition of murder, Pen.Code, § 187, and its classification as murder of the first degree if the killing is "willful, deliberate and premeditated * * *" with malice aforethought, Pen.Code, § 189, the court continued: "The word 'deliberate' means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed source of action. The word 'premeditated' means thought over beforehand." People v. Honeycutt, 29 Cal.2d 52, 61, 172 P.2d 698. "The law, however, does not require that the thought of killing be pondered over for any specified length of time in order for the killing to be considered deliberate and premeditated. The time

will vary with different individuals and under varying circumstances. The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it include an intent to kill, is not such deliberation and premeditation as will fix an unlawful killing as murder of the first degree." People v. Carmen, supra, 36 Cal.2d 768, 778, 228 P.2d 281. "A killing of a human being with malice aforethought, but without deliberation and premeditation and not perpetrated by means of lying in wait, is murder of the second degree." Pen. Code, § 189. In addition, the court gave a full instruction on malice and also on manslaughter as distinguished from murder. A review of the record shows that the instructions given satisfy the requirements of the law as recently stated by this court. People v. Daugherty, 40 Cal.2d 876, 901–902, 256 P.2d 911.

Finally, defendant contends that the evidence is insufficient to sustain the verdict; that he should have been convicted either of second degree murder or manslaughter, and that this court should reduce the degree of the crime pursuant to the authority conferred by section 1181, subdivision 6, of the Penal Code. In this connection defendant argues that he was a chronic alcoholic; that at the time of the killing he was intoxicated, had been taking sleeping pills, and had been doing so for a long period of time. He claims that under these conditions he was not capable of forming an intent or of premeditation. The jury was fully instructed in the language of the statute, Pen.Code, § 22, on the effect of voluntary intoxication, its bearing on a person's ability to form an intent, and its relevancy insofar as affecting the degree of the crime. People v. Griggs, 17 Cal.2d 621, 625, 110 P.2d 1031.

[16–18] A review of the record shows that there was ample evidence from which the jury could have concluded that the murder was perpetrated by lying-in-wait and that it was the result of prolonged premeditation and deliberation. Direct evidence of a deliberate and premeditated purpose to kill is not required to sustain a conviction of first degree murder. Deliberation and premeditation may be inferred from proof of such facts and circumstances as will furnish a reasonable foundation for such an inference. People v. Guldbrandsen, 35 Cal. 2d 514, 519, 218 P.2d 977. As the evidence was sufficient to sustain the conviction of murder of the first degree, Pen.Code, § 189, this court would not be authorized to reduce the degree of the crime, Pen.Code, § 1181, subd. 6; People v. Daugherty, supra, 40 Cal.2d 876, 884, 256 P.2d 911, or to reduce the penalty from death to life imprisonment, Pen.Code, § 1260; People v. Jackson, 36 Cal.2d 281, 288, 223 P.2d 236; People v. Thomas, 37 Cal.2d 74, 77, 230 P.2d 351.

The judgment and the order denying a new trial are affirmed.

GIBSON, C. J., and SHENK and EDMONDS, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

The court here instructed the jury that "The law of this state provides that every person guilty of murder in the first degree shall suffer death or confinement in the state prison for life, at the discretion of the jury that finds him guilty. If you should find the defendant guilty of murder in the first degree, it will be your duty to determine which of the two penalties shall be inflicted, the death penalty or confinement in the state prison for life.

"The discretion which the law invests in you is not an arbitrary one and is to be employed only when you are satisfied that the lighter punishment should be imposed. *If you find the defendant guilty of first degree murder and do not find extenuating facts or circumstances to lighten the punishment, it is your duty to find a verdict of murder in the first degree and fix the penalty at death.* There will be handed to you for your use appropriate forms of verdict." (Emphasis added.)

The emphasized portion of the instruction should not have been given. It has not been, and should not be, the law of this state. Section 190 of the Penal Code provides that "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, *at the discretion of the jury trying the same*; * * *." (Emphasis added.) The statute leaves the determination of punishment for first degree murder to the discretion of the jury *alone*, directing only that it be death or life imprisonment. To permit the court to inform the jury that before life imprisonment may be imposed, there must be extenuating circumstances is to permit judicial invasion of the province of the jury and constitutes an interference with its exercise of the discretion directed by the statute. The statute leaves the penalty to the *sole* discretion of the jury; a majority of this court deprives this defendant of the right to a jury trial on the issue of penalty by condoning an instruction which tells the jury it may *not* fix the penalty at life imprisonment *unless* it finds that extenuating circumstances existed.

In Mr. Justice Schauer's dissent in People v. Williams, 32 Cal.2d 78, 195 P.2d 393, a case involving the same erroneous instruction, he traced the origin of the error which a majority of this court now sanctions once more. He showed that it began with specious reasoning in People v. Welch, 1874, 49 Cal. 174, and that it has, from time to time, been followed until the present time. In People v. Bollinger, 196 Cal. 191, 209, 237 P. 25, 31, the question was once again discussed and the cases holding that the giving of such an instruction not to be error once again cited. The court there said: "We have, however, gone into the subject in the hope, if not the expectation, that the practice of giving such instructions may be abated, thus giving assurance that the penalty reflects the decision of the jury alone, and at the same time sparing this court the necessity of repeatedly passing on such assignments of error. And considering the numerous occasions this court has held that section 190 of the Penal Code confers on the jury alone the discretion of determining the punishment in cases of guilt of murder in the first degree, trial courts, especially where a human life is at stake, should not interfere with the discharge of that solemn duty by the jury." As Mr. Jutice Schauer said, dissent, People v. Williams, supra, 32 Cal.2d 78, 96, 195 P.2d 393, 403: "The denounced practice has been continued *because this court has tolerated it and the evil instruction will continue in use until this court finally enforces what it has so often recognized to be the law.*" In Winston v. United States, 172 U.S. 303, 19 S.Ct. 212, 43 L.Ed. 456; Strather v. United States, 172 U.S. 303, 19 S.Ct. 212, 43 L.Ed. 456; Smith v. United States, 172 U.S. 303, 19 S.Ct. 212, 43 L.Ed. 456; Andres v. United States, 333 U.S. 740, 68 S.Ct. 880, 92 L.Ed. 1055, the Supreme Court reversed judgments of conviction where a statute similar to ours was concerned and instructions invading the province of the jury, as here, were given. "The proper practice for the trial court is to refrain from giving any instructions which might have a tendency in the slightest degree to influence or control the discretion of the jury in its determination of the proper penalty in a case where the defendant is charged with murder in the first degree." People v. Martin, 12 Cal.2d 466, 470–471, 85 P.2d 880, 883. Prior to and including the Williams case, this court deplored, while condoning, the error of the instruction. See People v. Bawden, 90 Cal. 195, 27 P. 204; People v. Rogers, 163 Cal. 476, 126 P. 143; People v. Bollinger, supra, 196 Cal. 191, 237 P. 25; People v. Ross, 134 Cal. 256, 66 P. 229; People v. Smith, 13 Cal.2d 223, 88 P.2d 682; People v. Kolez, 23 Cal.2d 670, 145 P.2d 580. In the case at bar, we are told by the majority that the question of whether or not the giving of the instruction was prejudicial error is completely answered by the decision in the Williams case.

The instruction under consideration is not always given when a defendant is charged with first degree murder. In those cases where it is not given and where the discretion conferred by statute, Pen.Code, § 190, is left wholly to the jury trying the case, the defendant is given his right to a jury trial upon all the issues including that of imposition of penalty. In cases where the instruction is given, the defendant is deprived of his right to a jury trial upon the issue of imposition of penalty. Is this equal protection under law? Is not the rule now, as it has always been, that those in the same class shall receive equal protection and equal rights? It appears to me that all defendants accused of murder in the first degree are members of the same class. For the purpose of this argument, what occurs at the trial in the matter of proof is unimportant. If they are so accused and stand trial before a jury, then they stand in the same position. Suppose that there are two defendants charged with murder in the first degree. In one instance, the jury is instructed in the language of the statute that the penalty to be imposed rests in its discretion; in the other, the jury is charged with the instruction here under consideration—that it must give the death penalty unless it finds "extenuating facts or circumstances to lighten the punishment." What are these extenuating facts and circumstances? Conduct on the part of the deceased or conduct of the defendant? If the matter is left to the discretion of the jury as directed by the statute, many human frailties might be taken into consideration with a view toward achieving justice. An examination of the record in the case at bar shows no instruction given which defined "extenuating facts and circumstances." It appears to me that the error of the instruction is compounded by leaving to the jury the problem of determining just what facts and circumstances would be considered extenuating in a legal sense. If the language of the statute which leaves the matter of penalty to the discretion of the jury alone is not observed, have such defendants been accorded due process of law? When a jury has been told that in order to fix the penalty at life imprisonment it must find "extenuating facts or circumstances," can it be said that the defendant has not been seriously injured in his right to *life*? As was said in Andres v. United States, supra, 333 U.S. 740, 68 S.Ct. 880, 886, "In death cases doubts such as those presented here should be resolved in favor of the accused." The perpetuation of the serious error of this instruction has the effect of resolving all doubts in favor of the state. Apparently now it is to be the court-made law of this state that the instruction is not erroneous. Mr. Justice Traynor, in his dissent in People v. Kolez, supra, 23 Cal.2d 670, 675, 145 P.2d 580, 582, said that this court has been unwilling to overrule the cases holding that it was not error to give the instruction in question but has also been unwilling to hold that it was proper to give it. That "It has thus placed itself in the inconsistent position of tolerating the giving of an instruction that it condemns. It has sought to overcome this inconsistency by admonishing trial courts not to give the instruction. There can be no such middle ground, however. If the instruction is not erroneous it is quite proper for trial courts to give it and an unwarranted interference for this court to admonish them not to give it. If the instruction is erroneous it should be held to be so outright. The dilemma is not resolved but perpetuated when this court, in deference to precedent, sanctions an incorrect instruction and at the same time admonishes the trial court to cease giving it. The repeated disregard of such admonitions demonstrates that if the correct rule is to be applied, this court must join in its enforcement and reverse the judgments of trial courts that vitiate it. Disregard of admonitions of this court in the past has been held to indicate an attempt to influence the jury improperly and therefore to constitute ground for reversal. People v. Maughs, 149 Cal. 253, 263, 86 P. 187; People v. Costello, 21 Cal.2d 760, 135 P.2d 164; see People v. Ryan, 152 Cal. 364, 92 P. 853."

It also appears to me that the evidence is insufficient to justify the giving of an instruction on lying-in-wait. Ordinarily, the jury determines the state of mind of the defendant and the degree of the homicide from all of the circumstances of the case. A finding that a murder was by lying-in-wait, however, necessitates a verdict of first degree murder and takes from the trier of fact the further question whether it was willful, deliberate, and premeditated. People v. Thomas, 41 Cal.2d —, 261 P.2d 1, concurring opinion; People v. Bernard, 28

Cal.2d 207, 211, 169 P.2d 636; People v. Murphy, 1 Cal.2d 37, 41, 32 P.2d 635. The nature of the act by which the murder was committed outweighs all other circumstances. The dangers inherent in such a rule have been forcefully pointed out. Moreland, The Law of Homicide, pp. 197–198, 206–207. The greatest danger is that if the rule is improperly invoked a defendant may be found guilty of murder in the first degree even though there is no evidence of lying-in-wait and the jury did not reach the question of premeditation and deliberation. Although there was ample evidence of premeditation and deliberation in the present case to support a verdict of first degree murder on that ground, under the instruction on lying-in-wait the jury may have concluded that the crime was perpetrated by lying-in-wait and thus may never have reached the question of premeditation and deliberation. Although defendant was waiting and watching for his wife's visitor to leave, there is no evidence that the shots were fired from a position of concealment. Defendant entered his wife's house, spoke to her, and fired the shots that killed her. The victim was aware of defendant's presence and no more is shown than that he did not tell her in advance that he would kill her. That circumstance is not enough to require the jury to return a verdict of first degree murder. The instruction is prejudiciously erroneous since it permitted the jury to return a verdict of first degree murder without first finding premeditation and deliberation.

For the reasons above stated, I would reverse the judgment.

SCHAUER, J., concurs.

TRAYNOR, Justice (dissenting).

I concur in the conclusions and reasoning in the dissenting opinion of Mr. Justice CARTER except that I do not agree with any implications therein that defendant was denied due process of law or equal protection of the laws.

Rehearing denied; CARTER, TRAYNOR and SCHAUER, JJ., dissenting.

123 Cal.App.2d 74

PEOPLE v. PERRY et al.

Cr. 5081.

District Court of Appeal, Second District,
Division 2, California.

Feb. 4, 1954.

Defendant was convicted of burglary and conspiracy to commit burglary. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., entered judgments of conviction and denied defendant's motions for a new trial. Defendant appealed. The District Court of Appeal, Fox, J., held, inter alia, that evidence was sufficient to support convictions and that testimony of accomplice was sufficiently corroborated.

Judgments and orders denying motions for new trial affirmed.

1. Criminal Law ⚷1160

Before a verdict, which has been approved by trial court, can be set aside on ground of insufficiency of evidence, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion of guilt and if the circumstances reasonably justify the verdict, the opinion of a reviewing court that such circumstances might also be reasonably reconciled with innocence of defendants will not warrant interference with determination of jury.

2. Burglary ⚷41(1)
Conspiracy ⚷47

Evidence was sufficient to sustain convictions for burglary and conspiracy to commit burglary.

3. Criminal Law ⚷554

Jury was not required to believe alibi testimony of defendant in burglary prosecution.

4. Criminal Law ⚷511(1)

Corroborative evidence may be slight and entitled to little consideration when standing alone. Pen.Code, § 1111.

5. Criminal Law ⚷511(2)

Although corroborating evidence must raise more than a conjecture or suspicion of guilt, it is sufficient if it connects the defendant with the commission of the crime in such a way as to reasonably satisfy the fact-finding body that accomplice is telling the truth. Pen.Code, § 1111.

6. Criminal Law ⚷1159(5)

The weight of evidence corroborating accomplice is question for jury, whose finding on such issue cannot be disturbed on appeal, unless reviewing court can say that the corroborating evidence is either incompetent or is of such character that it could not tend to connect defendant with commission of the crime and could not reasonably support an inference of such connection.

7. Criminal Law ⚷511(1)

In prosecutions for burglary and conspiracy to commit burglary, testimony of accomplice was amply corroborated. Pen. Code, § 1111.

8. Criminal Law ⚷338(1)

In prosecutions for burglary and conspiracy to commit burglary, rejection of testimony by accused's mother that she had collected a number of bills with various numbers marked on them, was proper, in view of victim's ability to identify numbers marked on bill found in possession of accused.

◆

Erb, French & Picone, Samuel B. Picone, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Alan R. Woodard, Deputy Atty. Gen., for respondent.

FOX, Justice.

Appellant was convicted of burglary and conspiracy to commit burglary. He appeals from the ensuing judgments and orders denying his motions for a new trial.

The indictments in this case grow out of the plans of appellant and his confederates, Davidson and Perry, to burglarize Kay's Drive-In, on Laurel Canyon Boulevard, in North Hollywood, and the subsequent unlawful entry of these premises and the asportation of the safe containing some $8,000.

In August and September, 1952, Mr. Chenes owned five restaurants, one of which was Kay's Drive-In, where his main office was located. Late at night on Labor Day, Monday, September 1st, Mr. Chenes made up a bank deposit consisting of the receipts of the previous four days from all his restaurants. The bills were stacked according to the various denominations. There was one stack of 22 one-dollar bills which was to be kept for purposes of making change. Mr. Chenes marked the top bill on this latter stack with the number "22." He identified this bill and figures thereon at the trial because of the particular angle of the notation upon the face of the bill. After preparing these receipts for deposit Chenes put them in the safe in his office and locked it. He closed the office and left a few minutes after midnight on the morning of September 2d. He returned about 7:00 a. m. and discovered his place had been entered and the safe, which weighed between 300 and 400 pounds, was gone.

The charges against defendant Perry were dismissed and he was called as a witness for the People. He had known defendant Davidson for approximately a year. During the early part of August these two men met in a restaurant near the latter's apartment and discussed their mutual need of money and "the best and easiest place to get it." Perry, who had worked for Chenes for a short time, mentioned that Kay's Drive-In "would probably be a good place to get some money" because a substantial sum, he understood, was ordinarily kept in the safe there. Davidson suggested they go out and look the situation over. About the middle of August, Perry and Davidson inspected this eating establishment and the location of the office. Davidson said "it would be a cinch if the safe wasn't too large." Neither of them saw the safe on this occasion and Perry had not previously seen it. Shortly thereafter Perry was introduced to appellant by Davidson in the latter's apartment. The three of them discussed the deal. Davidson asked appellant and Perry to go out to the drive-in and "to try and get inside and see the safe, to see how large it was and how much it would weigh." On about August 25th, Perry accompanied appellant to the drive-in in a car driven by the latter. After they had parked about a block away appellant entered the office assertedly in quest of a cook's job. He returned in about 15 minutes and said the safe would weigh between 300 and 400 pounds, that the building could be easily entered with a small crowbar, and that it was all cheap construction. The original plan had been to take the safe on the week-end prior to the Labor Day week-end but Davidson had suggested they wait until the later period because the receipts would probably be greater. In the meantime, Perry expressed his disapproval of the whole idea and did not thereafter see either of the other men. Perry also disclosed that his girl friend, Marie, was Chenes's sister-in-law, that she worked for Chenes in his Burbank restaurant, and had been present when he discussed with Davidson the taking of the safe. She testified to such conversation, and that appellant's name was mentioned in connection with the job; also, that she told them to "lay off." She had been visited twice by Davidson and appellant at the place where she worked. When Davidson told her appellant had gone down to look at Kay's Drive-In she told him to get out and stay out. She further testified that shortly after midnight on September 2nd she received a telephone call from Davidson inquiring whether Perry was there. Upon receiving a negative reply Davidson said: "Well, I guess he is out getting drunk, we will have to count him out." He also said Miller was in the car waiting for him.

With respect to appellant's visit to the office of the drive-in, ostensibly to apply for a cook's job, Mr. Chenes testified that he interviewed Miller in the office several days before the theft of the safe. Chenes told appellant there was a job open and that he should talk to the chef since he was the one who handled the kitchen jobs and hours. Appellant, however, did not report to the chef, nor did he go to the kitchen.

Davidson was arrested on September 5th. A search of his apartment revealed several crowbars in a cupboard. There was a white substance that looked like plaster on one of them. An expert's examination of the white substance on this crowbar, which Davidson said belonged to him, disclosed that the crowbar contained layers of white plaster with a cream colored paint on it which was identical in appearance, and number and size of layers, with that on the area next to the door jam where the culprits had broken into the drive-in.

Upon appellant's arrest he had $8 in currency in his wallet consisting of a $5 bill and three $1 bills. One of these $1 bills had the figure "22" written on it. These were the figures Mr. Chenes identified as having been placed by him on the top bill of a stack of 22 $1 bills the night before the burglary. By way of explanation of his possession of this particular bill, appellant told a police officer that when he went to his apartment the night before, his landlady had told him that detectives had been looking for him; that since he had not had dinner, he went out and ate and paid for his dinner with a ten dollar bill, receiving the $8 in change. He did not remember or had not noticed the name of the place where he ate, although it was just a short distance from his apartment. When asked if he could find the place where he had his dinner, appellant was rather undecided whether he could or not.

Appellant sought to establish an alibi. He testified that he spent Labor Day night at the home of Mr. and Mrs. James L. Blair, in Long Beach. The Blairs and Dale Fox supported his alibi. During the investigation, however, appellant did not mention the names of these people to the officers. Appellant then claimed he had been at his apartment that night.

Appellant testified that he first met Perry around the early part of August; that Perry later told him he might be able to get a job as a cook at Kay's Drive-In; that they went out to the drive-in and he inquired of a lady in the office about a job; he was advised by her that Mr. Chenes did the hiring but that he was not in; that she, however, called him on the 'phone and then advised appellant that Mr. Chenes had a job for him and that he should go out to the central store for an interview. Appellant denied having been told to see the chef about a job. When, on his return to the car, Perry asked about the safe, appellant told Perry there was one in the office. Perry inquired about its size. Appellant estimated it was "about two and a half by two and a half." When Perry asked whether it could be taken out, appellant replied, "It could be removed, yes." He testified, however, that he told Perry he would not have any part in the job; he explained that he had been in trouble before in connection with a burglary, and that he was then on probation. Appellant had known Davidson for approximately three years.

Appellant contends (1) that the evidence is insufficient to support the judgment on either count; (2) that there is insufficient corroboration of Perry's testimony, who was an accomplice; and (3) that the court prejudicially erred in rejecting certain testimony offered by the defense.

[1] Before a verdict, which has been approved by the trial court, can be set aside on the ground of insufficiency of the evidence it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion of guilty. If the circumstances reasonably justify the verdict, the opinion of an appellate court that such circumstances might also be reasonably reconciled with the innocence of the defendants will not warrant interference with the determination of the jury. People v. Newland, 15 Cal.2d 678, 683, 104 P.2d 778.

Sufficiency of the Evidence

[2, 3] Appellant's own testimony discloses that he went out to the drive-in with Perry; that he was in the office and observed the presence of the safe, noted its size, and reached the conclusion that it could be removed. It also appears from the victim's testimony that although appellant was advised a job was available he nevertheless failed to follow up the directions given by Mr. Chenes for securing the employment. From these circumstances the jury could reasonably infer that appellant did not go to the drive-in for the purpose of obtaining a position but rather for the purpose of seeing the safe and determining its size and whether it could be removed from the office. In this connection it should be recalled that Davidson had requested appellant and Perry to ascertain the size of the safe, and that Davidson had told Marie that appellant had been out to look at Kay's Drive-In. Davidson, who had gone out with Perry, had looked the situation over from the outside and had concluded that it would be a "cinch" to enter the building with a small crowbar. The discovery of such an instrument in Davidson's apartment with stucco thereon, covered with paint which corresponded with that on the building at the place where it had been broken into, definitely identifies him with the burglary. From these facts the jury could reasonably draw the inference that the defendants were working together in planning the crime; that there was concert of action between them to commit this offense, and that appellant was a part of that conspiracy. The evidence clearly justifies the verdict on the conspiracy count.

The foregoing, plus the fact that appellant, when arrested, had in his possession the $1 bill on which the victim had placed the figures "22," justifies an inference that appellant participated in the burglary. The jury was obviously not impressed with appellant's story of the manner in which he came into possession of this particular bill, namely, that he had received it as change in a neighborhood restaurant where he claimed to have had dinner the night before, which establishment, however, he was unable to remember or identify. Likewise, the jury was not required to believe the alibi testimony. People v. Klinkenberg, 90 Cal.App.2d 608, 626, 204 P.2d 47, 613; People v. Mitchell, 91 Cal.App.2d 214, 219, 205 P.2d 101. It cannot therefore be said that the evidence is insufficient as a matter of law to sustain appellant's conviction of the charge of burglary.

Corroboration of Accomplice

[4–6] Because Perry was an accomplice his testimony had to be corroborated. Pen. Code, § 1111. "The corroborative evidence may be slight and entitled to little consideration when standing alone." People v. Wayne, 41 Cal.2d 814, 822, 264 P.2d 547, 550. Such evidence must raise more than a conjecture or suspicion of guilt, but it is sufficient if it connects the defendant with the commission of the crime in such a way as to reasonably satisfy the fact-finding body that the accomplice is telling the truth.

People v. Henderson, 34 Cal.2d 340, 342–343, 209 P.2d 785. The weight of corroborative evidence is a question for the jury's determination. Therefore, unless we can say that the corroborating evidence is either incompetent or is of such a character that it could not tend to connect appellant with the commission of the crime and could not reasonably support an inference of such connection, the finding of the jury on that issue cannot be disturbed on appeal. People v. McNamara, 103 Cal.App.2d 729, 738, 230 P.2d 411.

[7] Applying these principles, it is clear that Perry's testimony is amply corroborated. Appellant's testimony corroborates Perry's statement that they went out to the drive-in together; it also discloses that appellant took notice of the safe, estimated its size, and that it could be removed. The victim's testimony that although he advised appellant there was a job open as a cook and to see the chef about it, yet appellant neither saw the chef nor went to the kitchen, furnishes further corroboration of Perry's story. The testimony of Marie, that Davidson told her appellant had been out to look at Kay's Drive-In, justifies the inference that he did not go there for the purpose of seeking employment. These circumstances and the inferences to be drawn therefrom connect appellant with the conspiracy to commit the burglary and therefore furnish ample corroboration. The possession by appellant of the marked $1 bill definitely connects him with the actual commission of the burglary.

[8] Appellant contends that the court erred in rejecting testimony by Mrs. Miller, appellant's mother, that she had collected a number of bills with various numbers marked on them. This testimony was immaterial. The problem was not merely that a bill was found in the possession of appellant on which the figures "22" had been written but rather the fact that the victim was able to identify these figures as having been written by him on this bill.

The judgments and the orders denying motions for new trial are affirmed.

MOORE, P. J., and McCOMB, J., concur.

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123 Cal.App.2d 97

HAHN v. HAHN et al.

Civ. 19567.

District Court of Appeal, Second District,
Division 3, California.
Feb. 5, 1954.

Suit to foreclose a deed of trust securing payment of note representing loan by plaintiff to defendant and man associated with her in business venture. The Superior Court of Los Angeles County, Harold W. Schweitzer, J., entered judgment from which defendant appealed. The District Court of Appeal, Vallée, J., held that note and deed of trust were supported by consideration either on theory of statutory presumption that promissory note is given for sufficient consideration, or because of agreement of plaintiff to extend time for first payment of the principal of the loan.

Judgment affirmed.

1. Mortgages ⚿25(6)

Statutory presumption that a promissory note is given for sufficient consideration was sufficient to support finding, in action for foreclosure of deed of trust, that note and deed of trust were supported by valid consideration. Code Civ.Proc. § 1963, subd. 21.

2. Mortgages ⚿25(2)

An agreement to extend time for first payment of principal of a loan constituted a good and valid consideration for a note in amount of the loan, and a deed of trust securing payment.

3. Mortgages ⚿67

A delivery of a note and duplicate of original of deed of trust, made at request of defendant by person with whom defendant was associated in business, constituted a valid delivery binding on defendant, since delivery by authorized agent constitutes valid delivery, and delivery of duplicate of original of a deed of trust is equivalent of delivery of a single original. Civ.Code, § 1059, subd. 2.

4. Mortgages ⚿74

In suit for foreclosure of a deed of trust securing payment of a note representing a loan from plaintiff to defendant and man with whom she was associated in business venture, evidence warranted conclusion that defendant intended delivery by such man of note and duplicate of original of deed of trust to be an effective delivery. Civ.Code, § 1059, subd. 2.

5. Principal and Agent ⚷21

In suit to foreclose a deed of trust securing payment of note evidencing loan by plaintiff to defendant and man associated with her in business venture, wherein there was evidence that such man was the agent of defendant in the transaction, testimony of such man as to his conversations with defendant was admissible to establish the fact of agency.

6. Evidence ⚷121(1)

In suit to foreclose a deed of trust securing payment of note representing loan from plaintiff to defendants and man shown by evidence to have acted as defendant's agent, testimony of defendant's agent as to conversations between agent and plaintiff as to loan transaction was admissible as part of the res gestae.

7. Trial ⚷395(5)

Where court, in action to foreclose deed of trust, found that defendant and man associated with her purchased certain property, using as part of the purchase price a loan from plaintiff, and that defendant executed note and deed of trust which plaintiff sought to foreclose, fact of agency of such man to act for defendant was merely evidentiary, and need not be pleaded nor found, since it was implicit in the findings made.

8. Appeal and Error ⚷219(2), 302(5)

In absence of objection to findings before they are signed or on a motion for new trial, objections will be deemed waived, and need not be considered by appellate court.

9. Mortgages ⚷25(6), 319(3), 463

In suit to foreclose deed of trust securing payment of note given by defendant for loan obtained from plaintiff by defendant and man associated with her in business venture, evidence supported finding that plaintiff was owner and holder of deed of trust and note, that note was due and payable, and that no part of it had been paid, and that it was given by defendant for a good and valuable consideration.

10. Bills and Notes ⚷126

Purpose of provision for attorney fees in a note is to indemnify creditor against necessity of paying an attorney's fee, and to enable him to recover the full amount of his debt without deduction for legal expenses.

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Templeton & Miller, Los Angeles, for appellant.

Edward C. Maddox and William B. Murrish, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant Sarah E. Hahn from a judgment decreeing foreclosure of a deed of trust and ordering a sale.

In 1946, Young Hahn, uncle of plaintiff, and defendant were living together as man and wife. They were not married because Young is a Korean by birth and defendant is a Caucasian. They lived together from 1937 until May 29, 1951, when they separated.

In August 1946, Young and defendant contemplated purchasing a parcel of improved realty for $25,000. Young testified he discussed the purchase with defendant, and how the $25,000 might be raised, and told her, "We only have about $3,000 to begin with, but I told her, 'We probably can get a loan from the bank, say, five or $8,000'; and then the balance I was going to borrow from my nephew [plaintiff]. * * * She said, 'Sure, if it's going to be profitable for us, well, why not do it?'"

Young talked to plaintiff and informed him of his and defendant's plan to buy the property and of their need for a loan to do so. Plaintiff agreed to lend $20,000, to be repaid $2,000 a year, commencing one year thereafter, with interest at 5%. The money was paid to Young by means of several checks mailed to him, at plaintiff's instructions and directions, by plaintiff's father, Sai Di Hahn. Young deposited the money in defendant's bank account. Thereupon, Young and defendant purchased the property. They obtained the purchase price as follows: $3,000 cash from their savings, $8,000 from a bank loan, and $14,000 from the proceeds of the loan from plaintiff. The balance of the $20,000 loan from plaintiff was invested in furniture and in repairing and improving the property. Young testified he had told defendant he "got the money from Mr. S. D. Hahn, through the request of my nephew Arthur [plaintiff], and that the money was sent to us so that we could purchase the property." Defendant signed the escrow instructions in connection with the purchase. Title was taken in defendant's name only; it was thought that Young could not hold or take title to realty in his own name because of his Korean birth.

When the first payment of the loan became due in August, 1947, Young and defendant were unable to meet it. Young testified he told defendant they couldn't raise the money and asked what they should do about it; "[W]e figured we'd ask him [plaintiff] to take a trust deed on the property for $20,000, and let us pay as we had promised"; the commencement of payment "was to be made a year from the first date when it was due; that would be August of 1947; so, we were to make our first payment in 1948"; and defendant said, "That's all right."

Young testified to a conversation he had with plaintiff. He stated he said, "We couldn't pay you [plaintiff] the first payment as we had agreed orally, but in order to secure the $20,000 you advanced me, how would you like to take a trust deed on the property, and make the payment as usual; $2,000 with five per cent interest a year on the unpaid balance? And he said, 'Sure, that's okay.'" Plaintiff testified that he had a conversation with Young in August of 1947 concerning the repayment of the loan; he agreed to accept a promissory note and a deed of trust and that they could make the payment the following year.

On August 22, 1947, Young and defendant went to a lawyer and had a promissory note and a deed of trust drawn on the terms and conditions agreed upon. Defendant signed the note and signed and acknowledged duplicate originals of the deed of trust. Young testified the lawyer gave the papers to defendant and advised her to record them; defendant gave the papers to him and told him to keep them in his office safe and to record the deed of trust whenever he got around to it; "She said for me to give Dr. Arthur Hahn a copy of this trust deed, and also * * * the * * * promissory note"; he gave the note and one of the duplicate originals of the deed of trust to plaintiff; one of the duplicate originals of the deed of trust was kept in his safe until January 20, 1948, when he recorded it; when he did, he made a notation on the back of it that it be mailed to defendant; when it came back from the recorder's office, it was in an envelope addressed to defendant; he delivered it to her. Plaintiff identified the original promissory note and the duplicate original of the deed of trust which had not been recorded and testified Young had given them to him sometime in August of 1947.

While defendant and Young were living together, Young managed the financial and business affairs of both, with defendant's consent. On prior occasions, they had purchased four other rental properties and had taken title in defendant's name; defendant collected the rents and turned them over to Young; and they were managed and controlled by Young. He signed checks made payable to defendant, with her consent. All income received by either was placed under his management and control.

Defendant denied she ever agreed to the 1946 oral loan or that she ever knew of the use of the proceeds of such a loan to purchase the property. She contended she "really thought" that the money came from the family safe, from accumulated joint funds. She denied she ever knowingly signed the trust deed or the promissory note and contended she thought she had signed papers in favor of Young only, not plaintiff. She also denied she ever delivered the promissory note or deed of trust to Young to be transmitted and delivered by him to plaintiff.

Neither Young nor defendant paid any of the principal or interest on the promissory note. Plaintiff brought this suit for foreclosure of the deed of trust.

The court found: 1. From 1937 until May 29, 1951, Young and defendant lived together as man and wife, but were not married. 2. The property was purchased by Young and defendant for $25,000; title was taken in defendant's name as her sole and separate property. 3. In August, 1946, Sai Di Hahn, as an agent for plaintiff, forwarded by mail to Young the sum of $20,000, which was used in part on the purchase price of the property, in part on the purchase price of furnishings therefor, and in part for repairs. 4. Young orally agreed to repay the $20,000 at $2,000 a year with interest at 5% a year. 5. On August 22, 1947, defendant made and executed to plaintiff the deed of trust and promissory note for $20,000, and delivered them to Young; Young delivered a copy of the trust deed together with the original promissory note of $20,000 to plaintiff. 6. On January 28, 1948, Young delivered the original deed of trust to the county recorder and instructed the recorder to return the deed of trust after recordation to defendant; and it was thereafter mailed by the recorder to her. 7. Plaintiff is the owner and holder of the deed of trust and promissory note. 8. The note is due and payable, and no part of it has been paid. 9. Plaintiff gave defendant "good valuable" consideration for the note and deed of trust. Judgment for plaintiff followed. Defendant appeals.

Defendant's specifications of error are: 1. The evidence is insufficient to support the findings. 2. The court erred in failing to make a finding as to the agency of Young to act for her. 3. The court erroneously admitted evidence which was prejudicial to her.

[1, 2] It is first urged that there was no consideration for the promissory note. In negotiating the loan Young acted for defendant and himself. The loan was made to defendant and Young. Of the $20,000 loaned, $14,000 went into the purchase of the property, title to which was taken in the name of defendant. Defendant signed the note and deed of trust. It is presumed that a promissory note was given for a sufficient consideration. Code Civ.Proc. § 1963(21). The presumption is enough to support the finding that the note and deed of trust were supported by a valid consideration. Westberg v. Willde, 14 Cal.2d 360, 365, 94 P.2d 590; Scott v. Burke, 39 Cal.2d 388, 395, 247 P.2d 313. Further, plaintiff's agreement to extend the time for the first payment of the principal of the loan constituted a good and valid consideration for the note and deed of trust. Bank of America Nat. Trust & Savings Ass'n v. Hollywood Imp. Co., 46 Cal.App.2d 817, 821–822, 117 P.2d 13.

[3, 4] Defendant next says there was no delivery of the note and deed of trust. The argument appears to be that because defendant did not personally deliver the note and deed of trust to plaintiff and because she retained possession of one of the duplicate originals of the deed of trust, there was no delivery. The point is without merit. Young, at the request of defendant, delivered the note and one of the duplicate originals of the deed of trust to plaintiff. Delivery by an authorized agent constitutes a valid delivery. Civ.Code, § 1059(2); Neely v. Buster, 50 Cal.App. 695, 698, 195 P. 736. Delivery of a duplicate original of a deed of trust is the equivalent of delivery of a single original. See, Brenner v. Lesher, 332 Pa. 522, 2 A.2d 731, 733; Great American Life Ins. Co. v. Stephenson, 176 Okl. 295, 55 P.2d 56, 58; Oberlin v. Pyle, 114 Ind.App. 21, 49 N.E.2d 970, 972; 51 C.J.S., Landlord and Tenant, § 219 (4), page 825; 32 C.J.S., Evidence, § 821, page 749. The evidence warranted the inference that defendant intended delivery by Young to be effective.

[5, 6] As we have noted, Young testified to conversations he had with plaintiff. The testimony was admitted over the objection of defendant. She claims error. There was no error. The argument is that the testimony was hearsay. There was evidence that Young was the agent of defendant. Young's testimony of his conversations with defendant was admissible to establish the fact of agency. 2 Cal.Jur.2d 662, § 15. The fact of agency being established, the testimony of Young and plaintiff, as to their conversations relating to the business entrusted to Young, was admissible as a part of the res gestae. 2 Cal. Jur.2d 881, § 179.

[7, 8] Defendant says the court erred in failing to make a finding as to the agency of Young to act for her. There was no error. The ultimate facts, that defendant and Young purchased the property and defendant executed the note and deed of trust, were found. The fact of agency is evidentiary. It need not be pleaded nor found. Simpson v. Bergmann, 125 Cal.App. 1, 9, 13 P.2d 531; House Grain Co. v. Finerman & Sons, 116 Cal.App.2d 485, 489, 253 P.2d 1034; 2 Cal.Jur.2d 879, § 178. It is implicit in the findings made that Young was the agent of defendant. Under such circumstances an express finding of agency was unnecessary. Dixon v. Eastown Realty Co., 105 Cal.App.2d 260, 265, 233 P.2d 138. Further, it does not appear that defendant made any objection to the findings before they were signed or on a motion for a new trial. In Tooke v. Allen, 85 Cal.App.2d 230, at page 238, 192 P.2d 804, at page 810, this court said: "But we do not find in the record, nor is it suggested, that defendant objected to plaintiff's proposed findings upon that ground before the findings were signed, nor on motion for new trial. The objection urged now is one that could have been obviated on motion for a new trial. When section 634, Code of Civil Procedure, was amended in 1913 to require the service of findings, and again in 1933 to require that they be not signed prior to five days after service, the purpose was to permit of a procedure for the pointing out of defects in the proposed findings, including objections that they were uncertain or not sufficiently specific. The situation presented to us here is one in which we think the objection should be deemed to have been waived by the failure to urge it in the trial court. Del Ruth v. Del Ruth, 75 Cal.App. 2d 638, 644–645, 171 P.2d 34. Since the record is silent on the subject, it will be deemed to have been waived. We must presume the record includes all matters material to a determination of all points on appeal. Rules on Appeal 52."

[9] No purpose would be gained in discussing defendant's other points. They all relate to the sufficiency of the evidence to support the findings and are arguments on the weight of the evidence, with which we are not concerned. The evidence we have related amply supports the findings and the findings support the judgment.

[10] The note provides that if action be instituted thereon, defendant promises to pay such sum as the court may fix as attorney's fees. The judgment awarded plaintiff $836 as attorney's fees for services to the time it was entered. Plaintiff says he should be allowed additional attorney's fees for defending against the appeal. The purpose of a provision for attorney's fees in a promissory note is to indemnify the creditor against the necessity of paying an attorney's fee, Prescott v. Grady, 91 Cal. 518, 522, 27 P. 755, and to enable him to recover the full amount of his debt without deduction for legal expenses. 59 C.J.S., Mortgages, § 812(b), p. 1546. Three hundred dollars is a reasonable amount to be awarded plaintiff as attorney's fees on the appeal.

The judgment is affirmed. Plaintiff is awarded $300 as attorney's fees on the appeal.

SHINN, P. J., and WOOD, J., concur.

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123 Cal.App.2d 103

PLAZA v. CITY OF SAN MATEO et al.

Civ. 15672.

District Court of Appeal, First District,
Division 1, California.

Feb. 8, 1954.

Hearing Denied March 31, 1954.

Action against city which maintained golf course for injuries sustained by plaintiff, who had just completed a round of golf, when plaintiff was struck in mouth by golf ball as she was standing in parking area provided in connection with course. The Superior Court in and for the County of San Mateo, A. R. Cotton, J., sustained demurrer without leave to amend, and plaintiff appealed. The District Court of

Appeal, Finley, J. pro tem., held that a municipality acts in its proprietary capacity in the operation of a public golf course for the pleasure or amusement of patrons, and therefore owes its invitees the duty of exercising ordinary care for their safety, and that complaint was not so deficient that it could not be cured by amendment, with result that it was error to refuse permission to amend.

Judgment reversed with instructions.

1. Municipal Corporations ⚷724, 725

The powers of a municipal corporation are either governmental or proprietary.

2. Municipal Corporations ⚷725

A city, when operating a facility in a proprietary capacity, owes its invitees the duty of exercising ordinary care for their safety, in same manner as does a private operator.

3. Municipal Corporations ⚷742(1)

An action for damages inflicted by city in exercise of its governmental functions can be maintained only where a statute gives a right of action. Government Code, §§ 1953–2002, 53051.

4. Municipal Corporations ⚷857
Pleading ⚷225(1)

Complaint reciting that plaintiff was injured when struck in mouth by golf ball when standing in parking lot provided at golf course operated by city, and that course was in a dangerous and defective condition because of failure to provide a fence of sufficient height between course and parking area, did not adequately state a cause of action under Public Liability Act because of failure to allege that golf course was public property or that dangerous or defective condition complained of was a proximate cause of injury, but such defects were curable by proper amendments, and sustaining of demurrer without leave to amend was unwarranted. Government Code, §§ 1953–2002, 53051.

5. Municipal Corporations ⚷725

In determining whether an activity carried on by a municipality is proprietary in nature, it is the nature of the activity, and not its location, nor by what department carried on, nor fact that facility may also be used for governmental purposes, which is determinative, and each new activity must be decided on the peculiar facts presented.

6. Municipal Corporations ⚷734, 747(2)

In view of fact that primary purpose served by operation of a public golf course by city is pleasure or amusement to the patrons, the city acts in such activity in its proprietary capacity, and owes to its invitees the duty of exercising ordinary care for their safety, and thus it can be held liable for the negligence of its agents, officers and employees in connection therewith.

7. Pleading ⚷225(1)

Complaint against city for negligence of its officers and agents in operation of municipal golf course at which plaintiff was injured by being struck in mouth by golf ball was not so defective as to preclude curing of deficiencies by amendment, and thus sustaining of demurrer thereto without leave to amend was error.

8. Pleading ⚷229

Unless it is clear that a complaint does not state a cause of action and cannot be so amended as to obviate the objections thereto, it is error to refuse permission to amend.

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Saul N. Ross, San Bruno, for appellant.

Clark & Heafey, Edwin A. Heafey, Schofield & Hannegan, Oakland, Gerald P. Martin, San Francisco, for respondents.

FINLEY, Justice.

This appeal is from a judgment entered in favor of respondents City of San Mateo and Matt Thiltgen after their demurrer to appellant's complaint was sustained without leave to amend.

It is alleged in the complaint that the City of San Mateo is a municipal corporation; that it operated the San Mateo Municipal Golf Course to which the public was invited; that at the time of appellant's injury defendant Tom Fry was employed by the City as a golf professional and respondent Matt Thiltgen as Recreational Director; that on May 24, 1952, after paying the required admission fee and completing a round of golf, appellant, while at or near her car in the parking lot provided by the City, was struck in the mouth and injured by a golf ball driven from the golf course by defendant Patsy Yeakey.

It is claimed by appellant that the City of San Mateo, Tom Fry and Matt Thiltgen are liable in damages because of their negligence in managing the golf course and in failing to provide proper protection and proper facilities for the protection of paying patrons. It is claimed in particular "that they permitted a dangerous and defective condition to prevail in failing to provide a fence of sufficient height to protect persons using the parking area and clubhouse from golf balls driven by persons using the golf course proper." (C.T. 6) It is further alleged that for a long time prior to appellant's injury the claimed dangerous and defective condition existed and was known to employees and officers of the City of San Mateo who possessed the authority to remedy the dangerous and defective condition but that they failed to do so. It is also alleged that appellant presented her claim against the City of San Mateo, Matt Thiltgen and Tom Fry, which claim was rejected.

The complaint is in two counts. In the first Patsy Yeakey is charged with negligence in driving the golf ball which struck appellant. She defaulted. The other defendants are all charged in the second cause of action. Tom Fry, the golf professional, filed his answer.

In sustaining the demurrer of the City of San Mateo and Matt Thiltgen without leave to amend the Court ruled in effect that no cause of action founded upon negligence or upon violation of the Public Liability Statutes could be stated against these defendants on account of injury sustained by a paying patron who had been struck by a golf ball driven by a third party. The question before us is not whether appellant's present complaint is demurrable, but whether in view of the facts alleged there could possibly be a cause of action stated against the demurring parties.

[1] The powers of a municipal corporation are denominated, on the one hand, governmental, legislative or public; and on the other, proprietary or private. Chafor v. City of Long Beach, 174 Cal. 478, 163 P. 670, L.R.A.1917E, 685; Rhodes v. City of Palo Alto, 100 Cal.App.2d 336, 223 P. 2d 639.

[2] Whether appellant could state a cause of action outside the scope of the Public Liability Statutes against the City of San Mateo depends upon whether it is acting in its governmental capacity or in its proprietary capacity in operating a public golf course and in charging for the privilege of using its facilities. The significance of this is founded on the well-settled rule that, "When operating a facility in a proprietary capacity, a city, as does a private operator, owes its invitees the duty of exercising ordinary care for their safety." Rhodes v. City of Palo Alto, 100 Cal.App.2d 336, 341, 223 P.2d 639, 643; Sanders v. City of Long Beach, 54 Cal. App.2d 651, 129 P.2d 511.

[3] "It is only where statutes give a right of action that an action can be maintained [against a municipality] to recover damages inflicted by a city in the exercise of its governmental functions." Pittam v. City of Riverside, 128 Cal.App. 57 at page 61, 16 P.2d 768 at page 770; Kellar v. City of Los Angeles, 179 Cal. 605, 178 P. 505; Miller v. City of Palo Alto, 208 Cal. 74, 280 P. 108. In acting in its governmental capacity its liability is confined to those specific instances set forth in Section 53051 of the Government Code, and liability of officers and employees is governed by sections 1953–2002 of that Code. Accordingly, there would be liability only for a dangerous or defective condition of public property, and then only if those authorized to remedy the condition had knowledge or notice and failed within a reasonable time to take action to remedy it, or to take action reasonably necessary to protect the public against the condition. If all of the required elements are present, liability would attach, regardless of whether the use to which it is being put is governmental or proprietary in nature.

Respondents urge that the complaint does not and cannot state a cause of action against these defendants under Government Code Sections 1953 and 53051. One point urged is that it contains no allegation that the San Mateo Municipal Golf Course is public property owned by the City of San Mateo. It is admitted in respondents' brief, however (page 7) that "Some time subsequent to the adoption and filing of its Charter with the Secretary of State, the City of San Mateo became the owner and operator of the San Mateo Municipal Golf Course." Thus it is obvious that the complaint could have been amended to cure the defect complained of.

Respondents also urge that the only dangerous or defective condition relied upon by appellant to bring the cause of action under the Public Liability Acts is the height of the fence between the golf course proper and the parking lot. This is a specific allegation. It is, however, preceded by more general allegations, and in light of the decision in Bauman v. City & County of San Francisco, 42 Cal.App.2d 144, 108 P.2d 989, we cannot agree that the height of the fence is the only dangerous or defective condition complained of which could fall within the provisions of the Public Liability Acts.

In Bauman v. City & County of San Francisco, supra, 42 Cal.App.2d 144, 108 P.2d 989, action was brought under the Public Liability Act on behalf of a five year old child who was struck on the head by a baseball while playing in a sand box in an area set aside for small children on a public playground. The balance of the playground was in lawn and there was no fence or other protection between the area set aside for the small children and the balance of the playground. The baseball was batted by one of a group of boys playing ball on the portion outside the small children's area.

In discussion the Court used the following language, 42 Cal.App.2d at page 152, 108 P.2d at page 994: "There can be no doubt that, under the terms of the Public Liability Act, the liability of the appellant if any, must be predicated upon a showing that the playground was dangerous or defective." And further on at page 153 of 42 Cal.App.2d at page 994 of 108 P.2d: "It has frequently been stated that no hard and fast rule can be laid down as to what constitutes a dangerous or defective condition, but that each case must depend upon its own state of facts. [Citing cases.] It is also well-settled that as a general rule it is a question of fact for the jury to determine whether a given set of facts or circumstances creates a dangerous or defective condition. [Citing cases.]"

And further on in the opinion at page 153 of 42 Cal.App.2d at page 994 of 108 P.2d: "The jury was justified in finding that the playground was dangerous and defective for any of the following reasons: That the playground was rendered dangerous or defective by the negligence of appellant in permitting the playing of hard baseball in dangerous proximity to the sand box; that under the circumstances here existing it was the duty of appellant, if hard baseball was to be permitted to be played in the north end of the field, to erect some barrier for the protection of those playing in the small children's section; or the appellant negligently failed to properly supervise the playground by either failing to prevent the boys from playing hard baseball in dangerous proximity to the small children's section or in negligently failing to keep the small children away from the sand box while hard baseball was being played nearby. There can be no doubt that a dangerous or defective condition can be created by the use or general plan of operation of government operated property, as well as by a structural defect." Citing Huff v. Compton City Grammar School District, 92 Cal. App. 44, 267 P. 918.

In Fackrell v. City of San Diego, 26 Cal.2d 196, at page 204, 157 P.2d 625 at page 629, 158 A.L.R. 773, the Court in discussing the question of inherent danger in connection with the layout of a city street had this to say: "If the improvement is designed to be used without inspection and maintenance and under varying conditions which are normally to be anticipated then it should be made reasonably safe for ordinary use under all of those conditions and if, under any one or more of them, it is, or naturally will become, unsafe for such use because of its planned design then it is inherently dangerous." See, also, Moore v. Burton, 75 Cal.App. 395, 242 P. 902; Mulder v. City of Los Angeles, 110 Cal.App. 663, 294 P. 485; George v. City of Los Angeles, 11 Cal.2d 303, 79 P.2d 723; Sandstoe v. Atchison, T. & S. F. R. Co., 28 Cal.App.2d 215, 82 P.2d 216; Bigelow v. City of Ontario, 37 Cal.App.2d 198, 99 P.2d 298.

On the question of whether liability attaches under the Public Liability Act where the act of a third person is partially responsible for injury, such as the act here of Patsy Yeakey in driving the golf ball, the court in Bauman v. City & County of San Francisco, supra, 42 Cal.App.2d 144 at page 154, 108 P.2d 989 at page 995, has this to say: "The cases are legion that the question of proximate cause is primarily one of fact for the jury. The negligence of the defendant need not be the sole cause of the injury—as long as it is one of the proximate causes, the mere fact that such negligence concurs with that of an independent actor does not break the chain of causation. [Citing cases.] That this doctrine applies where the negligent act of a third person concurs with a dangerous or defective condition created by a city in causing an injury, so as to impose liability on the city under the Public Liability Act, was expressly held in Bosqui v. City of San Bernardino, 2 Cal.2d 747, 43 P.2d 547." In the present case we have in substance an almost identical situation as in Bauman v. City & County of San Francisco, supra, 42 Cal.App.2d 144, 108 P.2d 989, excepting that a golf course instead of a children's playground is here involved.

[4] It becomes obvious upon reading the complaint that it is vulnerable in its present form to special demurrer in not separately stating different causes of action. Assuming that the City was acting in its governmental capacity, it is also subject to general demurrer under the provisions of Government Code section 53051, in not alleging or stating facts to show that the San Mateo Golf Course is public property, and further, in not alleging that the dangerous or defective condition complained of was a proximate cause of appellant's injury. There is nothing in the facts alleged, however, to warrant the trial court in sustaining the demurrer without leave to amend.

Turning now to the question of the City's liability for alleged negligence on the part of its agents, officers and employees, there seems to be no positive rule by which it can be determined whether certain functions performed by municipalities are governmental or proprietary in nature. It would not be liable for such negligence unless in operating the golf course it was acting in its proprietary capacity.

Among the activities engaged in by municipalities in California which were held to be proprietary in nature are: A community theater, together with the parking lot used in connection therewith. Rhodes v. City of Palo Alto, 100 Cal.App.2d 336, 223 P.2d 639; a municipal auditorium, Chafor v. City of Long Beach, 174 Cal. 478, 163 P. 670, L.R.A.1917E, 685; the operation of a housing project, Muses v. Housing Authority, 83 Cal.App.2d 489, 189 P.2d 305; a hospital, Beard v. City and County of San Francisco, 79 Cal.App.2d 753, 180 P.2d 744.

Activities conducted by California municipalities which were held to be governmental in nature are: A public playground, Schmidt v. City of Vallejo, 122 Cal.App. 5, 10 P.2d 107; and Kellar v. City of Los Angeles, 179 Cal. 605, 178 P. 505; the operation of a miniature train in a public park, Meyer v. City and County of San Francisco, 9 Cal.App.2d 361, 49 P.2d 893; the operation of a swimming pool, Crone v. City of El Cajon, 133 Cal.App. 624, 24 P.2d 846; the maintenance and operation of a boy's summer camp in the mountains, Kellar v. City of Los Angeles, 179 Cal. 605, 178 P. 505; the operation of a draw bridge, Bettencourt v. State of California, Cal.App., 266 P.2d 201.

[5] As stated in Rhodes v. City of Palo Alto, 100 Cal.App.2d 336 at page 341, 223 P.2d 639 at page 642, and approved in Guidi v. State of California, 41 Cal.2d —, 262 P.2d 3: "It is the nature of the ac-

tivity, not its location, nor by what department carried on, nor the fact that the facility may also be used for governmental purposes, that determines its proprietary character."

Suffice it to say, without reproducing all of the reasoning that has gone into the subject, that no rule of thumb has been evolved which can be applied with certainty as each case arises. For the present at least, each new activity claiming the courts' attention must be decided on its own peculiar facts. The operation of public parks and playgrounds has been held to be governmental in nature because they promote the public health and partake in no degree of the nature of a private enterprise, Schmidt v. City of Vallejo, supra, 122 Cal.App. 5, 10 P.2d 107, and Kellar v. City of Los Angeles, supra, 179 Cal. 605, 178 P. 505. In the Kellar case the principle was extended to cover a boys summer camp, not in a public park or playground, but in the mountains, and maintained by the city, at which a weekly fee was charged for board, lodging and care. In Crone v. City of El Cajon, supra, 133 Cal.App. 624, 24 P.2d 846, it may perhaps be said that it was further extended to cover a swimming pool maintained by the city during the summer months "for the *pleasure* of its citizens." (Italics added.) 133 Cal.App. at page 626, 24 P.2d at page 847. Small fees were charged but these were not enough to pay the cost of operation.

Thus we see that the charging of a fee for use is not the determining factor nor, in view of the Crone case, is physical health alone the distinguishing factor, for it is stated in that case that the swimming pool was maintained "for the *pleasure* of its citizens." (Italics added.) It cannot be denied, however, that swimming is one of the more general and healthful of physical activities.

It would seem, too, that pleasure or amusement and not health would be the principal consideration in an instance such as in Meyer v. City and County of San Francisco, supra, 9 Cal.App.2d 361, 49 P.2d 893, where the city was held to be acting in its governmental capacity in operating a miniature train in one of the city parks. In principle we can see but little difference between the operation of a miniature train in a public park for the pleasure or entertainment of children and their parents and the operation by a city of a community theater with its accompanying parking lot, both situate in a public park, as in Rhodes v. City of Palo Alto, supra, 100 Cal.App.2d 336, 223 P.2d 639, or in the operation by the city of a municipal auditorium, as in Chafor v. City of Long Beach, supra, 174 Cal. 478, 163 P. 670, L.R.A. 1917E, 685. In each case the facility is operated primarily for the business, pleasure or entertainment of the public. Physical exercise or recreation is not involved in either. The only difference is that the miniature train is operated out in the open air while theater and auditorium activities take place inside. This might be considered a public health factor but it has not been so mentioned in the decisions.

It may be said that there is more similarity between the operation of a golf course and a swimming pool or boys' summer camp than there is between the operation of a golf course and a theater or auditorium. But what is the primary purpose behind each of them? If any general conclusion is to be drawn from a consideration of the cases, it is that public education, training for self preservation and good citizenship, and the fostering and safeguarding of public health are governmental functions, while the providing of mere amusement or entertainment is not. Guidi v. State of California, 41 Cal.2d 623, 262 P.2d 3. It must be conceded that time spent by a boy in a summer camp is to a degree educational, and if nothing more, training in cooperation and good citizenship. It is a matter of self preservation that all who are physically able should learn to swim for who can tell when it may be a factor in saving not only the life of the swimmer, but also the lives of others.

The underlying purpose behind the playing of a game of golf, however, is undoubtedly pleasure or amusement. True, it provides some exercise and gets the player out into the fresh air and sunshine, but a walk in the park would serve the same purpose. Golf is a game of skill and rivalry, with a decided social aspect, and it is doubtful that most people who play consider health benefits to be the primary objective. Some even ride between shots in small vehicles designed for this purpose, and have caddies to carry their clubs and equipment, which indicates that exercise is for them not the foremost consideration. A golf course does not serve the public generally but only those who play the game. It is designed for a single purpose, while a public park is devoted to no specific use and serves many purposes for the public in general. Many private golf courses are maintained, some for profit, and others as an adjunct to private clubs or associations. It is true that a public golf course undoubtedly makes the sport available to a segment of our population to which private courses would not be accessible, but this alone does not constitute it a governmental function. It is actually in competition with other courses, and in its clubhouse commercial enterprises usually are carried on where commercial rates are charged for commodities and services.

[6] We are satisfied, therefore, that the primary purpose served by the operation of a public golf course is pleasure or amusement, and that in the present case the City of San Mateo was acting in its proprietary capacity and therefore owed its invitees the duty of exercising ordinary care for their safety.

[7, 8] Nothing appears in the complaint to indicate that it cannot be amended, either as to the City of San Mateo or as to Matt Thiltgen. If essential facts are not alleged, and it is not obvious from the complaint that they cannot be supplied, or if distinct causes of action are not separately stated, these deficiencies can be corrected by amendment. Coleman v. City of Oakland, 110 Cal.App. 715, 295 P. 59. Unless it is clear that a complaint does not state a cause of action and cannot be so amended as to obviate the objections thereto, it is error to refuse permission to amend. Hillman v. Hillman Land Co., 81 Cal.App.2d 174, 183 P.2d 730.

The judgment is therefore reversed with instructions to the trial court to permit appellant to amend her complaint.

PETERS, P. J., and BRAY, J., concur.

123 Cal.App.2d 222

PEOPLE v. McNEAL.

Cr. 794.

District Court of Appeal, Fourth District, California.

Feb. 16, 1954.

Defendant was convicted of robbery, first degree. The Superior Court, Imperial County, L. J. Mouser, J., rendered judgment and an order denying defendant's motion for a new trial and defendant appealed. The District Court of Appeal, Griffin, J., held inter alia, that evidence was sufficient to sustain conviction and that competency of an interpreter duly appointed, could not be attacked for first time on appeal.

Judgment and order affirmed.

1. Robbery 🔑**24(1)**

Evidence was sufficient to sustain conviction for robbery.

2. Criminal Law 🔑**1159(4)**

In robbery prosecution, objection that testimony of prosecuting witness was contradictory in itself was not sufficient ground for reversal. Code Civ.Proc. § 1884.

3. Criminal Law 🔑**741(2)**

Question of identity of accused in criminal case is for jury unless evidence of identification is incredible as matter of law. Code Civ.Proc. § 1884.

4. Criminal Law 🔑**554**

In robbery prosecution, jury had right to reject accused's testimony in reference to his alibi. Code Civ.Proc. § 1884.

5. Criminal Law ⚷1035(1)

Competency of an interpreter duly appointed by court cannot be attacked for first time on appeal. Code Civ.Proc. § 1884.

6. Witnesses ⚷243

In robbery prosecution, where an interpreter was appointed for accused, certain leading questions were allowable. Code Civ.Proc. §§ 1884, 2046.

7. Criminal Law ⚷641

In robbery prosecution, record on appeal indicated that accused was fairly represented by public defender.

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Robert McNeal, in pro. per. for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Appellant was charged jointly with one Hurst and was convicted by a jury of the crime of robbery, first degree. Richard W. Petherbridge, public attorney, represented the defendants at the trial. Defendant McNeal filed his own notice of appeal in propria persona. After some delay, defendant informed this court that he desired the services of an attorney. This court appointed Mr. Petherbridge to represent the appellant on appeal and extended the time to file an opening brief. Appellant was so notified. Mr. Petherbridge, in an affidavit, made an application to be relieved as appellant's counsel, stating that on October 2, 1953, he addressed a letter to him at Box 686, Soledad, asking for information on the grounds upon which he wished to appeal, but received no response from the letter; that he wrote again on October 21st, renewing the request, and received no reply; that he believes, from remarks made by the appellant after rendition of the verdict of the jury, that McNeal felt that he was inadequately represented; that affiant knew of no grounds upon which an appeal in the matter could be founded with any reasonable prospects of success, and asked this court to relieve him as counsel. This court notified the appellant of this fact, refused to relieve him of the services of Mr. Petherbridge, informed him of the facts set forth in Petherbridge's affidavit, and allowed him either to file a brief in his own behalf or to furnish Mr. Petherbridge with sufficient information to permit him to file a brief on appeal. On November 24, 1953, appellant presented a document denominated *Opening Brief*, in which he claimed that he was not guilty of any offense; that he had an unfair trial due to the inability of the interpreter to properly interpret the testimony; that his attorney did not object to certain questions propounded by the district attorney; that his attorney made certain stipulations in open court to which he did not consent; and complained generally as to the conduct of his trial.

The testimony shows that early in the evening of March 13, 1953, a young Mexican boy named Abel Zarasuta, was working as a night irrigator on a lonely ranch near Holtville, on the road to Yuma. He observed a 1947 Pontiac station wagon approach on the Yuma road, make a "U" turn, and pull off the highway. Zarasuta continued with his work and passed within three yards of the parked car while he was carrying a kerosene pump lamp, and was able to observe two men in the front seat. One man came around the car, went up to Zarasuta, and had a short conversation with him as to the whereabouts of a camp of "Jimmies". The stranger then returned to the station wagon and drove away. Zarasuta positively identified the appellant McNeal as the man who arrived in the station wagon and entered into a conversation with him at the time and place.

About 11 o'clock that same evening he was again approached by the same two men. McNeal held a gun in his right hand and a flashlight in his left hand. He wore a green checkered shirt, which was partially covered with a piece of canvas or a jacket which was thrown over his shoulders. He had on Levi trousers and a white straw hat. Appellant McNeal cast his flashlight beam upon the witness's face. Hurst demanded that Zarasuta surrender his money and McNeal menaced Zarasuta with his pistol. Zarasuta gave Hurst $30.75 and McNeal his billfold. McNeal then struck the victim on the head with the butt of his pistol, knocking him to the ground. He was then kicked by McNeal and Hurst until he lost consciousness.

The police arrested McNeal and Hurst in Mexicali, wearing the clothes identified by the prosecuting witness, and in possession of a 1947 Pontiac station wagon. The prosecuting witness positively identified appellant McNeal.

Appellant offered an alibi that he was in a bar that particular night visiting a bartender friend. He offered no evidence to otherwise corroborate his story.

[1] The evidence was legally sufficient to support the judgment of conviction. The testimony of the prosecuting witness needed no corroboration, as indicated by the appellant. Code Civ.Proc. § 1844.

[2–4] Appellant's argument that the testimony of the prosecuting witness was contradictory in itself is not sufficient ground for a reversal. People v. Hightower, 40 Cal.App.2d 102, 106, 104 P.2d 378. The question of identification of the accused as the person who committed the crime was a question for the jury unless the evidence of identification was incredible as a matter of law. People v. Friday, 18 Cal.App. 2d 197, 63 P.2d 303. The jury had the right to reject the appellant's testimony in reference to his alibi. People v. Ferrato, 69 Cal.App.2d 176, 158 P.2d 573.

[5] An interpreter was duly appointed by the court and his competency cannot be attacked for the first time on appeal. Code Civ.Proc. § 1884; People v. Lem Deo, 132 Cal. 199, 64 P. 265; People v. Valencia, 27 Cal.App. 407, 408, 150 P. 68; People v. Phillips, 12 Cal.App. 760, 763, 108 P. 731.

[6] The record indicates that great care was exercised during the trial in eliciting testimony through the interpreter. There is no reversible error in the manner in which the complaining witness's testimony was elicited. The objection apparently is in reference to leading the witness. Under the special circumstances here related, certain leading questions were allowable. People v. Wilson, 46 Cal.App.2d 218, 224, 115 P.2d 598; Section 2046 Code Civ.Proc.; People v. Mendez, 193 Cal. 39, 49, 223 P. 65.

[7] The contention that the defendant was not fairly represented by his counsel is not borne out by the record. A review of the transcript clearly shows that the public defender conducted an able defense, and it reveals no impropriety on the part of his counsel. He no doubt had a proper reason for stipulating to certain testimony which was otherwise available.

On the motion for new trial the trial court was justified in accepting the evidence as being sufficient. People v. Ash, 88 Cal.App.2d 819, 826, 199 P.2d 711.

We conclude that the contentions of the appellant are without merit, and an examination of the record reveals that he had a fair trial and that there was no miscarriage of justice.

Judgment and order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

123 Cal.App.2d 204

AMERICAN BORAX CO. et al.
v.
CARMICHAEL.

Civ. 4667.

District Court of Appeal, Fourth District, California.

Feb. 16, 1954.

Hearing Denied April 14, 1954.

Action by defendants in a quiet title action to set aside judgment therein. The Superior Court of Kern County, Robert B. Lambert, J., sustained a demurrer without leave to amend and plaintiffs appealed. The Court of Appeal, Barnard, P. J., held that allegations that plaintiff in quiet title action was claiming title in spite of outstanding instruments, that she obtained service of process against corporation by service upon secretary of state by false representation, and that representation was made to certain defendants that their vendor had no title, did not show extrinsic fraud as ground for the relief sought.

Affirmed.

1. Judgment ⚿443(1)

Fraud warranting action to set aside judgment does not include a judgment regularly obtained upon fraudulent claim or by false testimony, but is limited to fraud in procuring the judgment.

2. Judgment ⚿443(1)

That plaintiff in quiet title action was claiming title in spite of outstanding instruments would not constitute "extrinsic fraud" as ground for setting aside the judgment.

See publication Words and Phrases, for other judicial constructions and definitions of "Extrinsic Fraud".

3. Judgment ⚿443(1)

Where order for service of process against corporation in quiet title action on Secretary of State was based on showing that corporation had been suspended and no process agents had been designated, that plaintiff allegedly obtained such order by wilful representation that she did not know whereabouts of corporation's officers, whereas she knew address of an officer, was not "extrinsic fraud" as ground for setting aside the judgment. Corporations Code, §§ 3301–3303.

4. Judgment ⚿443(1)

Alleged misleading of defendants in quiet title action by representation that their vendor had no title, made in letter seeking for quitclaim deed, was not "extrinsic fraud" as ground for setting aside judgment, where such defendants knew that plaintiff was taking an adverse position and defendants were duly served and given opportunity to defend.

5. Appeal and Error ⚿1073(1)

In action to set aside judgment in quiet title action, that such judgment covered lots which prevailing parties never owned did not disclose reversible error in absence of allegation or claim that appellants were in any way interested in such lots.

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Freda B. Walbrecht, Los Angeles, for appellants.

Maas & Nairn, Walter L. Maas, Jr., Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action to set aside a judgment. A demurrer was sustained without leave to amend and the plaintiffs have appealed from the judgment which followed.

The complaint, filed on August 20, 1952, alleges that in an action brought by Annie P. Carmichael a judgment was rendered on November 16, 1950, quieting her title, as against these plaintiffs, to certain real property in Kern County; that said judgment was obtained on representations that American Borax Company (a California corporation) and the Schorrs had no interest in said property, whereas Carmichael knew that such statements were not true; that Carmichael had, on August 4, 1943, and for a valuable consideration, executed and delivered several unrecorded deeds conveying portions of the property to American Borax Company; that in addition Carmichael had on July 5, 1941, given one John L. Keller an option to purchase the property on certain conditions; that Keller had assigned his interest in this option to the Borax Company, which had subdivided the property; that no notice of default had been given as provided in the option agreement; that the Borax Company was served with a copy of the summons and complaint by delivering same to the Secretary of State, and the directors or officers knew nothing of said action; that the plaintiff Harry Schorr relied on representations made to him by the attorney for Carmichael to the effect that the Borax Company has no title to Lot 207 at the time it was conveyed to them; that the plaintiffs first learned that such judgment had been obtained on fraudulent representations on August 1, 1951; and that the plaintiffs are able to show that they "had" a valid interest in said real property, as a defense to the action in which the judgment was rendered. Copies of the unrecorded deeds and of the option agreement, which was recorded, are attached to the complaint.

The appellants contend that extrinsic fraud was alleged "as to at least part of the plaintiffs"; that the complaint alleges that the attorneys for Carmichael represented to the Schorrs that the Borax Company had had no title to Lot 207 (which the corporation had agreed to sell to them), and because of such misrepresentation the Schorrs made no defense to the former action; that the complaint alleges that the Borax Company was served in the quiet title action by mailing summons to the Secretary of State, and that the directors or officers of the corporation knew nothing of said action; that the plaintiffs could amend and offered to amend by alleging that the affidavit filed in the former action, on which the order permitting service upon the Secretary of State was made, was fraudulent in that Carmichael knew the whereabouts of John L. Keller and knew that he was an officer of the Borax Company; and that the fact that the Borax Company did not have actual notice of the former action, coupled with the fraud of Carmichael in obtaining the judgment when she did not have title to all of the property, brings this case within the rules set forth in Parsons v. Weis, 144 Cal. 410, 77 P. 1007, 1010.

[1, 2] As pointed out in the case just cited, the fraud from which relief may be given in such a case as this "does not include a judgment regularly obtained upon a fraudulent claim or by false testimony, but it is limited to a fraud in procuring the judgment." The facts there involved were very different from those with which we are here concerned. In that case, the publication of summons had been secured by filing an affidavit giving the wrong address of the defendant, and it was found after trial that the plaintiff in the former action had knowingly misled the court with respect to the ownership of the land. In the instant case, appellants relied on an old option given more than nine years before the judgment was entered and, with respect to a small portion of the property, on some unrecorded deeds executed more than seven years before the judgment. The evidence on which the judgment was based may well have shown that these appellants had no remaining interest in the property, and may have shown that the unrecorded deeds were invalid and ineffective. The complaint was clearly insufficient, as was the offer to amend which appellants say was made. Moreover, no claim is made in the brief that any specified facts exist, and could be alleged, which would disclose extrinsic fraud in that connection. Whether or not these appellants had any rightful interest in the property was the specific question involved in the action in which the judgment was rendered. The fact that this respondent was claiming title, in spite of certain outstanding instruments, presented a factual question but would not constitute extrinsic fraud.

[3] With respect to the Borax Company it is contended that extrinsic fraud could be shown in that the complaint could be amended to further allege that the defendant wilfully represented that she did not know the whereabouts of the officers of the corporation, and thus obtained an order for service on the Secretary of State in order that the Borax Company would not have actual knowledge of the service. Section 3301 of the Corporations Code provides that every California corporation shall file with the Secretary of State a list of the names and addresses of its officers, and may file a designation of an agent for the purpose of service of process. Section 3302 provides that if such a designation has not been filed with the Secretary of State an order may be secured, under certain conditions, for service of summons by delivering it to the Secretary of State. Section 3303 provides that where service is made in that manner the Secretary of State shall give notice of such service of process to the corporation at its principal office by registered mail. It appears here, without dispute, that in the quiet title action the court made its order for service by delivery to the Secretary of State, founded upon an affidavit stating that the Borax Company was suspended in 1947 for failure to pay its franchise tax, and that no certificate designating either officers or agents for the service of process had been filed in the office of the Secretary of State. Presumably, the Secretary of State notified the corporation of the service of this summons as required by the statute. In any event, and if there was any defect in the affidavit by which the order for such service was secured, that matter could have been presented and passed upon in the other action. Assuming that it might be alleged and shown that this respondent knew Keller's address, and knew that he was or had been an officer of the corporation, this would not be sufficient to show extrinsic fraud or an intent to keep knowledge of the action from the corporation, merely because an attempt was made to obtain service in one of the ways provided for by statute. Any irregularity in the service, which is now claimed, would not be sufficient to establish the extrinsic fraud required.

[4] With respect to the appellants Schorr is is argued that the complaint alleges that they were misled by a representation made to them by the attorney for the respondent to the effect that the Borax Company had no title to the lot which it had agreed to sell to them. It is stated in the respondent's brief that such a statement was made by respondent's attorney in a letter written to the Schorrs asking for a quitclaim deed from them, and that when they refused to give such a deed they were thereafter served with summons and complaint in the quiet title action. This is not denied in appellants' reply brief. Whether the Borax Company had any interest or title in the property was the issue involved in the former action, the Schorrs knew that this respondent was making a contrary contention, they had the right to defend when later served with summons, and no extrinsic fraud appears in this connection.

[5] It is further suggested by appellants that the judgment in the quiet title action also covered some lots which Annie P. Carmichael never at any time owned. It was not alleged in the complaint, and it is not claimed in the briefs, that the appellants are in any way interested in any such lots, and no reversible error here appears. If any such error exists, the real owners of such lots would be free to take appropriate means to protect their own interests.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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123 Cal.App.2d 177

HARRIS v. LEE et al.

Civ. 19655.

District Court of Appeal, Second District, Division 1, California.

Feb. 15, 1954.

Hearing Denied April 14, 1954.

Action to have defendants declared trustees for benefit of plaintiff of certain real and personal property allegedly purchased with funds of plaintiff taken by the defendant, when plaintiff's wife, upon her departure in company with other defendant. The Superior Court of Los Angeles, Irvin Taplin, J., entered judgment from which a defendant appealed. The District Court of Appeal, Doran, J., held that evidence sustained findings that property in question had been purchased solely with plaintiff's funds, and that a trust should be imposed.

Judgment affirmed.

1. Appeal and Error ⟹989, 996

It is not within the province of an appellate court to weigh the evidence presented to trial court in action to establish a trust, but before appellate court is justified in reversing on ground of insufficiency of evidence, it must appear from record that, accepting full force of evidence adduced, together with every inference favorable to prevailing party that may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that law precludes the prevailing party from recovering judgment.

2. Trusts ⟹110

In action to have defendants declared trustees for benefit of plaintiff of certain real and personal property, wherein it was contended that one of the defendants, when the wife of plaintiff, had departed from their home with funds of plaintiff in company with other defendant, and that the defendants had thereafter used such funds to acquire the property, evidence sustained findings that funds of plaintiff had been taken and used in manner charged by him, and that no contribution was made by other defendant, and warranted the imposition of a trust in plaintiff's favor.

3. Appeal and Error ⚷1170(7)

In action to have defendants declared trustees for benefit of plaintiff of certain real and personal property, wherein it was contended that one of defendants, when the wife of plaintiff, had departed with funds of plaintiff in company of other defendant, exclusion of testimony of witness as to conversation referring to sum of money, allegedly owned by defendant with whom plaintiff's wife had departed and mingled with funds taken by wife, offered for purpose of impeaching testimony of former wife, was not prejudicial error under record showing that latter former wife had been cross-examined at considerable length and again examined on rebuttal. Const. art. 6, § 4½.

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Morris T. Johnson, Los Angeles, for appellant.

Hurt & Hurt, Arthur C. Hurt, Jr., Los Angeles, for respondent.

DORAN, Justice.

The present appeal is from a judgment decreeing that appellant James Minnfield and defendant Ada Lee, also known as Ada Lou Smallon Harris, held certain real and personal property in trust for the plaintiff-respondent Reece Harris, and ordering defendants to convey said property to respondent.

Findings of the trial court were to the effect that prior to September 20, 1950, plaintiff Reece Harris and defendant Ada Harris were married and resided in Chattanooga, Tennessee; that on or about that date Mrs. Harris, without plaintiff's knowledge or consent, deserted the plaintiff, taking the sum of $22,500 which was the property of the husband; that thereafter Mrs. Harris and appellant James Minnfield resided in Los Angeles as husband and wife. While in Los Angeles, on or about October 14, 1950, Minnfield and Ada Harris purchased real property for $11,000 cash, taking title in the names of George Lee (Minnfield) and Ada Lee (Harris) as joint tenants. About one week later these defendants bought furniture and furnishings for the house, for the sum of $4,000 cash. Thereafter defendants moved into the house, and made the further purchase of a 1950 Buick automobile for $3,300 cash.

It further appears that on November 18, 1950, plaintiff obtained a final decree of divorce from Ada Harris in Chattanooga, Tennessee, and on December 20, 1950, plaintiff filed complaint in the present action to declare a trust in respect to said property, asking for an accounting, and an injunction against disposing of said property.

The defendant, Ada Harris, filed an answer *in propria persona,* admitting all the material allegations of the complaint. The defendant, James Minnfield, admitted, by implication, the purchase of the property, and that Ada had $9,950 when leaving Tennessee; alleged further that Minnfield had $8,000 which was used towards the purchase; and otherwise denied plaintiff's material allegations. Plaintiff, and defendant Minnfield, appeared at the trial by respective counsel, and Ada Harris appeared in propria persona. As hereinbefore indicated, the trial court found in favor of plaintiff, motion for a new trial was denied, and the present appeal followed.

The greater part of appellant's brief is devoted to a discussion of the contention that "The findings and judgment of the trial court are against the evidence and the law". This includes a detailed examination of testimony given by certain witnesses from which it is argued that the plaintiff had failed to sustain the burden of proof in respect to the ownership of the money, any wrongful act depriving plaintiff of said money, and the tracing of such funds to the real and personal property in appellant's possession.

Appellant further points to an alleged "uncertainty of the trial court", as shown by certain statements that "The Court is faced with a very difficult proposition, not of deciding the case so much on the positive evidence that was placed before it, but the positive evidence that would have assisted the Court that was never placed before it by either side". From this situation appellant contends that the plaintiff failed to establish a case by "clear, satisfactory and convincing" evidence.

[1] It dealing with the above contentions, it is not within the province of an appellate court to weigh the evidence presented to the trial court. As stated in 4 Cal.Jur. 2d 487, "Before an appellate court is justified in reversing a judgment on the ground of insufficiency of evidence, it must appear from the record that, accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party that may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes the prevailing party from recovering a judgment". In such cases "the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached". Crawford v. Southern Pac. Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184.

[2] Without question, the present record discloses substantial evidence in support of the trial court's findings and judgment. Although contradicted to some extent, there is clear evidence to the effect that $10,000 deposited in a joint savings account was derived from funds which came from respondent's mother, which money was withdrawn by the wife in currency; that a further sum of $11,000 had been transferred by respondent to a safe to which the wife had access, and that the same disappeared when the wife left, together with a further sum of about $1,500 in loose bills. The wife's testimony largely corroborated that of the respondent in respect to the money, and admitted the taking thereof. These funds, so taken by the wife, were later placed in a Los Angeles bank box to which appellant had access; shortly thereafter the property hereinbefore described was purchased in the joint names of George Lee (appellant) and Ada Lee (Harris).

The trial court found, among other things, that it was not true that defendant contributed $8,000 "of his own funds * * towards the purchase" of the Los Angeles property, thus refusing to credit the appellant's story that this money had been won by appellant "playing the numbers lottery". The credibility of a witness' testimony is a matter peculiarly within the province of a trial court which, having a first hand opportunity to observe a witness' demeanor, is obviously placed in a much better position to evaluate the testimony given than is an appellate court which can only scan the printed record.

Appellant's argument that there was "uncertainty" in the mind of the trial court as to what determination should be made, is not borne out by the record. The trial court's statement that it was "faced with a very difficult proposition, not of deciding the case so much on the positive evidence that was placed before it, but the positive evidence that would have assisted the court that was never placed before it by either side", in no manner indicates any uncertainty as to what should be done.

Appellant's insistence that plaintiff had failed to "prove the essential facts for the establishment of an involuntary trust", is a matter going to the weight and credibility of the evidence, and one which the trier of fact has determined adversely to such contention. And, under the law, as set forth in section 853 of the Civil Code relating to resulting trusts where consideration is paid by one person and title is taken in the name of another; and section 2224 of the same code providing that a person who has obtained property by fraud or other wrongful act, becomes an involuntary trustee, the imposition of a trust in respondent's favor was clearly justified under such evidence.

Appellant's brief makes the further point that "The trial court erred by excluding the testimony of Thomas Alexander" by whom appellant sought to prove "a conversation at his house concerning a sum of money, allegedly owned by appellant and mingled with the funds of defendant, Ada Harris, for the purpose of impeaching the testimony of said defendant * * *". The trial court disallowed such testimony on the ground that (1), "No foundation had been laid"; (2), "Defendant Ada Harris, was called as a witness by plaintiff under Section 2055 [Code Civ.Proc.] * * * and was not a voluntary witness, hence she could not be impeached by appellant, because plaintiff is not bound by her testimony, if detrimental, anyway".

[3] It is admitted by the respondent that "Plaintiff cannot prove his case by the defendant, Ada Harris, without giving appellant the right to examine said defendant according to the rules of law". Appellant maintains, however, that Ada Harris "was cross-examined at considerable length and again examined on rebuttal", and that even if the judge did err in excluding the testimony for the reasons given, appellant has suffered no prejudice. Respondent's position appears to be a sound one in the language of Article VI, Section 4½ of the California Constitution, "after an examination of the entire cause, including the evidence", the reviewing court is "of the opinion that the error complained of has" not "resulted in a miscarriage of justice", and hence, under such section, no reversal may be had.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

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123 Cal.App.2d 270

KRUGER v. CITY OF OAKLAND et al.

No. 15664.

District Court of Appeal, First District, Division 2, California.

Feb. 17, 1954.

Hearing Denied April 14, 1954.

Action for wrongful conversion of resident's personal property and cross-action by city for cost of abating dangerous and unsanitary condition on resident's property. From adverse judgment of Superior Court, Alameda County, James R. Agee, J., resident appealed. The District Court of Appeal, Kaufman, J., held that where city council found a dangerous and unsanitary condition existed on premises of resident and after due notice to abate the condition the street department at request of city health officer removed 59 truck loads of lumber, metal, papers, rags, etc., from premises, evidence warranted finding that city acted pursuant to ordinance and did not convert personal property of resident.

Judgment affirmed.

Trover and Conversion 🔑40(4)

In action by resident against city and city officials for wrongful conversion of personal property, when city council found a dangerous and unsanitary condition existed on resident's property and street department at request of health officer after due notice to abate the condition removed 59 truck loads of lumber, metal, papers, rags, etc., and cross-action by city for cost of abating the condition, evidence warranted finding that city acted pursuant to ordinance and did not convert personal property of resident.

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Paul Kruger, in pro. per., for appellant.

John W. Collier, City Atty., George M. Cahalan, Deputy City Atty., Oakland, for respondents.

KAUFMAN, Justice.

This is an appeal by plaintiff Paul Kruger from a judgment in favor of defendants, the City of Oakland, and Charles A. Reed, Arthur Davis, Joseph J. Ward and James J. Sweeney, Jr., in an action for wrongful conversion of plaintiff's personal property by the aforementioned officers and employees of said City. The judgment was also in favor of the City on its cross-complaint, against Paul Kruger and Helma Kruger, his wife, in the sum of $855.74, the cost of the City's services in the abatement of a dangerous and unsanitary condition on plaintiff's premises.

The complaint alleged that plaintiff had stored on his premises scrap metal of the fair market value of $5,169; plumbing fixtures, supplies and tools, $1,000; antiques and certain metallic objects, $1,000; certain tools and miscellaneous metallic items, $334, making a total sum of $7,503; that defendants' agents acting under color of a resolution of the City Council of Oakland ordered the abatement of an alleged dangerous and unsanitary condition on plaintiff's premises; that said acts were done with malice toward plaintiff, for which exemplary and punitive damages were demanded in the sum of $15,000. It was further alleged that a verified claim had been filed for the fair market value of said property with the exception of item four (miscellaneous articles) but that no action had been taken by the City.

Appellant herein, an elderly crusader against political subversion nationally and locally, has filed a unique document of two pages which presents no issues on this appeal. This document sets forth a somewhat incoherent account of plaintiff's efforts to establish a Publicity Bureau which was thwarted by the raid on his premises, of Oakland's Invisible Government, of the seizing by the City employees of the contents of plaintiff's writing desk and other prized possessions by the crew who were told to "Take everything! It's all junk!" What is designated as the attestative sections of the brief contains a magazine article on Communist infiltration, letters to a state public official, attacks on Oakland public officials, and poems.

Respondent has set forth the issues as they were presented to the trial court by the Complaint, Answer, Cross-Complaint and Answer to Cross-Complaint as follows:

1. Did defendant City of Oakland wrongfully convert certain scrap metal stored in and about the plaintiff's premises?

2. What is the reasonable value of the services of the City in abating the dangerous and unsanitary condition?

Respondent sets forth the Oakland Ordinance with respect to abatement of dangerous or unsanitary conditions as Exhibit A to its answer and incorporated it by reference. This ordinance, No. 966 C. M. S., provides that every dangerous or unsanitary condition upon any premises in Oakland may be abated by the Health Officer in the manner provided therein. The procedure is then outlined for complaint and hearing. The Health Officer files a written complaint with the City Manager setting forth facts showing the alleged condition; the City Manager presents the same to the City Council which fixes a time and place for public hearing on the complaint. A copy of the resolution and complaint must be served on the owner of the premises not less than 5 days prior to the time fixed for hearing. When the hearing before the City Council is completed the Council must either dismiss the complaint or direct that the condition be abated. If abatement is ordered, the Health Officer must give written notice to the owner or occupant of the premises to abate, and if abatement is not commenced within 5 days thereafter and diligently prosecuted to completion, the Health Officer shall cause the condition to be abated. The Heath Officer may call upon the Street Department or other City Department to abate such condition in lieu of employing a contractor. The expense incurred by the City may be assessed against the real property on which the dangerous or unsanitary condition was located.

The evidence presented at the trial establishes that the City acted pursuant to the above ordinance and that all the procedural steps outlined therein were properly taken. A reading of the trial transcript shows that plaintiff made no attack upon the ordinance. There is nothing in the pleadings or at the trial attacking the constitutionality of the ordinance. Plaintiff's evidence was directed toward proving that the fair market value of the scrap metal seized was $7,503 and not $1,005.26, the amount which the buyer, Associated Iron and Metal Co., was ready to pay plaintiff for it, and which tender he had refused. The greater part of plaintiff's evidence, if his conclusions and accusations may be so characterized—he was the only witness at the trial—was offered to show malice toward plaintiff by City officials because of his attempts to expose the corruption allegedly existing in the municipal government.

It is unnecessary to review the abundant evidence that the condition of plaintiff's property prior to the abatement constituted a dangerous and unsanitary condition as well as a fire hazard. The home, occupied by Paul Kruger and his wife was located at 2642 Chestnut Street, Oakland. From 1939 to October 23, 1950 there had been numerous complaints, inspections, citations, and letters based upon the fact that Kruger was maintaining on his residential premises, a condition similar to a junk yard. The rooms of the house were filled with old newspapers, magazines, rags, stored furniture, packing boxes, etc., piled to heights of from 6 to 8 feet. In the yard, both front and back, there was a collection of scrap metal, lumber, glass, rubber, used brick, cans, etc., filling the property from the gutter in front to the rear boundary line and from one side fence to the other. The lot is approximately 26 feet by 132 feet. There are neat bungalows to either side of the Kruger property and across the street. The house to the south of plaintiff's is about 3 feet from the Kruger premises, and on the north, a wooden garage is near the Kruger's boundary line, toward the back of the lot. Only a single car driveway separates this neighbor's home from the Krugers.

The Fire Marshal's office recorded its first complaint against the premises on February 6, 1939, and at the time of the Council hearing thereon had made 25 inspections, issued 6 notices, written 4 letters, obtained 2 citations and had appeared in Police Court several times seeking abatement of these conditions as dangerous, unsanitary, a public nuisance, and an unlawful collection of combustible rubbish and waste. On December 26, 1949, plaintiff pleaded guilty in police court of the misdemeanor of violating Section 2–1.72 of the Oakland Municipal Code in that he unlawfully permitted an accumulation of paper, lumber and other combustible and inflammable waste material in and about his house and on his property.

The notice to abate the condition following the resolution by the City Council was served upon Mr. and Mrs. Kruger on August 7, 1950. Nothing was done by the Krugers so when two and one-half months had elapsed, the Street Department at the request of the Health Officer began the abatement on October 30, 1950, removing 59 truck loads of lumber, metal, papers, rags, cans, bottles, tires, sacks, etc. Fourteen of the truck loads were scrap metal. The photographic exhibits, some of which are included in respondent's brief, show to what fantastic lengths plaintiff's collecting instinct had led him, and are convincing evidence that a fire hazard was created. The witness for the Health Department also testified that the condition of the premises constituted a potential rodent hazard, that there was an excessive rodent population in the neighborhood, and the foreman of the Street Department crew testified to evidence of rats in the back yard and in the attic.

There is no evidence in the record that the City acted with malice. Mr. Kruger's conclusions and suspicions are not evidence of facts.

The reasonable value of the City's services in abating the dangerous and unsanitary condition is adequately supported by the testimony of the witness Davis of the Maintenance Division of the Oakland Street Department who kept the time sheets, testified to cost of labor and the charge for equipment.

We conclude that the judgment of the trial court is amply supported by the law and the evidence and that no prejudicial error appears in the record before us.

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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123 Cal.App.2d 186

HARTMAN v. RIZZUTO et al.

No. 15621.

District Court of Appeal, First District, Division 1, California.

Feb. 16, 1954.

Hearing Denied April 14, 1954.

Plaintiff brought action to recover deposit made by defendant, and defendant filed cross-complaint to rescind contract for purchase and sale of realty and demanded return of deposit to him. The Superior Court, County of Santa Clara, M. G. Del Mutolo, J., entered judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that where plaintiff owned parcel of realty composed of two lots, and he constructed duplex on first lot in accordance with city zoning ordinance requiring duplex to have open rear yard space 25 feet in depth, and plaintiff then sold duplex to third party but retained 20 foot wide strip at rear of duplex, so that third party had rear yard only five feet in depth, and thereafter plaintiff contracted with defendant for sale of second lot and portion of first lot retained by plaintiff, as though they were a single parcel, and defendant had no reason to suspect that he could not build on parcel, which had been part of first lot, because of zoning ordinance, defendant was entitled to rescind contract and recover deposit made thereunder.

Judgment affirmed.

Vendor and Purchaser ⚷107, 334(1)

Where plaintiff owned parcel of realty composed of two lots, and he constructed duplex on first lot in accordance with city zoning ordinance requiring duplex to have open rear yard space 25 feet in depth, and plaintiff then sold duplex to third party but retained 20 foot wide strip at rear of duplex, so that third party had rear yard only five feet in depth, and thereafter plaintiff contracted with defendant for sale of second lot and portion of first lot retained by plaintiff, as though they were a single parcel, and defendant had no reason to suspect that he could not build on portion of parcel, which had been part of first lot, because of zoning ordinance, defendant was entitled to rescind contract and recover deposit made thereunder.

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J. E. Longinotti, Rankin, Oneal, Luckhardt, Center & Hall, San Jose, for appellant.

O. Vincent Bruno, San Jose, for respondent.

FRED B. WOOD, Justice.

The principal question upon this appeal is whether or not a rear yard requirement of a municipal zoning ordinance continues operative and makes the land affected not "marketable" or not "free and clear of all incumbrances," under the circumstances of this case.

Plaintiff and cross-defendant R. H. Hartman owned an L-shaped parcel of realty near the intersection of George and First Streets in the City of San Jose. It consisted of two lots, numbered 15 and 17, each 137.50 feet in depth. Lot 15, approximately 47 feet wide, fronted on George Street. Lot 17, 68.75 feet wide, fronted on First Street and at the rear abutted the rear half of lot 15.

In 1941, Hartman built a duplex dwelling on the front portion of lot 15. The rear well of the building was about 63 feet in from George Street. The applicable ordinance required this building to have an open rear yard space 25 feet in depth, extending clear across the width of lot 15. The plot plan which Hartman submitted to the city with his application for a building permit showed that the lot had a depth of 137 feet. It also showed the precise location of the proposed building on the lot and no structure on the lot to the rear of the building. In his application for a permit to build "in accordance with Plans, Specifications and Plotplan filed" therewith, Hartman agreed that he would "in all things strictly comply with the conditions of this permit, and with all laws and ordinances governing the erection, alteration and occupancy of buildings in said City of San Jose." The desired permit was issued. It granted permission to build a duplex "in accordance with" the application which Hartman had made and filed.

In 1946, Hartman sold to Dr. Turco the front half of lot 15, retaining the unimproved rear half of the lot. This divided into two ownerships the rear yard open space required for the duplex, Turco acquiring 5 feet of it in depth and Hartman retaining title to the remaining 20 feet. It also converted Hartman's L-shaped holding, with frontage on two streets, into a rectangular parcel (lot 17 and the abutting rear half of lot 15), fronting on First Street. Lot 17 was improved with a four apartment building.

In 1951, Hartman entered into a contract with defendant and cross-complainant Louis Rizzuto for the sale, as a single parcel, of lot 17 and the rear half of lot 15, for the price of $35,000, Rizzuto depositing $5,500 in escrow. The contract declared that "title to said premises is to be shown free and clear of all incumbrances" save for certain exceptions not here relevant, and that if title "shall not prove marketable" and seller not be able to perfect the same within 90 days, "the purchaser shall have the option of demanding and receiving back said deposit and shall be released from all obligations hereunder."

Before the escrow transaction was consummated, Rizzuto gave notice of rescission of the contract, predicated upon asserted misrepresentations concerning the number of apartments available for lease, and demanded the return of his deposit. Plaintiff filed suit claiming the $5,500 deposit as due and owing to him. Rizzuto cross-complained, alleging rescission upon the ground mentioned and demanding that the $5,500 be returned to him. At the close of the trial Rizzuto was permitted to amend his cross-complaint to allege that the purported sale was in violation of the San Jose Municipal Code and that Hartman could not produce a marketable title.

The trial court found Hartman knew but never informed Rizzuto of the facts above narrated concerning the duplex, its required rear yard area, and the sale to Turco; that "in fact a portion of said property, subject to the contract of February 14, 1951 herein, could not be legally used for construction purposes, and by law was required to be kept unimproved. That the said Cross-Defendant knew at all times that Cross-Complainant contemplated the purchase of said First Street property principally for income purposes"; and that "by reason thereof, there was a substantial and material failure of consideration to the Cross-Complainant herein, which fully justified and warranted Cross-Complainant's rescission of the contract of sale."

Accordingly, judgment was rendered that Hartman take nothing and that Rizzuto recover from Hartman and the escrow holder the $5,500 deposit with interest since the date of deposit.

The judgment should be affirmed. As orally stated by Honorable M. G. Del Mutolo, the judge who made these findings and rendered this judgment: "Now, there is no question about it, that Mr. Hartman could sell that property, yes, he could sell it all right, but what good is that property to them if there was a certain restriction in the rear that they could not build on it? Now, whether the City would have permitted them to build on that 47-foot strip, or not, that's a different story, as long as they had a right to build on it, but as the ordinance stands at the present time, the City could not have given them permission to build on that 47-foot strip," and the "Rizzutos were not told that they could not build on this 47-foot strip, and, consequently, the 47-foot strip would be of no use to them, or even if it was of use to them, when they go to re-sell the property, they would have to tell the prospective purchasers that so many feet of that land, of that lot, could not be used for any buildings, and I think that when a person buys land, he should be told just exactly what he's getting, if he can't see for himself. If he can see for himself, that's well and good, but if he can't see for himself, which in this case they could not see for themselves, I think they have a right to rescind the sale, so that's the judgment that this Court is going to make, that the sale is rescinded."

Judge Del Mutolo was quite right in so holding. "Any title that is not free from encumbrances cannot be considered a marketable title and we think there can be no doubt that the restrictions hereinbefore set forth [including set-back lines, single family dwellings only, minimum yard and floor areas] substantially interfere with many uses which an owner reasonably might wish to make of the property, which was in an unincorporated area and which was near a commercial area. As was said in the case of Whelan v. Rossiter, 1 Cal.App. 701, at page 704, 82 P. 1082, 1083: 'Building restrictions and the like contained in grants of real estate are incumbrances on the title.' And in Tandy v. Waesch, 154 Cal. 108, 97 P. 69, our Supreme Court, in referring to restrictions far less stringent than the ones in the instant case, said, 154 Cal. at pages 110–111, 97 P. at page 70: 'The restrictions, reservations, and covenants constituted incumbrances upon the title of defendant, which, not being removed, justified plaintiff in seeking a recovery of his partial payment under defendant's contract to convey to him a title "free and clear of all incumbrances." * * *'" George v. Colvin, 98 Cal.App.2d 57, 61, 219 P.2d 64, 67.

The building restrictions in those cases were imposed by deed or contract, not by municipal ordinance. The imposition of similar restrictions by municipal ordinance does not of itself create "encumbrances" which entitle a purchaser to rescind upon the ground that the seller's title is not "marketable." The parties are deemed to have contracted in the light of applicable restrictions imposed by law. (See cases collected in 175 A.L.R. 1055 at 1056–57.) However, we have here something more than the mere impact of the ordinance. We have a building which was constructed some years ago under conditions which at the time involved no violation of the ordinance but has since been cut off from the greater part of its required rear yard and put in separate ownership. This gives lot 17 and the rear portion of lot 15 the appearance of a single parcel entirely dissociated from the building. There is nothing about this situation that would give Rizzuto, upon inspecting the premises, reason to believe or to suspect that an area 20 feet by 47 feet is dedicated and set apart as an open space not to be built upon. These circumstances presented questions of fact for determination by the trial judge. His determination is supported by the evidence.

This case presents factual and legal issues similar, though not identical, to those which were involved in Curran v. Heslop, 115 Cal.App.2d 476, 252 P.2d 378. There the land under purchase was improved with a dwelling. The porch had been enclosed in violation of the local building code and the state housing act. As a result, the bedroom and kitchen were without windows opening directly into a street, public alley, yard or court as required by the code and the act. Those violations were not apparent. They were deemed material. A judgment approving rescission by the purchaser was affirmed.

Hartman contends, in effect, that the ordinance at most imposed upon him as owner of lot 15 a mere personal obligation to provide and maintain an open space extending 25 feet to the rear of the duplex; that if he violated the obligation when he conveyed to Turco, retaining title to the rear 20 feet of the open space, his liability, if any, was of interest solely to the City, not a matter of interest to any third party nor to a subsequent purchaser from him of the remainder of the lot.

That is a misconception of the meaning and application of the significant provisions of the ordinance. Those provisions, applicable to zones in which lot 15 lies, declare: "* * * the minimum dimensions of yards (in feet) shall be" 25 feet for a rear yard on an interior lot (§ 9105.1 of the ordinance). "'Yard, Rear' is a yard extending across the full width of the lot and measured between the rear line of the lot and the rear line of the building" (§ 9101.-42). "'Yard' is an open space other than a court on the same lot with a building unoccupied and unobstructed from the ground upward except as otherwise provided in sections 9106.1 to 9106.7" (§ 9101.40). "Every part of a required yard shall be open from its lowest point to the sky unobstructed, except for the ordinary projection of sills, belt courses, cornices, eaves, and chimneys; provided however that none of these shall project into a minimum yard more than twenty-four inches" (§ 9106.2). "An accessory building may occupy not more than thirty percent of a required rear yard" (§ 9106.6). "'Lot' is land occupied or to be occupied by a building and its accessory buildings together with such open spaces as are required under this Chapter, and having its principal frontage upon a street or officially approved place" (9101.-26). "'Lot Lines' are the lines bounding a lot" (§ 9101.30). "* * * No lot area shall be so reduced or diminished that the yards or open spaces shall be smaller than prescribed by this Chapter * * *. No yard or other open space provided about any building for the purpose of complying with the provisions of these regulations shall be considered as providing a yard or open space for any other building provided further that no yard or open space on an adjoining property shall be considered as providing a yard or open space on a lot whereon a building is to be erected. * * * Every building erected shall be located on a lot as herein defined and in no case shall there be more than one dwelling on one lot except as hereinafter provided." (§ 9102.45.) Violations are punishable as misdemeanors, each day of the continuance of a violation being a separate offense; any condition permitted to exist in violation of the ordinance is a public nuisance, to be summarily abated (§ 1200).

This ordinance deals with land and imposes limitations and restrictions upon the use of land. Enacted in the exercise of the police power for the preservation of the public health and welfare, it speaks continually and unceasingly each and every day throughout the years until modified by amendment or repeal. It constantly and uninterruptedly imposes these use limitations and restrictions upon each parcel of land to which it applies, whether the land remains in the same ownership or changes ownership from time to time. The requirement that there be an open space 47 feet by 25 feet immediately in the rear of the duplex which Hartman built in 1941 is fully as operative today as it was prior to the sale to Turco. It conceivably might not continue effective as against a purchaser for value without notice, but we do not have that question. Before the escrow was consummated, Rizzuto learned about the open space requirement and demanded the return of his deposit.

Hartman treats his division of lot 15 and his sale of the front half to Turco as the creation of two "lots" which he calls the "Turco lot" and the "Hartman lot." He then invokes that clause of section 9102.45 of the ordinance, above quoted, which declares that "no yard or open space on an adjoining property shall be considered as providing a yard or open space on a lot whereon a building is to be erected." He says that when he cut the lot in two, no part of the property he retained could thereafter (under § 9102.45) provide any part of the open space that might otherwise be required for the Turco duplex. That is a specious argument which, as its starting point, takes the quoted clause entirely out of context. It is a sufficient answer to point out that this clause applies to a building which "is *to be* erected," not to one which "has been" erected. This clause was not intended to be used and can not be used to reduce a rear yard from 25 feet to 5 feet by selling off a portion of the property after the building has been erected with a yard area which conforms to the mandate of the ordinance.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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123 Cal.App.2d 182

HALE v. HALE.

Civ. 20006.

District Court of Appeal, Second District,
Division 1, California.
Feb. 15, 1954.

Suit for divorce. The Superior Court, Los Angeles County, Jesse J. Frampton, J., entered interlocutory judgment of divorce awarding custody of child, 2½ years of age, to father. Mother appealed from that portion of judgment awarding custody. The District Court of Appeal, Doran, J., held that evidence supported the judgment.

Judgment affirmed.

Divorce ⚷301

In action for divorce, wherein trial court found that both parents were fit to have and be awarded care and custody of child, 2½ years of age, evidence sustained judgment awarding custody to father. Civ.Code, § 138.

◆

Templeton & Miller, Los Angeles, for appellant.

Finch, Bell, Duitsman & Jekel, Inglewood, for respondent.

DORAN, Justice.

As recited in appellant's brief, "This is an appeal from that portion of the interlocutory judgment of divorce awarding the custody of the minor child of the parties to the defendant.

"Plaintiff filed a complaint for divorce on July 30, 1952, in which she alleged, among other things, that there was one child, Tani Hale, two and one-half years of age, that said minor child was in her custody, and that she was a fit and proper person to have and be awarded the custody, care and education of said minor, subject to the right of the defendant to visit said child at reasonable times.

"Defendant filed a cross-complaint in which he alleged that plaintiff was an unfit and improper person to have and be awarded the custody, care and education of said minor child and that the best interests of said minor demands that she be placed in the custody of the defendant.

"The court found that plaintiff and defendant are both fit persons to have and be awarded the care and custody of the minor child of the parties hereto, and as a conclusion of law determined that the custody of the minor child Tani Hale be awarded to the defendant, with the right of reasonable visitation reserved to the plaintiff.

"The interlocutory judgment of divorce from which this appeal is taken provides in part as follows:

"'Is is further ordered, adjudged and decreed that the custody of the minor child of these parties, namely, Tani Hale, is awarded to the defendant with the right of reasonable visitation reserved to the plaintiff.'"

It is contended on appeal that the order was an abuse of discretion, citing Section 138, Civil Code which provides that "As between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father." Appellant also relies upon and cites Bemis v. Bemis, 89 Cal.App.2d 80, 200 P.2d 84, and Juri v. Juri, 69 Cal.App.2d 773, 160 P.2d 73.

Respondent on the other hand points out that "Appellant testified that while she and respondent were living together, respondent worked at night and took care of the children during the day, until she got baby sitters, who did not come to her home; that she went to work for financial reasons, and to pay for a Buick automobile, upon which she had been making payments of $96.40 per month for eight or nine months.

"Darlene Small Brady testified that she had been employed by appellant as a baby sitter; that on several occasions appellant stayed out until 4:00 o'clock a. m. and that respondent had expressed concern about the children.

"Respondent testified that appellant called him many vile names in front of the children and slapped him around many times; that he earned enough money to maintain the home without appellant's having to work; that it was not necessary for appellant to go to work to liquidate family obligations, but she did so only because she wanted another car; that he could give the child a home in which his mother would cook good meals, take care of the child's clothes and things, and the child would not have to be 'farmed out all the time' because appellant was working."

A review of the record discloses that as a matter of law there was no abuse of discretion. The evidence, although conflicting, was amply sufficient to support the trial court's judgment. There is no question as to the law of the case and there are many decisions on the subject. However, in no two of the cases are the facts the same and although such decisions are a help they are not conclusive.

The evidence is sufficient to support the judgment and, as above noted, there was no abuse of discretion.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

BEVERAGE et ux.
v.
CANTON PLACER MINING CO. et al.*
Civ. 8341.

District Court of Appeal,
Third District, California.
Feb. 10, 1954.
Hearing Granted April 7, 1954.

Purchasers' action for specific performance of contract to convey real estate, and to quiet adverse claim. The Superior Court, Plumas County, Macmillan, J., rendered judgment for vendor on pleadings, and purchasers appealed. The District Court of Appeal, Paulsen, J., pro tem., held under circumstances purchasers should be permitted to amend so as to sufficiently describe real estate which they sought to have conveyed.

Judgment reversed with directions.

1. Mines and Minerals ⚿54(1)

In written agreement to sell real estate merely described as a certain acreage in placer claim, south of highway and between engineer stations, description was so uncertain that, without aid of extrinsic evidence, it would not afford means of identifying land. Civ.Code, § 1624.

2. Appeal and Error ⚿837(12)

On appeal from judgment rendered on pleadings in action for specific performance of land sale contract, evidence which had been introduced to show sufficiency of contract description and which was later stricken, was not before District Court of Appeal for consideration.

3. Specific Performance ⚿114(3)

Purchasers' complaint for specific performance was subject to claimed infirmity of inadequately describing land involved. Civ.Code, §§ 1624, 3538.

4. Appeal and Error ⚿863

On appeal from judgment rendered on pleadings in action for specific performance, case would be reviewed in same manner as judgment of dismissal following sustaining of a demurrer.

5. Vendor and Purchaser ⚿80

Where written agreement to sell real estate did not state in which state land was located, fact that agreement was dated at Sacramento justified assumption that real estate was located in California.

6. Appeal and Error ⚿236(2)

Where vendor, knowing long before trial of defects in purchasers' complaint for specific performance, filed no demurrer and gave no notice of intention to move for judgment on pleadings, and where Superior Court repeatedly declared that complaint could not be amended to state cause of action, purchasers could complain, on appeal, of trial court's refusal to grant motion to amend, even though no formal amendments had been offered. Civ.Code, § 3538; Code Civ.Proc. § 472c.

7. Specific Performance ⚿116½

Under circumstances of action for specific performance of contract to convey real estate purchasers would be permitted to amend so as to sufficiently describe real estate which they sought to have conveyed.

◆

J. Oscar Goldstein, P. M. Barceloux, Burton J. Goldstein, Goldstein, Barceloux & Goldstein, Chico, for appellants.

H. W. Glensor, Hilary H. Crawford, San Francisco, for respondents.

PAULSEN, Justice pro tem.

This is an appeal from a judgment on the pleadings in an action to specifically enforce the corporate respondent's contract to convey certain real property and to quiet the adverse claim of respondent Heney.

Appellant alleged among other things that:

> "II
>
> "On or about the 29th day of September, 1947, the defendant company, to-wit: Canton Placer Mining Company, a corporation, was the owner in fee simple of that certain tract or parcel of land situated in the County of Plumas, State of California, more particularly described as follows:
>
> "That portion of the Canton Placer Mining Claim, designated by the Surveyor General as Survey No. 4041 embracing a portion of township 24 North, Range 6 East, M. D. B. & M.; said portion appearing on the Original Offi-

* Subsequent opinion 278 P.2d 694.

cial Plat of said township as being in Section 10, and appearing on the Independent Resurvey of said township approved March 17, 1941 by the Commissioner of the General Land Office as being in Sections 3 and 10, to-wit:

"Beginning at Corner No. 51 of said Canton Placer Mining Claim and running thence N. 77° 52′ E. 496.3 feet to Corner No. 52; thence S. 80° 00′ E. 345 feet to Corner No. 53; thence N. 58° 27′ E. 416.38 feet to Corner No. 1; thence N. 29° 14′ E. 365.14 feet to Corner No. 2; thence S. 50° 30′ E. 270 feet to the North Bank of the North Fork of the Feather River; thence following the North Bank of said River Westerly to where it intersects the Southwesterly Right of Way line of State Highway Route No. 21 (Sign Route No. 24); thence Northerly to the place of beginning.

"III

"On said date of September 29, 1947, plaintiffs and defendant company made and entered into an agreement in writing, wherein and whereby the plaintiffs agreed to buy and defendant company agreed to sell, the lands and real property hereinabove described for the purchase price of $1500.00; plaintiffs then and there paid over unto defendant company the sum of $500.00 in cash to apply on said purchase price, and undertook and agreed to pay the balance of $1,000.00 upon the issuance of a preliminary title report; defendant company, by and through its attorney, agent and representative, Lincoln J. [V.] Johnson, then and there made, executed and delivered to plaintiff a writing, a full, true and correct copy of which said writing is hereto attached and marked Exhibit 'A' and by this reference incorporated herein; in said writing said company acknowledged receipt of said sum of $500.00 so paid by plaintiffs on account of the agreed purchase price, and undertook and agreed to deliver title in and to the said lands and real property, free and clear of all taxes and encumbrances, for the total purchase price of $1500.00.

* * * * * *

"V

"At the time of making said agreement, to-wit: September 29, 1947, said Lincoln V. Johnson was the duly accredited, authorized and acting attorney and agent for the defendant company, a corporation, and was duly authorized and empowered by the said defendant company, a corporation, to make and enter into, in behalf of said defendant company, a contract for the sale of said lands and real property in the amount and upon the terms and conditions hereinabove set forth, and was duly authorized and empowered by said defendant company, to make, execute and deliver unto plaintiffs, the writing hereinabove referred to and by reference incorporated herein, and to accept from plaintiffs the sum of $500.00 paid as aforesaid, on account of the agreed purchase price.

"VI

"Subsequent to said date of September 29, 1947, the exact time to plaintiffs being unknown, the defendant company ratified, approved and confirmed the agreement of sale hereinabove set forth and described, and received and accepted from its attorney and agent, the said Lincoln V. Johnson, the sum of $500.00 paid on account of the purchase price by plaintiffs as aforesaid, and ever since has retained and does now retain the said sum."

Exhibit A reads as follows:

"Sacramento, Calif.
Sept. 29, 1947

"Received from Katherine H. Beverage and Robert W. Beverage of Paxton, Plumas Co. Calif. $500.00 deposit on purchase price of seven and one-half (7½) acres, more or less, to south of State Highway at Chambers Creek, (between highway Engineer Stations 561 † 58.51 † to 577 †) being part of Canton Placer Claim.

"Balance of $1000.00 to be paid upon issuance of preliminary title report.

"Title fees to be paid by grantees.

> "Property to be delivered by grantor free and clear of taxes and incumbrances.
>
> Lincoln V. Johnson
> for Canton Placer Mining Co."

No demurrer was interposed, but answers were filed admitting defendants' ownership of the property described in Paragraph II, and generally denying the other allegations of the complaint.

When the case was called for trial plaintiffs' counsel made a long and detailed opening statement, after which defendants objected to the introduction of any evidence on the ground that the complaint failed to state a cause of action. It was claimed that the complaint was defective in several particulars, but the arguments revolved around the question of the sufficiency of the description contained in the agreement, Exhibit A, and the claim that it was void under the statute of frauds. Civ.Code, § 1624.

Over the objection of defendants, the court permitted plaintiffs to introduce evidence to show that the description set forth in Exhibit A was sufficient. Thereafter the court granted a motion to strike such evidence in its entirety and rendered judgment on the pleadings, stating that the motion was being granted on all the grounds stated in the original objection. In view of the conclusions we have reached it is not necessary to discuss all the grounds stated.

[1] The description is obviously so uncertain that, without the aid of extrinsic evidence, it would not afford the means of identifying the land. However that is certain which can be made certain. Civ.Code, § 3538; Mancuso v. Krackov, 110 Cal.App. 2d 113, 241 P.2d 1052; Tuck v. Gudnason, 11 Cal.App.2d 626, 54 P.2d 88. It is possible under proper allegations in the complaint that evidence would have been admissible and available to identify the land accurately. In the early case of Preble v. Abrahams, 88 Cal. 245, 26 P. 99, it is said that the description given in a transaction of this kind must at least furnish a *key* to identification and although it cannot be said with certainty that the description contained in Exhibit A necessarily contained such a key, neither can it be said with certainty that it does not. See, also, Gordon v. Perkins, 108 Cal.App. 336, 291 P. 644.

[2-4] The evidence admitted by the court and later stricken is not before us for consideration in ruling upon the correctness of a judgment on the pleadings. In determining the sufficiency of the complaint on such a motion the case must be reviewed the same as would be a judgment of dismissal following the sustaining of a demurrer. Gill v. Curtis Publishing Co., 38 Cal. 2d 273, 239 P.2d 630; Rannard v. Lockheed Aircraft Corp., 26 Cal.2d 149, 157 P.2d 1; Seeger v. Odell, 18 Cal.2d 409, 115 P.2d 977, 136 A.L.R. 1291. In Allen v. Stellar, 106 Cal.App. 67, 68, 288 P. 855, 857, a judgment of dismissal following the sustaining of a demurrer was affirmed under similar circumstances. The description in the agreement of sale was defective and it was claimed there, as it is here, that it could be made accurate by extrinsic evidence. The court said:

> "The complaint does not set forth the agreement as it is written and then follows with a statement of what was intended, or what lands were understood to be described, * * *. It is possible that [the sellers] own no other tract or parcel of land * * *, but it does not so appear from the complaint."

The court then quoted from Craig v. Zelian, 137 Cal. 105, 69 P. 853, as follows:

> "* * * 'An agreement for the sale of real property must not only be in writing and subscribed by the party to be charged, but the writing must also contain such a description of the property agreed to be sold, either in terms or by reference, that it can be ascertained without resort to parol evidence. Parol evidence may be resorted to for the purpose of identifying the description contained in the writing, with its location upon the ground, but not for the purpose of ascertaining and locating the land about which the parties negotiated, and supplying a description thereof which they have omitted from the writing.'

> "There is nothing in the complaint identifying the description contained in the writing, with its location upon the ground. There is nothing in the complaint showing that the description refers to a particular tract of land, which can be identified from the description given." The same rule of pleading is recognized in Joyce v. Tomasini, 168 Cal. 234, 142 P. 67, and Gordon v. Perkins, supra.

We think it clear that the complaint was subject to the objection stated. Appellants argue that the property mentioned in Exhibit A was the same property as that described more particularly in Paragraph II of the complaint, but no such allegation appears therein. There is nothing in the complaint to guide the court in ruling on the admissibility of evidence that might be offered to identify the property the parties had in mind. The objection was properly sustained.

[5] It might well be that with proper amendment evidence would be admissible to explain the description without altering or adding to it, and thus to identify the property accurately. No location was given by name, but the agreement was dated at Sacramento, from which it may be assumed the property was located in this State. McKevitt v. City of Sacramento, 55 Cal.App. 117, 203 P. 132. It referred to engineer stations on a state highway at Chambers Creek, gave the acreage involved and stated that it was part of a certain placer claim lying south of the highway. In connection with evidence of defendants' ownership and related matters it may have proved sufficient. (See United Truckmen, Inc., v. Lorentz, 114 Cal.App.2d 26, 249 P.2d 352; Joyce v. Tomasini, supra, Gordon v. Perkins, supra, and Towle v. Carmelo Land & Coal Co., 99 Cal. 397, 33 P. 1126.

[6] Appellants moved to amend, but the motion was denied. It is true that the motion was directed largely to amendments to conform to proof of facts brought out by the evidence that had been stricken and that no formal amendments were offered, but a reading of the record convinces us that such an offer under the circumstances would have been useless and that appellants were justified in reaching the same conclusion. The trial court repeatedly stated that the complaint could not be amended so as to state a cause of action. This was sufficient excuse for not making a more formal motion, although such a motion would have been better practice.

The defects in the complaint—and there are several—were known to defendants long before trial. No demurrer was filed and no notice of intention to move for judgment on the pleadings was given. If appellants' motion to amend was not technically correct this Court still has the power to permit amendment. Section 472c, C.C.P.; MacIsaac v. Pozzo, 26 Cal.2d 809, 161 P.2d 449; Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358.

[7] Under the circumstances disclosed by the record we are of the opinion that the judgment should be reversed with directions to grant leave to plaintiffs to amend their complaint. It is so ordered.

SCHOTTKY and PEEK, JJ., concur.

BURCHELL v. STRUBE et al. *

Civ. 15721.

District Court of Appeal, First District, Division 1, California.

Feb. 10, 1954.

Rehearing Denied March 12, 1954.

Hearing Granted April 7, 1954.

Interpleader action to determine the claims of an heir and the administratrix of the estates of two deceased heirs of plaintiff administrator's intestate, an assignee of 40 per cent of the heirs' interest in intestate's estate, and such assignee's assignee, in a fund held by plaintiff as administrator. From a judgment of the Superior Court, City and County of San Francisco, William T. Sweigert, J., declaring the assignee's assignee entitled to

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* Subsequent opinion 279 P.2d 1.

recover nothing, he appealed. The District Court of Appeal, Bray, J., held that appellant could not recover the difference between such percentage of the heirs' interest and ten per cent thereof, to which the probate court adjudged the original assignee entitled.

Judgment affirmed.

1. Descent and Distribution ⚷86

A probate court's determination under Probate Code section providing that such court, if it finds that fees, charges or consideration paid by a decedent's heir to his assignee was grossly unreasonable, may refuse distribution to assignee except on terms deemed just and equitable, is final adjudication of rights of parties to assignment, so as to preclude assignee of one to whom decedent's heirs assigned 40% of their interest in estate from recovering, in administrator's interpleader action, difference between such portion of heirs' interest and 10% thereof, to which probate court adjudged original assignee entitled. Probate Code, § 1020.1.

2. Courts ⚷201

A probate court has jurisdiction to hear and determine all questions of law and fact, determination of which is ancillary to proper judgment in case which it has power to hear and determine.

3. Courts ⚷198

The superior court, while sitting in matters of probate, is the same as while sitting in equity in cases at law or special proceedings.

4. Executors and Administrators ⚷315(6)

A probate court, having jurisdiction to determine, on distribution of decedent's estate, what persons have legal or equitable rights to distributable property of estate and extent and nature of their interests, distribution decree determining such matters is conclusive as to heirs', legatees' and devisees' rights, though incorrect, unless corrected on appeal.

5. Constitutional Law ⚷178

Descent and Distribution ⚷86

The Probate Code section, authorizing probate court to refuse distribution to assignee of a decedent's heir except on terms deemed just and equitable, if court finds that fees, charges or consideration paid by heir to assignee was grossly unreasonable, is not unconstitutional as impairing contracts when construed as rendering probate court's determination a final adjudication of rights of parties to contract or assignment. Probate Code, § 1020.1.

6. Jury ⚷31(3)

The Probate Code section, authorizing probate court to refuse distribution to assignee of a decedent's heir, if court finds that fees, charges or consideration paid assignee by heir were grossly unreasonable, is not unconstitutional as denying trial by jury when construed as rendering probate court's determination a final adjudication of rights of parties to assignment. Probate Code, § 1020.1

7. Jury ⚷13(1)

The constitutional guarantee of right to jury trial is inapplicable to cases within equity jurisdiction, and a jury may not be demanded in such a case as a matter of right.

◆

Robert E. Hatch, San Francisco, for appellant.

Thomas C. Vassar, San Francisco, for respondent.

BRAY, Justice.

Defendant Wiley on a settled statement appeals from a judgment against him in an interpleader action.

Questions Presented.

1. Is a determination under section 1020.1 of the Probate Code limited to distribution in the estate or does it affect the ultimate rights of the parties to the contract?

2. If not so limited, is the section constitutional?

Facts.

Defendant Wiley's assignor, Walter C. Cox, is in the business of searching for heirs. Lucy Falkiner (now deceased), Charles J. C. Strube, and Reinhold R. Strube (now deceased) were the heirs of Charles G. Moore, deceased. Cox obtained assignments to 40 per cent of the interest of said heirs in the Moore estate for his services in investigating and procuring proof of their relationship to Moore. In the Probate Court of Napa County a hearing was held under section 1020.1, Probate Code. The court there adjudged that the heirs were not "lost or missing heirs," the assignments were obtained "at least by high pressure methods," were grossly unreasonable and against public policy, and that distribution pursuant to said assignments should be denied in an amount in excess of 10 per cent. This judgment became final. Later a decree of final distribution was entered distributing to Cox 10 per cent of the distributive shares of said heirs. Thereafter plaintiff filed this action in the San Francisco Superior Court, setting forth the foregoing matters, alleging that as administrator of the Moore estate he held $7,686.73 and that Wiley as assignee of Cox claimed to be entitled to 30 per cent more of the interests of said heirs, asked that the heirs Wiley and Cox be required to interplead and their claims determined. After a trial at which the decree under section 1020.1, Probate Code, and the decree of distribution were admitted, the court entered the judgment appealed from, declaring that the Napa County Probate Court decree fully determined and adjudicated all of the rights and liabilities of the parties and that defendant Wiley was entitled to recover nothing.

Effect of Decree under Section 1020.1, Probate Code.

Defendant contends that the section only relates to distribution and that in spite of the probate court's finding under the section, the heir hunter can collect by suit or otherwise the full percentage provided in the contract. Section 1020.1 provides that upon motion of any interested party, the probate court, before making distribution to the assignee of an heir, may inquire into the consideration for any contract or assignment between the heir and the assignee "and into the amount of any fees, charges, or consideration paid or agreed to be paid * * * and into the circumstances surrounding the execution of such assignment, transfer, agreement * * * and if it finds that the fees, charges or consideration paid by any such heir * * * is grossly unreasonable or that any such assignment * * * was obtained by duress, fraud or undue influence it may refuse to make distribution pursuant thereto except upon such terms as it deems just and equitable."

While this section has been considered in several cases the exact point raised here has not been passed upon. In Lund's Estate, 65 Cal.App.2d 151, 150 P.2d 211, the appellant invoked the provisions of section 1020.1 and the probate court found that although the contract assigned to the respondent a one-third interest in the appellant's interest in the estate, the probate court refused to distribute to the respondent that interest but did distribute $1,000 to him, a sum equalling much less than that interest. On appeal it was contended that the court had "set aside" the assignment and granted a recovery on a quantum meruit and that such a recovery was not within the issues of the pleadings under the section. The reviewing court held that the assignment had not been set aside but was given effect, not according to its precise terms, but to the extent of awarding reasonable compensation for the respondent's services for which appellant had agreed to a larger amount. While the opinion contains some language which might appear to support defendant's contention (for example, it states that the section gives the probate court jurisdiction to determine the validity of the assignment "at least for the purpose of distribution"), the opinion in no wise attempted to discuss the effect of the section other than as to distribution. It expressly stated, "We are not called upon here, however, to determine the numerous questions which may arise with respect to said section." 65 Cal.App.2d at page 153, 150 P.2d at page 213.

[1] Ettlinger's Estate, 87 Cal.App.2d 494, 197 P.2d 163, although the facts are not analogous to those in our case, is persuasive that the determination under section 1020.1 is a final one. There, pursuant to that section, a proceeding was brought to have the probate court approve an assignment made by an heir of her interest in the estate then pending. After a hearing the court approved the assignment. No appeal was made from this order. Nearly a year

later the heir filed a motion to set aside the order approving the assignment. After a hearing the probate court refused to set the order aside. In sustaining that action the reviewing court held that in the absence of evidence of fraud, a party who had had a fair opportunity to present her case at the first hearing could not be permitted to seek relief from the judgment against her, nor to relitigate the matter.

In Stanley's Estate, 34 Cal.2d 311, 209 P.2d 941, the court was considering an appeal from a decree of distribution, distributing the estate in accordance with an agreement between the heirs. It pointed out that prior to the adoption of section 1020.1 the probate court had no jurisdiction to pass upon the validity and effectiveness of an assignment by an heir on an interest in an estate, and then held, 34 Cal.2d at page 319, 209 P.2d at page 945: "The clear implication from the foregoing is that a probate court may determine the validity of an agreement that property shall be distributed in a certain manner. [Citations.]" The appellant contended that even if the probate court had the power to determine the validity of such an agreement, its power was limited to determining the agreement's validity as to that part of the property which is a part of the estate. As to this contention the court said, 34 Cal.2d at page 319, 209 P.2d at page 946: "Where an agreement embraces both property that is a part of the estate and property which is not a part of the estate, especially community property, the probate court has jurisdiction to decide the validity of the entire agreement. It must be remembered that a probate court has jurisdiction to determine rights under contracts ancillary to the exercise of its probate jurisdiction."

[2, 3] The absurdity of defendant's contention is shown by the following illustration. An heir hunter receives, as here, a 40 per cent assignment of an heir's interest in the estate. The probate court determines that such percentage is inequitable and allows 10 per cent or even determines that the contract is wholly inequitable. The heir hunter immediately filed suit on the contract, and attaches the heir's interest in the estate. In the case where the probate court allowed him 10 per cent he receives that portion of the heir's estate by distribution and the other 30 per cent through the attachment. In the case where the probate court holds the entire contract inequitable, the heir hunter, in spite of a judgment to that effect which is appealable, McPherson's Estate, 90 Cal.App.2d 17, 202 P.2d 565, and has become final, nevertheless collects the entire 40 per cent. "* * * confusion, delay and uncertainty" would result, as the court in the Stanley case said, 34 Cal.2d at page 319, 209 P.2d at page 946, from a denial of jurisdiction in a probate court to hear and determine all questions of law and fact, the determination of which is ancillary to a proper judgment of a case which it has power to hear and determine. "'The superior court, while sitting in matters of probate, is the same as it is while sitting in equity, in cases at law, or in a special proceeding * * *.'" 34 Cal.2d at page 319, 209 P.2d at page 946. It was there pointed out that to limit the probate court in determining the validity of the heir's agreement to the property in the estate might result in the ridiculous situation of the probate court determining "the part of the agreement addressed to it as valid, and a superior court might reach a contrary result on the remainder of the contract, or vice versa." 34 Cal.2d at pages 319–320, 209 P.2d at page 946. Likewise a similar situation would result if it could be held that a contract was inequitable in the probate court and equitable in the superior court or vice versa. As said in Raphael's Estate, 103 Cal.App.2d 792, 795, 230 P.2d 436, 438: "Probate Code sec. 1020.1 lays the duty of determining whether 'the fees, charges or consideration paid by any * * * heir * * * is grossly unreasonable' and whether 'any such assignment, transfer (or), agreement * * * was obtained by duress, fraud or undue influence' upon the probate judge * * *."

In Cazaurang's Estate, 75 Cal.App.2d 217, 170 P.2d 694, where the court reduced the percentage provided in the assignment, the court discussed the limited jurisdiction of the probate court prior to the enactment of section 1020.1 and then held that the Legislature had specifically conferred upon the probate court the power to determine the validity of the heir's agreement and to fix and determine the reasonableness of the compensation to be charged by the person acting thereunder.

In Butler's Estate, 29 Cal.2d 644, 177 P.2d 16, 18, 171 A.L.R. 343, the court pointed out that section 1020.1 is not limited to "heir-hunters" agreements. While it quotes from Lund's Estate, supra, 65 Cal.App.2d 151, 150 P.2d 211, to the effect that the section gives the probate court " 'some control, at least for the purpose of distribution, over' " heir hunters' agreements, it nowhere limits that control to purposes of distribution. It stated that the section enlarged the power of the probate court with respect to all assignments and agreements by heirs and that the section expressed a public policy to limit rather than enlarge the rights of the holders of such instruments.

[4] On the general subject of the doctrine of res judicata the following from Easter's Estate, 24 Cal.2d 191, 148 P.2d 601, is applicable. Speaking of the effect of a decree of distribution the court said, 24 Cal. 2d at page 194, 148 P.2d at page 603: " 'It was equally within the jurisdiction of the court, and its duty, to determine * * * what other persons had legal or equitable rights to the distributable property of the estate, and the extent and nature of their interests. Having jurisdiction to determine these matters on distribution, when the decree does so determine them, although the determination may be incorrect, it is conclusive as to the rights of heirs, legatees, and devisees unless corrected on appeal. * * *' "

Constitutionality.

[5–7] Defendant contends that if section 1020.1 is construed so as to make the probate court's action a final adjudication of the rights of the parties to the contract or assignment, then the section would violate both the federal and state Constitutions as impairing contracts and denying trial by jury. Defendant cites no cases that support this contention. We know of no cases holding that the right of a court of equity to inquire into the consideration for a contract, constitutes an impairment of such contract in the constitutional sense. The second contention has been flatly decided against defendant's contention in Cazaurang's Estate, supra, 75 Cal.App.2d 217, 225, 170 P.2d 694, 699: "The constitutional guaranty of a right to trial by jury has no application to cases coming within the equity jurisdiction, and a jury may not be demanded in such cases as a matter of right."

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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123 Cal.App.2d 158

LEVIN
v.
MARTIN C. LEVIN INV. CO., Inc., et al.

Civ. 15451.

District Court of Appeal, First District,
Division 2, California.
Feb. 15, 1954.

Action by shareholder-director-officer of family corporation against other two such shareholder-director-officers for an accounting, for funds alleged to have been wrongfully appropriated, for removal of defendants as corporate officers and directors, for attorney's fees, and for other relief. The Superior Court, City & County of San Francisco, I. L. Harris, J., entered judgment declaring that plaintiff take nothing and that all parties recover their attorney's fees, and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that, where judgment was entered declaring that plaintiff take nothing, award of attorney's fees to plaintiff was improper.

Judgment reversed in part and affirmed in part.

1. Corporations ⚷321

In action by a shareholder-director-officer of family corporation against other two such shareholder-director-officers for an accounting, for funds alleged to have been wrongfully appropriated, for removal of defendants as corporate officers and directors, for attorneys' fees, and for other relief, evidence was sufficient to sustain trial court's finding that rentals paid to corporation by partnership, in which defendants were interested, were not below current and reasonable market value.

2. Corporations ⚷308(1)

Stockholder would be held to have ratified, by acquiescence with full knowledge, acts of corporation in paying salaries to two of the corporate officers. Corporations Code, § 820.

3. Corporations ⚷321

In action by shareholder-director-officer of family corporation against other two such shareholder-director-officers for an accounting, for funds alleged to have been wrongfully appropriated, for removal of defendants as corporate officers and directors, for attorneys' fees, and for other relief, evidence was not sufficient to establish fraudulent or dishonest acts on part of defendants. Corporations Code, § 830.

4. Corporations ⚷393

A court will not inter-meddle in internal affairs of a corporation in absence of fraudulent conduct on part of those entrusted with its management.

5. Corporations ⚷321

Where, in action by shareholder-director-officer of family corporation against other two such shareholder-director-officers for an accounting, for funds alleged to have been wrongfully appropriated, for removal of defendants as corporate officers and directors, for attorneys' fees, and for other relief, judgment declaring that plaintiff take nothing and that all parties recover their attorneys' fees was affirmed except that that portion which awarded plaintiff attorney's fees was reversed, defendants were properly allowed attorney's fees. Corporations Code, § 830.

6. Corporations ⚷321

Where, in action by shareholder-director-officer of family corporation against other two such shareholder-director-officers for an accounting, for funds alleged to have been wrongfully appropriated, for removal of defendants as corporate officers and directors, for attorneys' fees, and for other relief, judgment was entered declaring that plaintiff take nothing, award of attorney's fees to plaintiff was improper. Corporations Code, § 830.

◆

Leon A. Blum, San Francisco, for plaintiff-appellant.

John D. Costello, San Francisco, for Estate of Samuel A. Levin, deceased.

Albert A. Axelrod, San Francisco, for respondents Martin C. Levin Inv. Co., Inc., and Jennie L. Myers.

Stanley Levin, San Francisco, for respondent Joseph Levin.

NOURSE, Presiding Justice.

This is an appeal by plaintiff Samuel A. Levin from a judgment declaring that plaintiff take nothing by reason of his Second Amended Complaint. The judgment also provided that all parties recover their attorney's fees under § 830, Corporations Code.

The Martin C. Levin Investment Co. is a family corporation, which was incorporated in February 1939, to take over certain real property previously owned by Martin C. Levin, deceased brother of Samuel A. Levin, Joseph Levin and Jennie L. Myers. There are 1,000 shares of common stock, of which plaintiff owns 300 shares. Defendants Joseph and Jennie own the remaining 700 shares. Samuel, Joseph and Jennie have been the only directors since the date of incorporation, Joseph being also president, Samuel, vice-president and Jennie, secretary-treasurer. At the time of incorporation the entire Board of Directors voted that Joseph be paid $150 per month salary as president and manager of the corporation, and that Jennie be paid $200 per month as secretary-treasurer for the ensuing year. Plaintiff Samuel Levin attended that meeting and voted for the resolution. Because of strained family relationships Samuel Levin has attended no meetings of the directors or shareholders since April 8, 1944. The by-laws provide that the directors be elected at annual meetings and hold office till the next annual meeting of the shareholders. At every annual meeting the same directors were elected. Samuel attended the meetings of April 8, 1944 and April 9, 1949 by attorney. He did not attend personally or by attorney in the years 1942, 1943, 1945, 1946 or 1947. The last meeting he had personally attended ended in a fist fight.

The minutes of the 1945, 1947 and 1948 meetings of the Board of Directors show that salaries were continued at the same rates. The same salaries were in force at the time of trial.

Defendants Joseph Levin and Jennie Myers and some of their respective children are partners in a scrap iron business known as "Joseph L. Levin & Sons" which has places of business in San Francisco and Los Angeles. This partnership has been renting from defendant corporation and occupying for its own use two of the most valuable corporate properties located at 2225–2255 Third Street, San Francisco, and 2863 E. Slauson Ave., Los Angeles. These properties have been rented on a month to month basis, no written lease ever having been made between the partnership and corporation. Plaintiff Samuel Levin has no financial interest in this partnership.

From 1939 to 1947 the partnership has paid the corporation a monthly rent of $250 for the San Francisco property and $150 for the Los Angeles property. In 1947 Joseph Levin and Jennie L. Myers as directors and officers of the corporation increased the rent of the San Francisco property to $500 per month, and the Los Angeles property to $300. There has been no increase since 1947.

The Second Amended Complaint alleged that the defendants Joseph and Jennie have leased to themselves individually and to members of their families within the firm of Joseph Levin & Sons, valuable real property at rentals below the current and reasonable market value thereof; that they leased to the Sierra Candy Co. property at rental unknown to plaintiff and have appropriated said rentals for their personal use and benefit; that the salaries paid to Joseph and Jennie were and are unreasonable and disproportionate to the work performed by them; that Joseph and Jennie have taken unfair advantage of the fact that they constitute a majority of the Board of Directors and are operating the corporation for their personal benefit disregarding plaintiff's rights; that plaintiff made written demands for an accounting on January 15, 1948 and February 9, 1948, and that defendants have refused to comply with plaintiff's demands. Plaintiff asked judgment (a) requiring an accounting; (b) a money judgment for funds wrongfully appropriated; (c) removal of Joseph and Jennie as officers and directors; (d) attorneys' fees and costs; (e) other and further relief.

Defendants answered, denying generally the allegations of fraud and unfair advantage; alleged the reasonableness of the salaries for the labors performed; alleged that since the incorporation of defendant corporation, it has employed Herbert F. Baker, a certified public accountant, to audit the books and prepare income tax returns; that copies have been furnished to plaintiff when received by the corporation; that the books have been at all times open to plaintiff for inspection; that plaintiff has never made any objection to the reports prepared by Mr. Baker.

Defendants for a second and further defense alleged that prior to 1942, Samuel Levin and defendants Joseph Levin and Jennie Myers, together with Harold T. and Martin Levin, were copartners transacting a scrap metal business in San Francisco and Los Angeles under the firm name of M. Levin & Sons; that during this time they rented from defendant corporation the properties at 2225 Third Street, San Francisco, and 2863 E. Slauson Street, Los Angeles. That during 1942 or immediately prior thereto an action for dissolution of partnership was commenced in San Francisco Superior Court by Joseph, Jennie, and Martin Levin against plaintiff Samuel, and Harold T. Levin as defendants; that after protracted litigation, Samuel Smith was appointed arbitrator to settle said dispute and was given certain powers by the court and by stipulation of the parties; that it was provided that the rentals were to continue at the same rates unless said Samuel Smith should determine that they were too low, in which event he had the right to fix the rentals; that said Samuel Smith determined that the rentals were not out of line with the value of said properties and recommended that they be continued at the rates then being paid. The court in February 1943 entered a decree approving Smith's report, and said decree has become final. A third defense pleaded that the action was barred by Section 343, C. C .P.

Following the trial the court found for defendants on all issues, but in the Findings in Paragraph IX stated that "the court makes no finding with respect to paragraph VII of the Second Separate and Further Defense to plaintiff's Second Amended Complaint." Paragraph VII alleged that $500 for the San Francisco property and $300 for the Los Angeles property were reasonable rentals. Plaintiff moved for a new trial and at the hearing the court set aside its previous judgment and restored the case for further hearing. Further evidence was taken with reference to rental value of the properties. The court then entered judgment again finding substantially on all issues for defendants, but found that as of January 1, 1952, the reasonable rental of the San Francisco property is $750 per month and $500 per month for the Los Angeles property under a three year lease; and that if defendants continue to occupy said property they should pay the aforesaid rentals.

[1] Appellant contends that determination of rental values was an important issue in the case, and that the finding that the rentals paid by the partnership to the corporation were not below the current and reasonable market value is not supported by the evidence. Appellant cites various portions of experts' testimony in support of this charge, while respondent cites other portions of the experts' testimony to show that the finding is amply supported. The issue was fully and fairly tried and the court's finding is supported by substantial and competent evidence.

Appellant contends that the salaries were not properly authorized, citing language from cases to the effect that directors cannot vote salaries to themselves, nor can they vote a salary to one of their members as president where he takes part in the proceedings or his vote is essential to the adoption of the resolution. Wickersham v. Crittenden, 93 Cal. 17, 32, 28 P. 788; Angelus Securities Corp. v. Ball, 20 Cal. App.2d 423, 432, 67 P.2d 152; Pece v. Tama Trading Co., 22 Cal.App.2d 219, 70 P.2d 652. It is also contended that the salaries were unreasonable, since there was testimony that the reasonable charge by realtors for performing the services here performed by the officers would have been 3% of the gross rent receipts, and that totals considerably less than the salaries paid annually.

[2] Respondents cite excerpts from plaintiff's own testimony where he stated at the trial that he never had made any objection to the continued payment of the salaries, and that he was not then making any objection. Joseph Levin as president managed in addition to the San Francisco and Los Angeles parcels mentioned heretofore, 15 other parcels of real property in San Francisco, collected the rents, attended to repairs, attended to the payment of taxes and insurance. Jennie Myers testified in detail as to her duties as secretary-treasurer, payment of all corporation bills, writing up of the minutes and attendance at meetings. However, as a stockholder, plaintiff must be held to have ratified the acts of the corporation by acquiescence with full knowledge, West Side Irrigation Co. v. United States, 9 Cir., 246 F. 212, 219; 2 Fletcher Cyc. of Corp., Perm. Ed. 802, Sec. 764, and this precludes his complaint at this time.

Respondents further point out that the decisions cited above by appellant have been in effect overruled by the present provisions of Section 820 of the Corporations Code. That section now provides that no contract or transaction between the corporation and one or more of its directors is void or voidable where his vote is counted if (a) the fact is known and noted in the minutes, and the board ratifies the action without counting the vote of such director; or (b) the fact is disclosed and the majority of shareholders approve; or (c) the contract or transaction is just and reasonable as to the corporation at the time it is authorized or approved. See Caminetti

v. Prudence Mutual Life Ins. Association, 62 Cal.App.2d 945, 146 P.2d 15.

Appellant contends that the judgment should have ordered the removal of the directors Joseph and Jennie for gross abuse of discretion in renting property at unreasonable rents, voting salaries to themselves contrary to law, etc. This argument is based on the assumption that all these matters have been established by the evidence against the directors, whereas in fact the court has found in favor of the directors on these matters.

[3, 4] Respondents correctly maintain that there is no evidence to establish fraudulent or dishonest acts of the directors, and cite authority to the effect that a court will not inter-meddle in the internal affairs of a corporation in the absence of fraudulent conduct on the part of those entrusted with its management. Wall v. Board of Regents of University of California, 38 Cal.App.2d 698, 699, 102 P.2d 533; Briggs v. Scripps, 13 Cal.App.2d 43, 45, 56 P.2d 277; 19 C.J.S., Corporations, § 984, page 447; Brainard v. De La Montanya, 18 Cal.2d 502, 509, 116 P.2d 66.

[5] Finally, appellant protests the allowance of counsel fees to Joseph and Jennie against the corporation contending that under section 830, Corporations Code, they have not fulfilled the conditions (1) of being successful in whole or in part, and (2) the court finds that their conduct equitably and fairly merits such indemnity.

[6] There is a cross-appeal by one of the respondents, the Martin C. Levin Investment Co., Inc., from that part of the judgment awarding counsel fees to the attorney for plaintiff Samuel Levin. Cross-appellant contends that section 830, Corporations Code, does not provide for attorney's fees in all circumstances, and that an unsuccessful litigant is never entitled to attorney's fees against the successful party. Corporations Code, section 830, allows indemnity for an individual director's reasonable expenses including attorney's fees if both of the following conditions exist: (1) The person sued is successful in whole or in part or the proceeding against him is settled with the approval of the court. (2) The court finds that his conduct fairly and equitably merits such indemnity. There is nothing in the section about "when a person sues." Cross-appellant has been able to find no authority interpreting this section. But irrespective of the provisions of that section, there is no authority to award counsel fees to an unsuccessful litigant. McArthur v. John McArthur Co., 39 Cal.App. 704, 179 P. 700; Murphy v. F. D. Cornell Co., 110 Cal.App. 452, 454, 294 P. 490. Plaintiff concedes this in his closing brief.

The portion of the judgment awarding plaintiff and appellant attorney's fees is reversed. Otherwise the judgment is affirmed.

DOOLING and KAUFMAN, JJ., concur.

123 Cal.App.2d 193

MARCHESE BROS.

v.

A. LYON & SONS et al.

Civ. 15710.

District Court of Appeal, First District, Division 1, California.

Feb. 16, 1954.

Action by plaintiff for breach of an express warranty by defendants in connection with sale of brandy. The Superior Court, in and for the County of Santa Clara, denied defendants' motion for change of venue, and defendants appealed. The District Court of Appeal, Peters, P. J., held that when salesman solicited orders from plaintiff in county of its residence, and plaintiff made counter suggestion that warranty be made by sellers, and sellers accepted counter offer in county of their residence, contract was made in county of residence of sellers, and venue therein was proper instead of in county of plaintiff's residence wherein contract was neither made nor to be performed.

Order reversed.

1. Venue ⚷7

Action by corporate plaintiff which had purchased brandy from defendants subject to an express warranty, claiming that the brandy was not as warranted, offering to return quantity on hand and demanding return of purchase price, plus expenses incurred, was basically one for breach of an express written warranty, with rescission and restitution being but the remedies sought for the claimed breach thereof, and thus the contract provisions of venue statute were applicable. Code Civ.Proc. § 395(1).

2. Venue ⚷72

Where facts set forth in affidavits in support and in opposition to motion for change of venue in action for breach of express warranty were not in conflict, question as to where the contract was entered into became one of law and not of fact. Code Civ.Proc. § 395(1).

3. Pleading ⚷8(9)

Allegations of complaint that a contract was entered into and was to be performed in certain county were conclusions of law and were not binding on the trial or Appellate Courts.

4. Venue ⚷7

Where brandy salesman solicited orders from plaintiff in county of its residence, and plaintiff made counteroffer to buy on condition that seller make certain warranty, and counteroffer was submitted and accepted by sellers in county of their residence, as indicated by making of invoices containing the express warranty and terms of sale, and other documents, contract would be deemed to have been made in county of residence of sellers, where last event necessary to make it a binding agreement occurred, and venue of action for breach of express warranty contained therein was in county of residence of seller. Code Civ.Proc. § 395(1).

5. Contracts ⚷145

Where contract is not made in the presence of the contracting parties, the contract is generally deemed made where the last event necessary to make a binding agreement occurred, which normally is the place where the unconditional acceptance of the offer is made or placed in the mail.

6. Venue ⚷52½

Where plaintiff did not reside in either the county where contract containing express warranty was made, or county wherein it was allegedly to be performed, it could not successfully resist motion of defendants for change of venue to county of their residence wherein contract was made by contending that it was to be performed in another county. Code Civ.Proc. § 395(1).

Curtis H. Palmer, Los Angeles, J. Albert Hutchinson, San Francisco, for appellants.

Gallagher, Ruffo & Rainville, Albert J. Ruffo, San Jose, for respondent.

PETERS, Presiding Justice.

Plaintiff is a corporation with its principal place of business in Santa Clara County. Defendants are a partnership with their principal place of business in Los Angeles. Two of the partners, A. Lyon and William Lyon, reside in Los Angeles, the third, Leon Lyon, resides in Kentucky. Plaintiff purchased 100 barrels of brandy from defendants subject to an express warranty. After the merchandise had been delivered and the purchase price paid, plaintiff brought this action in Santa Clara County, claiming that the brandy was not as warranted, offering to return the quantity still on hand and demanding the return of the purchase price of the quantity still on hand, plus expenses incurred. Defendants moved for a change of venue to Los Angeles County on the ground of residence and on the ground that the contract was made in that county. The motion was denied. Defendants appeal.

The pertinent facts are set forth in the complaint and affidavits filed on the motion. The facts are not in dispute. On May 16th and 24th, 1951, appellants sold two lots of imported brandy to respondent. Each of the invoices for these two shipments, which were sent from appellants' Los Angeles office to respondent in San Jose, contained an express warranty to the effect that "This merchandise is guaranteed to have Federal ATU [Alcohol Tax Unit] approval as 20 year Old Brandy and pass all Food and Drug Administration regulations." The complaint alleges that when the brandy was received it carried the necessary federal approval of its sale as twenty-year-old brandy but that, about April 15, 1952, the Alcohol Tax Unit rescinded this approval, because, according to the information and belief of respondent, such agency found that the brandy was not twenty-year-old brandy. Respondent thereupon served on appellants a notice of rescission, offering to restore to them the balance of the brandy still on hand, and demanding the return of the purchase price of that amount of the brandy. Thereafter, this action was brought in Santa Clara County.

The affidavit of A. Lyon, one of the appellants, avers that after the brandy was imported by appellants, they authorized one Philip Marshall to solicit orders for it on a commission basis; that about May 16, 1951, Marshall called at the Los Angeles office of appellants and stated that he had an order from respondent for fifty barrels of the brandy, on condition that appellants would make the express warranty above quoted; that appellants agreed to make the warranty and accepted the order in Los Angeles county; that appellants then issued an invoice and mailed it, with a sight draft attached, to respondent in San Jose. The second sale of fifty barrels on May 24, 1951, is averred to have occurred under similar circumstances.

The affidavit of Philip Marshall avers that he is a licensed broker of alcoholic beverages in Los Angeles; that on May 16th and 24th, 1951, respectively, he received in the mail on behalf of respondent, he believes from one Ernest Baer of San Francisco, two orders, directed to appellants, for the brandy, which orders stated that they were made on condition that appellants would make the warranty above quoted; that he presented the orders to appellants at their Los Angeles office; that appellants then agreed to sell the brandy subject to that express warranty; that he received a commission on the two sales, which he divided with Baer.

The affidavit of Norman Hanak, an office employee of appellants who was present during the negotiations with Marshall over the warranty, corroborates Lyon and Marshall, and, in addition, avers that the brandy at the time of the two sales was stored in San Francisco; that the terms of the orders were the billing of warehouse receipts with sight drafts attached directed to respondent's bank in San Jose; that after the invoices and sight drafts were drawn up they were taken by appellants to a Los Angeles bank with instructions to mail them to respondent's bank in San Jose.

A counter-affidavit was filed by Paul Marchese, president of respondent. He avers that he was contacted in San Jose by Ernest Baer; that Baer, on behalf of appellants, offered to sell the twenty-year-old brandy; that he made two purchases through Baer, each sale carrying the express warranty; that the merchandise was delivered to respondent in San Francisco and payment was made pursuant to the agreement by sight draft at respondent's bank in San Jose. This affiant avers that his sole contact in the deal was with Ernest Baer; that he never dealt with Marshall; that all matters relating to the two purchases occurred in Santa Clara County; that respondent's obligation to pay arose and was to be performed in Santa Clara County.

Thus, the factual situation is simply one where Baer contacted respondent in San Jose and secured orders for the brandy on condition appellants would make the express warranties above quoted. Baer forwarded the orders to Marshall in Los Angeles. Marshall brought the orders to appellants in Los Angeles. In Los Angeles appellants accepted the orders after agreeing to make the warranties. Invoices and sight drafts were then prepared in Los Angeles and mailed in Los Angeles by a Los Angeles bank to respondent's bank in San Jose, where they were paid. The merchandise was delivered in San Francisco.

It is respondent's theory that Santa Clara County is a proper county for the trial of the action either because, under section 395(1) of the Code of Civil Procedure, appellants contracted to perform an obligation in that county, or the contracts were there entered into. Appellants dispute both contentions, urging that under the facts they are entitled to have the action tried in Los Angeles County.

Both sides agree that section 395(1) of the Code of Civil Procedure is the controlling section. It provides: "In all other cases, except as in this section otherwise provided, and subject to the power of the court to transfer actions or proceedings as provided in this title, the county in which the defendants, or some of them, reside at the commencement of the action, is the proper county for the trial of the action. * * * When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary. * * *"

Thus, the section lays down the following general rules for the venue of actions falling within its provisions:

1. The general rule is that actions shall be tried in the county where the defendant or some of them reside at the commencement of the action;

2. But where the action is based upon a contract whereby the *defendant has contracted to perform an obligation in a particular county*, then such action may be tried in (a) the county where the obligation is to be performed; (b) the county where the contract was entered into; (c) the county of defendant's residence. In determining where a contract is to be performed, in the absence of a special contract in writing to the contrary, the county where the obligation was incurred shall be deemed to be the county where it is to be performed.

[1] Although appellants contend that the instant case is one in implied or *quasi* contract for rescission or restitution and is therefore transitory, we think that the action is basically one for breach of an express written warranty. No promise implied in law is involved. The rescission and restitution pleaded are but the remedies sought for the claimed breach of the express contract. It is clear, therefore, that the contract provisions of the section are here applicable.

Under these provisions it must be determined whether the contract was entered into in Santa Clara County, and, if not, whether there was a special contract on the part of appellants to perform in that county.

[2, 3] It is quite clear that the contract was not entered into in Santa Clara County. The facts as set forth in the affidavits are not in conflict. The question as to where the contract was entered into thus becomes one of law and not of fact. While the complaint alleges that the contract was entered into and was to be performed in Santa Clara County, such allegations are conclusions of law and are not binding on the trial or appellate courts. Erwin v. Cee-Tee Construction Co., 114 Cal.App.2d 364, 369, 250 P.2d 287; Wilson v. Hoffman, 81 Cal.App.2d 664, 666, 184 P.2d 951.

[4, 5] The uncontradicted facts show, as a matter of law, that the contract was entered into in Los Angeles. Baer solicited orders for the brandy from respondent in San Jose. If it be assumed that Baer possessed the power to accept orders that would be binding on appellants (a fact which does not appear), no such acceptance was made by him. Respondent made a counter-suggestion—we will buy so many barrels, but only on condition that the seller will agree to make the requested warranty. This was obviously at least a counter-offer, if not the original offer. Baer sent this counter-suggestion to Marshall in Los Angeles. Marshall, in Los Angeles, submitted it to appellants, who, in Los Angeles, accepted it. This acceptance

was indicated not only by what was said to Marshall, but by the invoices, containing the express warranty and the terms of the sale, and the other documents, all executed in Los Angeles and mailed in that city. In cases where contracts are not made in the presence of the contracting parties, the contract is generally deemed made where the "last event" necessary to make it a binding agreement occurs. That, normally, is where the unconditional acceptance of the offer is made or placed in the mail. Johnson v. Banta, 87 Cal.App.2d 907, 198 P.2d 100; Ivey v. Kern County Land Co., 115 Cal. 196, 46 P. 926. It must be held that the contract here involved was entered into in Los Angeles.

Nor was there any special contract in writing that appellants should perform any part of their obligation in Santa Clara County. The contract was entered into in Los Angeles, and the merchandise was delivered in San Francisco. The most that can be spelled out of the admitted facts is that respondent—the plaintiff in the action—was to perform, by paying the sight drafts, in Santa Clara County. But section 395(1) does not apply to the obligations of the plaintiff. It provides that "When a defendant [the appellants here] has contracted to perform an obligation in a particular county" such county may be the venue for an action for breach of that contract. No such obligation was here incurred by appellants.

[6] Appellants contend that even the provision requiring them to deliver the brandy "F. O. B." San Francisco does not constitute a special contract to perform in that county. Something can be said for this position. Johnson v. Banta, 87 Cal.App.2d 907, 198 P.2d 100; Southern Pac. Co. v. Hyman-Michaels Co., 63 Cal.App.2d 757, 147 P.2d 692. But even if appellants did contract to perform part of their obligations in San Francisco, a point we do not have to decide, the result would be that San Francisco would, under section 395(1), become *a* county for the trial of the action, not *the only* county for said trial. Los Angeles, as either the county of appellants' residence or the county where the contract was made, is also, under the section, a proper county for the trial. But Santa Clara County cannot qualify at all as *a* county in which the action may be tried. For these reasons the motion for change of venue to Los Angeles County should have been granted.

The order appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.

123 Cal.App.2d 165

HANSEN et al. v. WARING, Auditor.

Civ. 15556.

District Court of Appeal, First District, Division 2, California.

Feb. 15, 1954.

Hearing Denied April 14, 1954.

Mandamus action involving question as to amount of compensation of deputy clerks of municipal court who had previously served in similar positions in justice's court at salaries higher than the minimum authorized for their positions in the municipal court. The Superior Court, County of Alameda, O. D. Hamlin, J., entered judgment from which the clerks appealed. The District Court of Appeal, First Appellate Division, Dooling, J., held that since clerks of justice's court were earning $275 per month and had less than one year's service at time such court was superseded by municipal court under statute providing that one deputy clerk should receive minimum salary of $250 monthly and other deputy clerks should receive minimum salary of $225 monthly, with annual increments until stipulated maximum was reached, deputy clerks were entitled only to the minimum salaries provided for clerks of municipal court, notwithstanding statute providing that officers of superseded court should receive similar compensation in new positions and should be entitled to all benefits and privileges which they enjoyed by virtue of their positions in the superseded court.

Affirmed.

1. Clerks of Courts ⟹33

Where deputy clerks of justice's court were earning $275 per month and had less than one year's service at time such court was superseded by municipal court under statute providing that one deputy clerk should receive minimum salary of $250 monthly and other deputy clerks should receive minimum salary of $225 monthly, with annual increments until stipulated maximum was reached, deputy clerks were entitled only to the minimum salaries provided for clerks of municipal court, notwithstanding statute providing that officers of superseded court should receive similar compensation in new positions and should be entitled to all benefits and privileges which they enjoyed by virtue of their positions in the superseded court. St.1949, p. 2681; St.1951, p. 3916.

2. Clerks of Courts ⟹2

Where Legislature, in providing for superseding of justice's court by municipal court, fixed lower salaries scale for deputy clerks of municipal courts than those fixed for justice's court, the assignment of clerks of superseded justice's court to similar position in municipal court at the lower salary was a compliance with Municipal and Justice Court Act provision requiring that employees of superseded courts be assigned "as far as practical" to positions similar in duties and compensation. St.1949, p. 2681.

See publication Words and Phrases, for other judicial constructions and definitions of "As Far As Practical".

Oswald G. Ingold, Henry Poppic, Berkeley, for appellants.

J. F. Coakley, Dist. Atty., County of Alameda, R. Robert Hunter, Asst. Dist. Atty., Oakland, John P. Sparrow, Deputy Dist. Atty., San Francisco, for respondent.

DOOLING, Justice.

This case is presented on an agreed statement on appeal and the only question is one of statutory construction.

Appellant Seyman was appointed a deputy clerk of the Berkeley Justice's Court on September 13, 1951; appellant Hubbs received a like appointment on September 24, 1951; and appellant Hansen was appointed to a like position on December 16, 1951. On January 1, 1952 the Berkeley Justice's Court was superseded by the Municipal Court for the Berkeley-Albany Judicial District. At the time the Berkeley Justice's Court was so superseded each appellant was receiving a salary of $275 per month.

By Chapter 1704, Statutes of 1951, p. 3916, the legislature provided, so far as material here:

> "Section 1. The municipal court established in a district embracing the Cities of Berkeley and Albany shall be constituted, and the judges, officers and attaches thereof shall receive compensation, as follows:
>
> * * * * * *
>
> "(2) There shall be one clerk * * who may appoint the following:
>
> * * * * * *
>
> "One deputy clerk, who shall receive a minimum salary of two hundred fifty dollars ($250) monthly with annual increments of ten dollars ($10) to a maximum of three hundred dollars ($300) monthly;
>
> "Four deputy clerks, each of whom shall receive a minimum salary of two hundred twenty-five dollars ($225) monthly with annual increments of ten dollars ($10) to a maximum of two hundred seventy-five dollars ($275) monthly;
>
> "(3) Persons who succeed to positions in the municipal court under provisions of the Municipal and Justice Court Act of 1949 shall receive credit for continuous prior service in superseded courts and shall receive, in addition to the minimum rate, the annual increments commensurate with such years of prior service up to the maximum rate set."

Appellant Seyman was appointed to the position of deputy clerk of the new Municipal Court carrying the minimum salary of $250 per month and the other appellants to two of the four such positions carrying a minimum salary of $225 per month. Since none of them had a year's service in the superseded court, each was paid only the minimum salary. They sought a writ of mandate to compel the payment to each of them of $275 per month, the salary that they had been receiving in the superseded Justice's Court. Judgment went against them.

Appellants rely on sections 4 and 5 of the Municipal and Justice Court Act of 1949, Stats.1949, p. 2681. These sections, so far as pertinent read:

> "Sec. 4. The clerk, or chief clerical officer by whatever name known, his deputies and other attaches in his office, the marshal or constable, or similar official, his deputies and attaches, and all other officers or employees of each court superseded in whole or in part by a municipal or justice court, shall become the clerk, his deputies and attaches, the marshal or constable, his deputies and attaches, and officers or employees of such municipal or justice court upon its organization, so far as such positions are provided by law.
>
> "All such persons shall be deemed to be appointed upon the organization of the court and to have met all of the requirements for appointment to permanent positions as hereinafter provided * * *.
>
> "Sec. 5. * * *
>
> "Upon the organization of the court, the clerks, deputies and attaches or employees of the superseded court or courts shall be assigned, as far as practical, to positions in the municipal or justice court similar in duties and compensation to the positions held in any such superseded court. Every person who succeeds to any office or position in the municipal or justice court by virtue of any of the provisions of this act shall be entitled to all of the benefits and privileges, not inconsistent herewith, which attached to such person by virtue of his office or position in any superseded court."

Appellants point out that by these sections the legislature has provided that the deputy clerks of the superseded court shall become the deputies of the new municipal court "so far as such positions are provided by law", and "shall be assigned, as far as practical, to positions * * * similar in duties and compensation to the positions held in any such superseded court" and "shall be entitled to all of the benefits and privileges, not inconsistent herewith, which attached" to them "by virtue of (their) office(s) or position(s) in (the) superseded court."

From this they argue that since the salary provisions of Ch. 1704, Stats. of 1951, above quoted set minimum and maximum salary limits, and the salaries that they previously received are within those limits the two statutes should be construed together to entitle them to receive $275 per month. This argument would have more force if Ch. 1704 only set minimum and maximum limits. It however goes much further. It provides very definitely that the employee shall start at the minimum salary and receive thereafter annual increases of $10 per month until the maximum is reached, and as to employees from superseded courts it provides that they shall receive credit for continuous prior service "and shall receive, in addition to the minimum rate, the annual increments commensurate with such years of prior service".

[1] It seems perfectly clear that the legislature intended the minimum to be the starting salary, unless the employee had one or more years prior service in the superseded office.

It is also noteworthy that the Municipal and Justice Court Act of 1949 relied on by appellants provides that employees of superseded courts "shall be assigned, *as far as practical,* to positions * * * *similar* in duties and compensation * * *."

[2] Where the legislature has, as here, fixed a lower salary scale for the new positions the assignment of appellants to those positions is "as far as practical" a compliance with this provision. Nor does "similar" necessarily mean "identical". It is defined in Webster's New International Dictionary, 2d Ed.: "Nearly corresponding; resembling in many respects; somewhat like; having a general likeness."

Handlon v. Wolff, 72 Cal.App.2d 53, at page 58, 164 P.2d 46, at page 49, construed a charter provision differing in language from the statutes in question here, but even so it held that a more stringent "blanketing in" provision might be satisfied by "a similar position in kind and degree—one that in salary, authority, duties, etc. is *reasonably comparable* to the employee's former position." (Emphasis ours.)

Judgment affirmed.

NOURSE, P. J., and O'DONNELL, J. pro tem., concur.

123 Cal.App.2d 184

PEOPLE v. WALTERS.

Cr. 5148.

District Court of Appeal, Second District, Division 1, California.

Feb. 15, 1954.

Petition asking District Court of Appeal to fix bail on appeal. The Court held that since petitioner was convicted of theft of vehicle and while on probation another information was filed charging him with forgery of fictitious name, and separate judgment was entered upon his guilty plea, there were two separate proceedings, and in view of fact that no appeal was taken from first judgment of conviction, the Court was without power to fix bail or to order release of defendant, whose probation had been revoked, pending appeal from second judgment of conviction.

Petition denied.

Bail 🔑44

Where petitioner was convicted of theft of vehicle and while on probation another information was filed charging him with forgery of fictitious name, and separate judgment was entered upon his guilty plea, there were two separate proceedings, and in view of fact that no appeal was taken from first judgment of conviction, District Court of Appeal was without power to fix bail or to order release of defendant, whose probation had been revoked, pending appeal from second judgment of conviction. Vehicle Code, § 503.

Lowell Lyons, Los Angeles, for appellant-petitioner.

No appearance by respondent.

PER CURIAM.

This is a petition asking this court to fix bail on appeal. It appears that on or about July 9, 1952, appellant herein was convicted in the Superior Court of the County of Los Angeles of violation of section 503 of the Vehicle Code, a felony. Proceedings were suspended and the accused was placed on probation.

While appellant was on probation in the above-mentioned proceeding, the District Attorney of Los Angeles County, on October 7, 1953, filed another information against appellant, containing three counts, in each of which he was accused of the crime of forgery of fictitious name, a felony. To this information appellant pleaded guilty as to count I thereof and not guilty as to counts II and III. Judgment was pronounced on count I by which appellant was sentenced to the state prison. Counts II and III were dismissed.

At the time the last-mentioned judgment was pronounced, the court revoked the probation in the case first above mentioned and sentenced appellant to state prison, the sentences to run concurrently.

Appellant filed a timely notice of appeal "from the judgment rendered in the above entitled case" (the one wherein he was charged with forgery of fictitious name) "on the 18th day of November, 1953." Bail on appeal was fixed by the superior court in the sum of $5,000. The petition alleges that a good and sufficient bond in said amount was tendered, but "clerk of said court has refused to release the defendant and accept the bond because of revocation of probation" in the first above-mentioned action.

No appeal was taken from the judgment pronounced in the first case. Appellant contends, however, that "the proceedings in the appealed case and the termination of the probation in said action 149810 were all substantially one proceeding * * *."

With this contention we cannot agree. Two separate judgments were pronounced and an appeal taken from only one of them. Since no appeal was taken from the judgment rendered in the first above-named case, this court is without power to fix bail or to order the release of appellant.

The petition is denied.

123 Cal.App.2d 219

PEOPLE v. JEFFERSON.

Cr. 792.

District Court of Appeal, Fourth District, California.

Feb. 16, 1954.

Defendant was convicted of assault with deadly weapon, and from judgment rendered by the Superior Court, San Diego County, L. N. Turrentine, J., she appealed. The District Court of Appeal, Barnard, P. J., held that where evidence tended to show that defendant had assaulted police officer who was trying to disarm her, and, after retiring to her house and within 15 minutes, had assaulted him again with pocket knife, failure to require prosecution to elect offense upon which charge should be grounded was not error, especially where record did not disclose that defendant had requested prosecution to elect.

Judgment affirmed.

1. Criminal Law 🔑678(1)

Where defendant, whom police officer was trying to disarm, allegedly assaulted officer with knife once in her yard and again, with another knife, after retiring into her house, alleged offenses were not separate and distinct but were in course of continuous effort to disarm defendant, and prosecution was not required to elect act upon which charge of assault with deadly weapon would be based. Rules on Appeal, rule 36(b).

2. Criminal Law 🔑678(1)

Prosecution is not required to elect which of several acts shall be ground for crime alleged where such acts form part of same transaction, and, as a whole, constitute but one and same offense.

Duke & Buttermore, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Dep. Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the crime of assault with a deadly weapon, it being charged that on a certain day she committed such an assault upon the person of one G. Mehegan. A jury found her guilty as charged, and she has appealed from the judgment which followed.

A quarrel occurred between the defendant and her husband about 2 p. m. on February 27, 1953. In response to a radio call several officers arrived and found the defendant standing in the yard of her home, and her husband out in the street. She had a butcher knife in her hand and told one of the officers that he would have to use his gun to get the knife. While she was standing near the doorway of her home, and the officers were standing in a semicircle trying "to talk her out of the knife," she started swinging the knife at the group. One slash of the knife was so close that Officer Mehegan threw his arm up and the knife cut his sleeve. Mehegan put his hand on his gun and defendant's husband pinioned his arms. Another officer took the husband to the police car, and just then a police sergeant arrived. After being told what had happened the sergeant asked the defendant to give him the knife. The sergeant then told Mehegan to get his night stick from the car and try to knock the knife from the defendant's hand when he, the sergeant, succeeded in diverting her attention. The sergeant then accused the defendant of not being married and asked to see her marriage license. She immediately offered to show the license, and went into the house to get it, followed by some of the officers. She laid the butcher knife down on a dresser, and the sergeant grabbed it. When the defendant saw this she said: "I have got another knife". She then took a pocket knife from her purse and began slashing at the other officers. Just then, Mehegan returned with the night stick, and as he entered the room he found the other officers dodging around the furniture in the crowded room, and the defendant slashing at them. Mehegan struck her with the stick and she struck him with the knife, cutting his hand. A struggle then ensued during which the defendant dropped the pocket knife. She was then handcuffed and taken to the station.

Appellant's sole contention is that it was "substantial error for the trial court to deny appellant's demand for an election." It is argued that where the evidence shows the commission of two offenses, either of which would sustain the charge in the information, and the evidence is not clear as to which of the offenses is relied on for conviction, the defendant may demand that the People make such an election unless the jury is in some other manner informed as to which offense is relied on; that the evidence here showed one such offense with a butcher knife, and another and different offense with a pocket knife; that appellant's evidence tended to show, as to the assault outside the house, that if she struck Mehegan with the knife at all, she did it in self defense; that with respect to the second assault within the house, she testified that she did not open the pocket knife; that some of the jurors may have believed that she was guilty of an assault with the butcher knife, while others may have believed that she was guilty of an assault with the pocket knife; and that prejudice appears under the rule laid down in People v. Ruiz, 48 Cal. App. 693, 192 P. 327.

It may first be noted that it does not clearly appear that any such demand for an election was made. The only thing that appears in the record is a petition to supplement the record, filed by the appellant's counsel, in which it is stated that after the completion of the People's evidence appellant's attorney appeared with the district attorney in chambers and moved for an order compelling such an election, which motion was denied by the court. The minutes of the court show nothing in that connection and, apparently, there was no reporter present. No effort appears to have been made to obtain a record of what occurred on that occasion, in accordance with Rule 36(b) of the Rules on Appeal.

[1, 2] In any event, the rule relied on by the appellant "has no application where a series of acts form part of one and the same transaction, and as a whole constitute but one and the same offense," as stated in People v. Simon, 21 Cal.App. 88, 131 P. 102. This whole episode consumed from 10 to 15 minutes, most of which time was taken up in talking outside the house in an effort by the officers to induce the appellant to give up the knife. Both of the matters relied on as being separate and distinct offenses, occurred in the course of a continuous effort on the part of the officers to disarm the appellant. They were a part of the same incident, and they could not reasonably be held to constitute two separate offenses, each complete in itself, and each of which would require a separate charge and a separate trial. Within a moment or two after the cutting of Mehegan's coat these parties went into the house, the officer grabbed the knife when it was laid down, and the appellant immediately got the other knife and began slashing at the officers. Within a few seconds she was overpowered and dropped the knife. Under these circumstances neither error nor prejudice appears in not compelling the prosecution to elect as to which part of the attack it relied on. This case falls within the principles set forth in People v. Simon, 21 Cal. App. 88, 131 P. 102, rather than those announced in the Ruiz case.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

123 Cal.App.2d 353

PEOPLE v. COOPER.

Cr. 5071.

District Court of Appeal, Second District, Division 2, California.

Feb. 18, 1954.

Hearing Denied March 17, 1954.

Defendant was convicted of exciting lust of child under age of 14. The Superior Court, Los Angeles County, Charles W. Fricke, J., entered judgment, and defendant appealed. The District Court of Appeal, Moore, P. J., held that denial of defendant's motion for permission to withdraw plea of guilty rested in sound discretion of the court.

Judgment affirmed.

1. Criminal Law ⚷274

Denial of defendant's request to change his plea of "guilty" to "not guilty" rested in sound discretion of trial court. Pen. Code, § 1018.

2. Criminal Law ⚷274

Where prosecution for exciting lust of child under age of 14 had been pending for over a year after defendant had pleaded guilty under guidance of his own attorney and idea of reopening case for contest was not suggested until application for probation had been denied, showing was not made by defendant which would have justified a reopening. Pen.Code, § 288.

3. Criminal Law ⚷273

Plea of guilty is an admission of every element of offense charged and constitutes a conclusive admission of defendant's guilt.

4. Criminal Law ⚷274

While plea of guilty may be withdrawn by reason of the mistake, ignorance, inadvertence, or any factor that overcame defendant's exercise of free judgment, basis of motion for such relief must be established by clear and convincing evidence. Pen.Code, § 1018.

5. Criminal Law ⚷31

Despite his weakness at time of his crime, a culprit is liable for his act.

6. Criminal Law ⚷273

Defendant's sexual psychopathy does not mean that he did not have an understanding of the nature of his act or of significance of his pleading guilty to it or of consequences of his change of plea from not guilty to guilty.

7. Criminal Law ⚷982

Where defendant had pleaded guilty to exciting lust of child under age of 14 and had been diagnosed as a sexual psychopath, trial court did not abuse its discretion in denying him probation. Pen.Code, § 288.

8. Criminal Law ⚷982

Grant of probation is an act of grace and clemency and is properly denied where conduct of convict is such that it indicates a depravity that requires exercise of restraint and discipline as means of improving such offender.

9. Criminal Law ⚷982

No one, after repeatedly violating the common precepts and practices of decency and of ordinary morality is, after apprehension, entitled to be turned loose to prey upon the society that sustains his body with bread and his heart with human fellowship, but such person must first satisfy the state that he deserves to be restored to his natural freedom.

10. Criminal Law ⚷982

Claim that prisoner convicted of vicious crime should be restored to full liberty because he is diseased has no foundation in the law.

11. Criminal Law ⚷982, 1147

Granting of probation is vested in sound discretion of the court which will not be disturbed except upon convincing proof that it has been abused.

◆

Lowell Lyons, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James D. Loebl, Deputy Atty. Gen., Ojai, for respondent.

MOORE, Presiding Justice.

Appellant was accused in six counts of having violated section 288 of the Penal Code. Three of the offenses occurred in July 1951; three in the following August. He was arraigned on September 18th, pleaded not guilty, and his trial was set for October 23. On the latter date he appeared with his counsel, and with leave of the court withdrew his plea of not guilty and pleaded "guilty as charged in Count 6." Before accepting such plea, however, the court closely examined him as to whether his change of plea was his own act; whether he so pleaded voluntarily; whether any one had held out a promise of a lesser sentence or any other advantage for pleading guilty. As to such inquiries, appellant assured the court that he was pleading guilty because he was guilty. The hearing on his application for probation was set for November 8, and his counsel was then directed promptly to file the preliminary transcript with the probation officer. Also, a hearing as to the matter of his sexual psychopathy was set for November 15 and two physicians were appointed to examine the accused, and the disposition of the other five counts went over to a later date. Both doctors found appellant to be a sexual psychopath and no evidence having been submitted on behalf of the prisoner, on November 15 the court found in accordance with the expert testimony and committed the accused to the State Hospital at Norwalk for an indeterminate period not exceeding 90 days.

On February 21, 1952, appellant was returned by the hospital with a diagnosis as a sexual psychopath and was then, on the findings of the same two physicians, recommitted. He was returned on May 1, 1953, with the superintendent's certification that the patient was no longer a menace to the health and safety of others and had received the maximum benefit of hospitalization, and the court set the date for the hearing on application for probation. After reviewing the judicial events pertaining to appellant from the time of his arraignment, the court denied probation, and after hearing the argument of appellant's counsel, sentenced appellant to the State Prison for the term prescribed by law, and dismissed the other counts. Prior to pronouncement of sentence, appellant's counsel requested leave for appellant to speak. This request was denied. From the ensuing judgment comes this appeal.

[1-3] Demand is made for reversal upon the grounds about to be stated and denied for the reasons explained. Appellant alleges he was denied due process of law in that the court refused "him a right to change his plea of 'guilty' to 'not guilty'." He made no such motion, unless he considers his request to speak following the denial of probation such a plea. Even if it be assumed that a motion was made, there was ample justification for its denial. He was attended by his counsel when he changed his plea to "guilty." He was catechised by the deputy district attorney in the presence of the court as to his reasons, and he assured the court he did so because he was guilty and that he made the change voluntarily. While the granting of such a request rests in the sound discretion of the court, People v. Broady, 120 Cal.App.2d 901, 262 P.2d 669 there was no showing made by appellant that would have justified a reopening of the case for a contest. The action had been pending after a plea of guilty for over a year. The idea of reopening it was not suggested until the application for probation had been denied. This is not sufficient. Proof must overcome the act of appellant in pleading guilty under the guidance of his own attorney. Such a plea is an admission of every element of the offense charged, and constitutes a conclusive admission of defendant's guilt. Ibid; People v. Tidwell, 108 Cal.App.2d 60, 63, 238 P.2d 21; People v. Griffin, 100 Cal.App.2d 546, 548, 224 P.2d 47; People v. Butler, 70 Cal.App.2d 553, 561, 161 P.2d 401; People v. Brown, 140 Cal.App. 616, 36 P.2d 194.

[4] While a plea of guilty may be withdrawn pursuant to Penal Code section 1018 by reason of the mistake, ignorance, inadvertence or any factor that overcame the defendant's exercise of a free judgment, the basis of the motion for such relief "must be established by clear and convincing evidence." Moreover, the reviewing court is justified in concluding that the motion was properly denied when it is shown that the accused "acted with knowledge of the facts and on advice of

his counsel." In any event, the granting of such a motion rests in the sound discretion of the court. Ibid. No satisfactory showing for a change of plea was made herein.

[5, 6] Appellant misconceives his status resulting from the finding, after he had pleaded guilty, that he was a sexual psychopath. When did the legislature enact a statute, or an appellate court hold to the effect that a person should be absolved of his crime because he was weak, or ill, or diseased when he committed it? Despite his weakness at the time of his crime, a culprit is liable for his act. His sexual psychopathy does not mean that such a convict had no understanding of the nature of his act or of the significance of his pleading guilty to it or of the consequences of his change of plea. People v. Broady, supra. In open court under advice of his counsel, he personally stated his desire to change his plea to guilty and he was emphatic that he had not been induced by any agency outside his own mind. By reason of his frequent appearances in court and of the availability to the judge of the psychiatric reports, the nature of his intelligence and the degree of its sanity were known prior to the hearing on his application for probation. Those factors did not warrant a different decision.

[7–9] There is no basis for the claim that the court abused its discretion in denying him probation. While such an order is consonant with the tendency of California's modern trend in the field of criminal law, it is still an act of grace and clemency, People v. Hainline, 219 Cal. 532, 28 P.2d 16, and is properly denied where the conduct of the convict was such as to indicate a depravity that requires the exercise of restraint and discipline as means of improving the offender. No man, after repeatedly violating the common precepts and practices of decency and of ordinary morality is, after apprehension, entitled to be turned loose to prey upon the society that sustains his body with bread and his heart with human fellowship. He must first satisfy the state that he deserves to be restored to his natural freedom.

[10, 11] The claim that a prisoner convicted of a vicious crime should be restored to full liberty because he is diseased has no foundation in the law. Every criminal can truly say that he inherited tendencies to crime, or suffers from glandular ills, or by reason of bodily disease his mind no longer functions clearly and his power to form a judgment has been impaired. But any such victim is not necessarily by reason of his abnormality to be exempted from penalties provided by statute for his crime. He must strive to be fit for society and where his behavior suggests the remedial measures of incarceration and prison discipline he has no such right as requires a court to release him on probation. The act of granting probation is vested in the sound discretion of the court which will not be disturbed except upon convincing proof that it was abused. People v. Wahrmund, 91 Cal.App.2d 258, 262, 206 P.2d 56. There was no such showing made by appellant. On the contrary, one of the psychiatrists opined that he should not have probation.

The contention that appellant was unjustly denied a new trial is sheer folly. He made no motion for a new trial in the ordinary acceptation of that phrase. But, proceeding upon the assumption that a protest at being denied probation is equivalent to such motion, there is no reasonable basis for his present contention. With legal advice, with open mind, with freedom of choice, he adopted his own course. After having freely declared his guilt in unequivocal terms he cooperated with the court thereafter on every program until probation was denied. His plea was his trial; nothing more was requisite; he was then ready for sentence. It was fairly conducted. Having determined his own doom by his own voice with advice of counsel, he had no right to demand that the lawyer who had faithfully and intelligently served him be shoved aside in order to have the court listen to the prattle of a disappointed convict. He had no innate right to argue the merits of his motion for probation. The amount of such argument allowable in all cases rests in the sound discretion of the court. Defendant's attorney had presented the reasons for his motion with clarity and had responded to the comments of the trial judge. If an experienced advocate cannot rock a judge's decision on the pertinent issues presented by a motion for probation, what could be expected of the unfortunate prisoner who had spent no time consorting with philosophers, scientists or moralists or in solving legalistic problems? Appellant received a fair and generous treatment by the court and is entitled to nothing more than that which he will receive at the hands of the agency established for the care of the unfortunate who come under its care.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

123 Cal.App.2d 126

KEEBLE v. BROWN et al.

No. 15618.

District Court of Appeal, First District, Division 1, California.

Feb. 10, 1954.

As Amended on Denial of Rehearing March 12, 1954.

Action to foreclose a chattel mortgage, given on the parties' paving and excavating partnership's equipment left after division of other partnership equipment between them as security for defendant's note for part of an amount due plaintiff from defendant on termination of the partnership. From a judgment of the Superior Court, Santa Clara County, Leonard R. Avilla, J., for plaintiff, defendants appealed. The District Court of Appeal, Bray, J., held that the evidence supported the trial court's finding of modification of the written partnership contract by an executed oral contract between the parties for computation of partnership profits and losses on an overall basis covering their total joint operations, rather than job by job basis; and that determination of the questions of defendant's right to a credit for any portion of depreciation, taken by plaintiff alone, on equipment jointly owned by the parties, and the amount of such credit, should be referred to the trial court.

Judgment reversed and cause remanded for determination of the depreciation issue, and judgment otherwise affirmed.

1. Pleading 🔑237(8)

In action to foreclose chattel mortgage, given on equipment of paving partnership between parties as security for defendant's note for part of amount due plaintiff on termination of partnership, allowance of amendment of complaint to conform to proof of parties' executed oral agreement to compute partnership profits and losses on overall basis, instead of individual job basis, was not abuse of trial court's discretion as completely changing cause of action from one on written partnership contract to one on oral contract, as defendant was not prejudiced.

2. Contracts 🔑246

An executed oral modification of a term or provision of written contract does not wholly extinguish contract nor substitute new cause of action for cause of action on contract.

3. Pleading 🔑236(1)

The trial court has wide discretion in granting of amendments to pleadings.

4. Pleading 🔑245(3)

Great liberality is allowed with respect to amendments of complaint at trial, if defendant is not prejudiced thereby, ends of justice will be subserved, and issues to be decided are not wholly changed.

5. Appeal and Error 🔑1039(13), 1041(4)

In action to foreclose chattel mortgage, given by defendant on equipment of parties' paving and excavating partnership to secure defendant's note for amount due plaintiff on termination of partnership, where plaintiff's counsel said in opening statement that he expected to prove parties executed oral agreement to compute partnership profits and losses on overall basis, instead of individual job basis, court continued case for four days to give defendants opportunity to meet such issue, and they made no request for additional time, they were not prejudiced by amendment of complaint to conform to proof of such oral agreement nor misled by variance, if any, between original and amended complaint.

6. Pleading 🔑388

A variance between original and amended pleading must have misled or served to mislead adverse party to be fatal.

7. Pleading 🔑248(1)

Amendments of plaintiff's pleadings to conform to proof must not introduce new cause of action or substantially change plaintiff's claim.

8. Appeal and Error 🔑931(1, 3)

On appeal from judgment on conflicting evidence, District Court of Appeal must follow evidence which, with reasonable inferences therefrom, supports trial court's finding.

9. Partnership 🔑296(3)

In action to foreclose chattel mortgage, given by defendant on equipment of parties' paving and excavating partnership to secure defendant's note for amount due plaintiff on termination of partnership, evidence supported trial court's finding of modification of written partnership contract by parties' executed oral contract for computation of partnership profits and losses on overall basis covering parties' total joint operations rather than individual job basis. Civ.Code, § 1698.

10. Contracts 🔑248

Whether written contract has been modified by an executed oral agreement is a fact question. Civ.Code, § 1698.

11. Contracts 🔑238(2)

The fact that work has actually started under written contract does not preclude alteration of contract by executed oral agreement between parties. Civ.Code, § 1698.

12. Account 🔑4

Where a fiduciary relationship exists between parties and facts are peculiarly within knowledge of one of them, an accounting lies.

13. Account 🔑21

An equity court once taking jurisdiction of accounting between parties standing in fiduciary relationship will grant further relief demanded by situation and necessary to complete justice.

14. Appeal and Error 🔑1178(6)

On appeal from judgment for plaintiff in action to foreclose chattel mortgage given by defendant on equipment of parties' paving and excavating partnership to secure defendant's note for amount due plaintiff on termination of partnership, determination of questions, not decided by trial court, as to whether defendant was entitled to credit for any portion of depreciation, taken by plaintiff alone on partners' joint property, and amount of such credit, should be referred to trial court.

15. Appeal and Error 🔑1048(1)

Error, if any, in trial court's ruling sustaining plaintiff's objection to question asked expert witness by defendant on subject as to which exhibit prepared by such expert spoke for itself, was not prejudicial.

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Bohnett, Hill, Cottrell & Bohnett, San Jose, for appellant.

Rankin, Oneal, Luckhardt, Center & Hall, San Jose, for respondent.

BRAY, Justice.

In an action to foreclose a chattel mortgage defendants appeal from a judgment in favor of plaintiff.

Questions Presented.

1. Alleged abuse of discretion in permitting amendment of complaint.

2. Was there an *executed* oral agreement?

3. Should the court have found on depreciation?

Facts.

This controversy grew out of a partnership contract between the plaintiff and defendant F. H. Brown[1] executed in 1945.

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[1] Unless otherwise appearing, "defendant" will refer to F. H. Brown.

Defendant was a supervisor and estimator who had been employed by numerous large contractors. Plaintiff was a paving and excavating contractor who owned a large quantity of equipment. Under the agreement defendant was to bid on and supervise jobs to be undertaken by the partnership. Plaintiff was to make his equipment available on a rental basis. The profits were to be split equally. From modest beginnings the business greatly increased and ultimately exceeded $2,000,000. Defendant was in control of all jobs. Various pieces of equipment were purchased on plaintiff's credit, but half was to belong to defendant on his payment of half the cost.

In 1947 it was deemed advisable to obtain a quarry to provide material for a number of jobs on contract at that time. This investment did not turn out as well as hoped. These difficulties, among others, prompted plaintiff to take steps to terminate the contract as provided therein. In 1949 and until plaintiff in 1950 gave defendant notice to terminate the contract, efforts were being made to wind up the venture. The chief problem was to make an equal division of the equipment and other property which had been accumulated and belonged jointly to the parties. The problem was complicated by the fact that the exact amount due plaintiff could not be determined at that time. The problem was solved by an "agreement and promissory note" wherein defendant, with his wife, defendant Dorothea Brown, joining, promised to pay a minimum of $30,000 and to cooperate with plaintiff in obtaining a complete accounting to determine the additional amount due plaintiff, which amount defendants agreed to pay. The note was secured by a chattel mortgage on the equipment left after a division between the parties of other equipment.

An audit was made of the books. Plaintiff's accountant determined that the sum owing plaintiff in excess of the $30,000 provided in the note was $45,755. Defendant then prepared a statement showing the sum to be some $20,000. The difference in these figures and the cause of the controversy lies in the manner in which the particular party allocates the loss or profit on the many jobs performed. This will be discussed later.

1. Amendment to Complaint.

[1-7] When the trial commenced plaintiff's complaint[2] pleaded the original partnership contract, the "agreement and promissory note" and the chattel mortgage in full. On the second day of the trial plaintiff, over defendants' strenuous objections, was permitted to file an amended complaint to conform to proof, alleging the claimed executed oral agreement hereafter discussed. Defendants were given a four day continuance to amend their answer and to prepare to meet the issue. They did amend their answer and the trial proceeded. Defendants contended that the court abused its discretion in allowing the amendment in that it completely changed the cause of action from one on a written contract to one on an oral contract. We can see no abuse of discretion. An executed oral modification of a term or provision of a contract does not wholly extinguish the contract nor does it constitute the substitution of a new cause of action for the cause of action on the contract. See 12 Am.Jur. § 427, p. 1004. The trial court has a wide discretion in the granting of amendments to pleadings. "Great liberality is allowed with respect to amendments at the trial if the defendant is not prejudiced thereby and the ends of justice will be subserved provided the issues to be decided are not wholly changed." Genger v. Albers, 90 Cal.App.2d 52, 55, 202 P.2d 569, 571; see also Phillips v. Mathews, 90 Cal.App.2d 161, 202 P.2d 798. Defendants were not prejudiced by the amendment. In his opening statement plaintiff stated that he expected to prove the claimed executed oral statement, and the amendment was made to conform to the proof on that issue. The court continued the case for four days to give defendants an opportunity to meet the issue. No request was made for additional time. If there was a variance between the original complaint and the amendment it was not a material one, nor were defend-

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[2] "Complaint" herein refers to the first amended complaint.

ants misled by it. "A variance to be fatal must have misled or served to mislead the adverse party". Genger v. Albers, supra, 90 Cal.App.2d at page 55, 202 P.2d at page 571. In that case an amendment to conform to the proof was permitted at the conclusion of the trial changing the cause of action from one in claim and delivery to one in conversion. Dressler v. Johnston, 131 Cal.App. 690, 21 P.2d 969, cited by defendants as "not exactly in point with the situation here," is just that. There, in an action on a contract defendant obtained a verdict, the judgment on which was reversed on appeal. At the second trial defendant moved to amend the answer to conform to the evidence at the first trial. The amendment embodied a new and different theory from the one considered at the first trial. The reviewing court stated, 131 Cal.App. at page 695, 21 P.2d at page 970: "After a judgment has been reversed on appeal, without qualification, a motion to amend a pleading to conform to the evidence which was adduced at the original trial does not lie." Also, "'A commonly recognized limitation upon the propriety of amendments to conform to the proof is that they must not introduce a new cause of action, or substantially change the claim * * *.'" The amendment in our case did neither. See Wilson v. Sharp, — Cal.App.2d —, 260 P.2d 623, for test of what constitutes a wholly different cause of action.

2. The Oral Agreement.

The basic dispute between the parties is the method of computing the profits and losses of their operations. Defendants contend that by the terms of the written contract these were to be determined on a job by job basis. Plaintiff contends, first, that the contract is ambiguous on this subject and therefore parol evidence was admissible to prove what was intended, and secondly, that if the agreement so provided, the parties by an executed oral agreement agreed that the profits and losses were to be computed on an over-all basis. The difference in method is important primarily because it is the rentals claimed by plaintiff for equipment owned by him alone and used on the jobs, which cause the chief difference in the figures of the parties.

The agreement provided in the event "the job or project shall result in a loss * * * in the computation of such loss, no charge shall be made to the cost of such job for rental or use of" plaintiff's equipment. Defendants contend that this clause is not ambiguous although at the opening of the trial defendants' counsel stated "some of those things, apparently, were not clearly thought through in the preparation of this contract * * *." Plaintiff contends that this constitutes an admission that the contract is ambiguous, binding defendants under the rule of Coonan v. Loewenthal, 129 Cal. 197, 61 P. 940. As we believe that the evidence supports the court's finding of an executed oral contract we do not deem it necessary to discuss this point further.

[8] While the evidence is conflicting we are required to follow that which, with the reasonable inferences therefrom, supports the court's finding. The parties started out on a job by job accounting basis, but before very long, due to their expanding operations, such method became impracticable. Plaintiff's office manager and accountant testified that statements prepared by defendant or his office force contained charges allocated to particular jobs without consideration as to whether those charges were fully chargeable to the particular job. Thus, defendant's office expense was charged entirely to one job. Tire expense was charged and income credited indiscriminately to jobs. After this situation was called to plaintiff's attention he spoke to defendant about it and defendant stated that they had outgrown their agreement, that they would have to figure their profit and loss on an overall basis, and if on such basis there was a loss, plaintiff would have to "discount" his rental. Plaintiff agreed to this method, and the accounts were kept in that manner.

[9–11] Apparently most of the contract jobs made money. The operation of the quarry, however, lost considerable money, which fact was apparent by 1949.

Plaintiff told defendant that if he was not to receive rental for his equipment, he would take two of his tractors off the quarry and use them in his personal business. Defendant could then hire tractors which would be paid for jointly, but plaintiff would be getting rental for his tractors. Defendant then told him that they were figuring their operations on an over-all basis, so plaintiff left the tractors. While defendant denied that there was ever any over-all agreement at any time, it is interesting that he admitted discussing with plaintiff at the quarry the matter of rental charge for plaintiff's equipment. Plaintiff wanted to know if defendant was going to invoke the rental clause on him. Defendant contends he answered by saying he did not know yet what he was going to do. Three other changes in the contract were made by oral agreement, defendant's weekly salary was increased to $100, his office overhead was charged as job costs, and defendant's name was used with plaintiff's in bidding on contracts. For approximately four and a half years the overall method of accounting was used, the financial statements prepared by defendant were on that basis excepting one prepared January 25, 1950. Even though there is evidence to the contrary, the evidence amply shows that when the venture was first started it was not anticipated that at any one time there would be the number of jobs on hand which subsequently developed; the business grew so large that it was impracticable to account on a per job basis; the accounts were soon kept on an over-all basis; the parties agreed that they should be so kept and that the method of accounting was an executed thing. As the court found,—the oral agreement provided that accounting between the parties and the determination of profit or loss should not be computed on an individual job basis but rather on an over-all basis covering their total joint operations, which "oral understanding continued and was confirmed by their acts and conduct throughout and to the date of the dissolution * * *." Whether a writing has been modified by an executed oral agreement is a question of fact. Eastwood v. Golden State Produce Co., 113 Cal.App. 581, 583, 298 P. 838. Because in D. L. Godbey & Sons Const. Co. v. Deane, 39 Cal.2d 429, 246 P.2d 946, the oral agreement to modify a term of the written contract as to computations was entered into before the work actually started, defendant construes that decision as holding that an oral agreement entered into after the work is started cannot constitute the oral agreement which section 1698 of the Civil Code states may, if executed, alter a written agreement. There is nothing in the case to support such construction, nor is it the law.

3. Depreciation.

Large equipment which was purchased and which under the contract was to be the joint property of the parties, was purchased in plaintiff's name. The partnership in the partnership income tax reports took no depreciation upon that equipment; plaintiff did in his personal income tax reports. Defendant testified that he discussed this situation with plaintiff and that plaintiff told him that this would be adjusted between them. Plaintiff did not deny so stating. Defendant's counsel asked defendant if he ever received any depreciation credit on this equipment. Plaintiff objected. Considerable discussion followed between counsel ending with a statement by defendant's counsel to the effect that the court would have to rule on the value of this adjustment to be credited defendant on the indebtedness due plaintiff. The court then overruled plaintiff's objection and the witness answered that he did not receive such credit. Unfortunately the matter ended there. Plaintiff contends that the parties treated this equipment as plaintiff's until such time as the accounting might be had and therefore that plaintiff was entitled to have the depreciation. This, of course, is directly contrary to the conversation related by defendant and not denied by plaintiff. Defendant contends that the trial court should have made a finding on this subject although there is no record of a request therefor. Plaintiff points out, however, that there is no evidence upon which the court could have found the amount of the depreciation taken by plaintiff. Had the depreciation been taken by the partnership, defendant would have received the benefit of his share thereof.

[12, 13] As the evidence now stands, it would appear that in all fairness defendants should receive credit on their indebtedness to plaintiff for their share of that depreciation. Where there is a fiduciary relationship (and there is one here) and the facts are peculiarly within the knowledge of one of the parties (the amount of this depreciation is known only to plaintiff) an accounting lies. Having once taken jurisdiction, the court will grant further relief demanded by the situation and necessary to complete justice. Smith v. Blodget, 187 Cal. 235, 201 P. 584; citing 2 Pomeroy's Equity Juris., § 910, and 4 Pomeroy's Equity Juris., § 1421. That the issue of whether defendants are entitled to this depreciation was before the court is shown by the approximately eight pages of transcript covering the argument concerning its admissibility and by the fact that the court permitted defendant to testify to his conversation with plaintiff concerning it, which conversation was not denied. During that argument defendant's counsel stated: "It does come down to a direct issue before the Court to rule as to whether or not we can show, and we will make the offer to do it, of the value of the depreciation or this adjustment that was to come to Mr. Brown in this $35,000 settlement, and also in the total depreciation that was taken. I think the Court's going to have to rule that we're either in or out on that." The court at no time ruled on the issue stated by defendants, although it did rule on the admissibility of the question objected to, namely, had defendant received any depreciation credit on the equipment jointly owned with plaintiff. In Jakobsen v. Peratis, 213 Cal. 671, 3 P.2d 305, the court said concerning matter which was not answered other than by the contention that it was being raised for the first time on appeal, 213 Cal. at page 672, 3 P.2d at page 305: "But they appear from the uncontradicted facts, and there is no necessity that an argument on the law be first made in the trial court."

[14] In order that equity may be done, it would seem fair to refer to the trial court the determination whether defendants are entitled to a credit for any portion of the depreciation taken by plaintiff alone on the joint property, and, if so, what amount should be credited.

If the court determines that defendants are entitled to this credit, one other matter should be taken into consideration. Plaintiff testified that defendant agreed to pay his share of the interest which plaintiff would be required to pay upon the purchase price of the equipment purchased by plaintiff. The court should also determine whether there was such agreement and if, as appears, plaintiff has not received such reimbursement, plaintiff should be credited therewith.

[15] Defendant complains of a ruling of the trial court in sustaining an objection to a question asked the expert who prepared exhibit 17 as to whether he had made any attempt to allocate rentals of plaintiff's equipment. While the question should have been allowed, the error was not prejudicial as the exhibit speaks for itself on the subject.

The judgment is reversed and the cause is remanded for the sole purpose of determining the depreciation and interest issues as hereinbefore stated. In all other respects the judgment is affirmed. Respondent shall recover costs.

PETERS, P. J., and FRED B. WOOD, J., concur.

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123 Cal.App.2d 150

In re NUNES' ESTATE.

NUNES v. NUNES.

Civ. 15623.

District Court of Appeal, First District, Division 1, California.

Feb. 15, 1954.

Rehearing Denied March 17, 1954.

Hearing Denied April 14, 1954.

Action by testator's nephew of the half blood, who was named Joseph and who sometimes was called Joe E., to determine heirship, wherein testator's second cousin, who was named Joe E. and who sometimes was called Joseph, contended that he was the intended beneficiary of testamentary gift to Joe E., "a nephew of mine." The Superior Court, County of Santa Clara, Ralph McGee, J., excluded extrinsic evidence and entered judgment on instructed verdict for the nephew of the half blood, and the second cousin appealed. The District Court of Appeal, Peters, P. J., held that the will contained a latent ambiguity since no one person completely fit the description of the beneficiary, and that declarations of testator made to drafter of will should have been admitted to prove testator's intent.

Reversed.

1. Wills ⚷439

The basic rule of construction of will is to give effect to intention of testator. Probate Code, § 105.

2. Wills ⚷440, 488

Intention of testator must be ascertained from will, if possible, and if terms of will are certain and free from ambiguity, effect must be given thereto and no speculation is permitted as to whether an intention may have existed contrary to that expressed, but if language used is ambiguous, extrinsic evidence may properly be considered. Probate Code, § 105.

3. Wills ⚷488

If a latent ambiguity exists in will, such ambiguity may be removed by extrinsic evidence. Probate Code, § 105.

4. Wills ⚷456, 487(2)

While words in will are to be given their usual and ordinary meaning, evidence of surrounding circumstances can sometimes be used to show meaning of words in will. Probate Code, § 105.

5. Wills ⚷493

Where testator had nephew of the half blood named Joseph, who was sometimes called Joe E., and had a second cousin named Joe E., who was sometimes called Joseph, testamentary gift to Joe E., "a nephew of mine" contained latent ambiguity, since no person completely fit the description. Probate Code, § 105.

6. Wills ⚷489(4)

Once it is determined that extrinsic evidence is admissible because of latent ambiguity in will as to identity of beneficiary, oral declarations of testator to drafter of will are admissible to prove intent of testator. Probate Code, § 105.

7. Wills ⚷489(4)

Where will contained latent ambiguity as to identity of beneficiary, oral declarations of testator made to drafter of will were admissible to prove intent of testator as to intended beneficiary. Probate Code, § 105.

Rankin, Oneal, Luckhardt, Center & Hall, San Jose, for appellant.

Foley, Foley, Andreuccetti & Foley, San Jose, Machado & Machado, San Jose, for respondent.

PETERS, Presiding Justice.

The basic problem presented on this appeal is whether the seventh paragraph of the will of Joseph F. Nunes so clearly describes the respondent as recipient of the bequest therein provided as to preclude the introduction of extrinsic evidence that would tend to show that, in fact, the decedent intended to leave the bequest to appellant. The trial court determined, as a matter of law, that respondent was the only person precisely described in the will, excluded the proffered extrinsic evidence to show a contrary intent, and instructed the jury to bring in a verdict for respondent. From the judgment entered on that verdict this appeal is taken.

Respondent is admittedly the son of a half brother of the deceased, and so is the nephew, or nephew of the half blood, of the deceased. Respondent's legal name is Joseph E. Nunes, or Joseph Nunes, although occasionally he calls himself, or is called, Joe. Appellant is admittedly a second cousin of the deceased, but was usually referred to by the deceased as his "nephew." Appellant's name is Joe E. Nunes, although occasionally he calls himself, or is called, Joseph.

The seventh paragraph of the lawyer-drafted will reads as follows: "I hereby give, devise and bequeath unto Joe E. Nunes, a nephew of mine, a one-quarter interest in my ranch located at Hollenbeck Avenue, near Sunnyvale, California."

There is no question as to the identity of the land involved. During probate this property was sold, and the value of the one-quarter interest here involved has been fixed at about $25,000. Respondent instituted this proceeding to determine heirship, claiming to be the person described in the will. Appellant answered, claiming that he was the "Joe E. Nunes, a nephew of mine" described in the questioned paragraph.

Respondent testified on his own behalf to the effect that his name was Joseph E. Nunes; that he was also known as Joe E. Nunes; that he was, during the lifetime of the deceased, acquainted with him, and that he was a nephew of the deceased. On cross-examination he admitted that his birth certificate did not contain any middle name or initial, and was not sure whether it named him as Joseph or Joe; that he started to use the "E" in his name after confirmation; that many of his acquaintances called him Joe; that for a long time his checking account has been in the name of Joseph E. Nunes, and that he signed checks in that fashion; that his mail box bears the name of Joseph E. Nunes; that his trucks bear that name, and that the permit to operate as a radial carrier was issued in that name; that he registered to vote as Joseph E. Nunes; that his father called him Joe; that he does not use Joseph exclusively in his business dealings; that he spent three years in the army under the name of Nevada E. Gibson, but that he assumed his real name upon discharge. On redirect, there was introduced the high school diploma of respondent and certain business receipts wherein he was named Joe E. Nunes, and a chauffeur's license naming him Joe Ernest Nunes. Altogether some 67 invoices, receipts and bills, in which respondent was described in various ways, were introduced. Then the probate file in the estate proceeding was admitted into evidence. It included the will here involved. The residuary clause of that will was directed to the nieces and nephews of the deceased. The file also included a petition of one Mary Alves to determine heirship under this clause, in which it was adjudicated that respondent was a nephew within the meaning of that clause. After the introduction of this evidence the respondent rested.

Appellant opened his case by introducing the birth certificate of respondent which named him as Joseph Nunes. The will of respondent's father was then introduced. It refers to respondent as Joseph Nunes. Respondent's voting registration, which he signed with the name of Joseph E. Nunes, and appellant's registration signed Joe E. Nunes were also introduced. Appellant testified that he had lived on the ranch described in paragraph seventh of the will since 1930, and that he was a second cousin of the deceased. After a discussion between court and counsel, the court ruled that respondent was the only person that fitted the description in paragraph seventh, and that extrinsic evidence to show that appellant was intended was not admissible. The basis for this ruling is disclosed by the following statement: "Now, I take it from the testimony here * * * that this will does accurately and definitely describe the claimant, Joseph E. Nunes, whom it refers to as Joe E. Nunes, and whom it calls his nephew, and that there is, therefore, no ground for invoking the rule of either of these exceptions; and I place no emphasis or importance on the fact that the will calls him Joe, and his Christian name and his business name is Joseph. I think that's immaterial."

The appellant then made an offer of proof. By the testimony of the attorney who drafted the will, and who was named executor therein, he offered to prove that the attorney had known the deceased intimately for at least twenty years; that during that period he had known of only one nephew of the deceased named Joe E. Nunes, and that that was appellant; that during the preparation of the will, and during the twenty years of friendship, he had never heard the deceased refer to any other person than appellant when he talked about Joe E. Nunes; that when deceased called at the office of the attorney to give instructions about the will he told the attorney he had several nieces and nephews whose addresses were unknown to him, but when the deceased discussed the bequest that ultimately was put into paragraph seventh he specifically directed that he wanted the one-quarter interest "in that ranch property upon which his nephew, Joe E. Nunes, was then working and then residing," to go to that Joe E. Nunes; that he then described that Joe E. Nunes "as his nephew living on the ranch"; that the attorney had made notes of these conversations and such notes are still in existence and are offered in evidence; that in those notes it appears that the deceased directed that the ranch interest here involved should go to "Joe E. Nunes, my nephew on the ranch." The testimony of the office associate of the attorney was offered in corroboration. By the attorney who drafted the will appellant also offered to prove that after the will was drafted he had at least twenty conversations with the deceased about a proposed gift by deceased to appellant of several acres of land; that during all of these conversations the deceased always referred to appellant as his nephew on the ranch; that such gift was consummated before the death of decedent.

The appellant also offered, through the testimony of contractors, buyers, insurance men, employees, and neighbors all friends of the deceased, to prove that in their many conversations with deceased he had always referred to appellant as his "nephew on the ranch," and had always professed a high regard for him, and had never referred to respondent as his nephew. In addition, the testimony of one Mary Malarque was offered. She had been raised by the deceased and his wife, and had lived with them from childhood until her marriage. Her offered testimony was to the effect that she had lived on the ranch in question from 1916 to 1939; that during the entire period she never heard deceased refer to respondent as his nephew, nor did she ever see respondent at the home of deceased or know of any such visit; that during this period she did hear deceased, on innumerable occasions, refer to appellant as his nephew Joe, or as his nephew on the ranch.

In addition, the testimony of three named persons, all of Portuguese descent and two of whom were Catholic priests, was proffered to the effect that in Portugal, the native country of deceased, it is the common custom and practice to call a second cousin, nephew or uncle. A large number of documents, all describing appellant as Joe E. Nunes, was offered.

The court ruled that the objection to all this offered testimony was sustained, and then directed the jury to bring in the following verdict: "We the Jury, * * * find and return our verdict herein as follows: one, that Petitioner is a nephew of Joseph F. Nunes, also known as J. F. Nunes, Deceased; second, that Respondent is not a nephew of said Deceased, but is a second cousin of the Deceased; third, that the Petitioner is the person described in paragraph 7 of the will of said Deceased."

The issue on this appeal is clear cut. Does the phrase "Joe E. Nunes, a nephew of mine" so exactly describe the respondent that extrinsic evidence to show that appellant was in fact intended to be so described was not admissible? Is there an ambiguity as to the identity of the legatee? Respondent argues that, although there are two persons named Joe E. Nunes, he is the only one that is a nephew, and so the only one described in the will. Appellant argues that he is the only person named Joe E. Nunes that fits the description in the will, and that Joe and Joseph are not the same name. He concedes that he is not a blood nephew, but urges that, for identification purposes, the deceased's constant reference to him as nephew is sufficient to at least raise an ambiguity to show who was meant.

The rules of law applicable to this problem are not seriously in dispute. The basic statutory provision applicable is section 105 of the Probate Code. It provides: "When there is an imperfect description, or no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence, excluding the oral declarations of the testator as to his intentions; and when an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding such oral declarations."

[1, 2] The basic rule of construction is, of course, to give effect to the intention of the testator. That intention must be ascertained from the provisions of the will, if possible. If the terms are certain and free from ambiguity, effect must be given thereto and no speculation is permitted as to whether an intention may have existed contrary to that expressed. But if the language used is ambiguous, extrinsic evidence may properly be considered. (See, generally, cases cited 26 Cal.Jur. p. 883, § 199, et seq.)

[3] If a latent ambiguity exists, such ambiguity may be removed by extrinsic evidence. One of the leading cases on this subject is Estate of Donnellan, 164 Cal. 14, 127 P. 166, 167. There the following provision was presented for construction: "'to my niece Mary, a resident of New York, said Mary being the daughter of my deceased sister Mary'". The deceased sister Mary had two daughters, Annie Sheridan and Mary Smith. Annie was a resident of New York. Mary lived in Ireland and had never been in the United States. The court held that there was a latent ambiguity because no one person exactly fitted the description in the will. If niece Mary was intended, she had never been in New York, while if Annie was intended, the wrong name had been used in the will. The following statement appearing in that case has been frequently quoted, 164 Cal. at page 20, 127 P. at page 168: "Broadly speaking, there are two classes of wills presenting latent ambiguities, for the removal of which ambiguity resort to extrinsic evidence is permissible. The one class is where there are two or more persons or things exactly measuring up to the description and conditions of the will [giving examples]. The other class is where no person or thing exactly answers the declarations and descriptions of the will, but where two or more persons or things in part, though imperfectly, do so answer.'

Another frequently cited case is Taylor v. McCowen, 154 Cal. 798, 99 P. 351. In that case the court quoted, with approval, the following statement from Patch v. White, 117 U.S. 210, 217, 6 S.Ct. 617, 29 L.Ed. 860: "'It is settled doctrine that, as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence. Such an ambiguity may arise upon a will, either when it names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things that answer the name or description; or, secondly, it may arise when the will contains a misdescription of the object or subject, as where there is no such person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator. * * *'" 154 Cal. 802, 99 P. 353.

Both sides agree that the above two quotations, and section 105 of the Probate Code, state the applicable law. It is not necessary, therefore, to cite the other cases where these rules have been applied. See for a recent application of some of these rules, Estate of Sargavak, 41 Cal.2d 314, 259 P.2d 897. It is in the application of these basic and well settled principles to the facts of this case that the parties differ. If paragraph seventh of the will contains a latent ambiguity as to the identity of the legatee, the trial court should have admitted the proffered testimony, and the judgment must be reversed. If it does not, the trial court properly excluded the extrinsic evidence, and the judgment should be affirmed.

One case relied upon by respondent as being "directly in point" is Estate of Lyons, 36 Cal.App.2d 92, 96 P.2d 1018. In that case paragraph seventh of the will made a bequest to Cornelius Lyons describing him as a cousin, and as being the child of John and Mary Lyons of Eighteenth and Church Streets, San Francisco. Paragraph fourteenth nominated Cornelius Lyons of 630—11th Avenue, San Francisco, as one of the executors. A codicil executed four years later left a bequest to Cornelius Lyons "mentioned in Paragraph Seventh" of the will. There were two persons with the name of Cornelius Lyons. The Cornelius Lyons mentioned in paragraph seventh was a second cousin of the deceased, the one mentioned in paragraph fourteenth, a first cousin. The latter tried to show that the reference in the codicil to paragraph seventh was a mistake and that paragraph fourteenth was intended. The court quite properly held that extrinsic evidence was not admissible for this purpose because there was no ambiguity in the will as to the identity of the legatees. Had there been such an ambiguity, such evidence would have been admissible. Obviously, the case is of little help in determining, in the instant case, whether an ambiguity as to the identity of the named legatee exists.

It is our opinion that a latent ambiguity as to the legatee named in paragraph seventh exists. No one person exists who precisely fits the description of "Joe E. Nunes, a nephew of mine." Respondent is a nephew, or at least a nephew of the half blood, but he is not named Joe E. Nunes. His name is Joseph and not Joe. Even though, for certain purposes, the two names may have the same legal effect, for descriptive purposes they are not necessarily identical. The evidence shows that respondent was named Joseph on his birth certificate and generally uses that name in his business and social relationships, although, occasionally, being called Joe. Appellant, on the other hand, is named Joe, and generally uses that name, although, on occasion, is called Joseph. For purposes of identification the two names may be entirely distinct. Thus if one wanted to name the actor and comedian, the name Joe E. Brown would immediately identify him to most persons. But the name Joseph E. Brown would not necessarily identify the same person or identify him in the mind of the hearer. Moreover, the name Joe is not necessarily an abbreviation at all. It may be, and frequently is, the full name of the person involved. Even when used as an abbreviation, it is not necessarily, inevitably, and universally recognized as the abbreviation for Joseph. It may just as well be an abbreviation for Josephus, Josh, Jonah, Josiah, or even for the name John. (See 38 Am.Jur. p. 599, § 8.)

[4] It is also by no means certain that respondent is the only "nephew" of the deceased. The word "nephew" does not necessarily and exclusively describe a legal blood relationship. It may have been used to identify a person. It is a matter of common experience that persons often refer to intimates by calling them a name implying blood relationship, such as son, nephew, niece, my boy, etc., when no such relationship exists. While words in a will are to be given their usual and ordinary meaning, evidence of surrounding circumstances can sometimes be used to show the meaning of the words used. (See 3 Page on Wills, Lifetime Edition, p. 164.) In Estate of Kessing, 123 Cal.App. 119, 10 P.2d 1015, 1016, it was held that one described in a will as "'my nephew Ivan Kessing'" could share in the estate even though not in fact a blood nephew of the deceased. Thus, where one is described by a relationship which in fact does not exist, he may, in some cases, show that the testator intended him by the words used.

[5] Appellant is, of course, not a blood nephew of the deceased, while respondent does fit that description. If there were not a latent ambiguity as to the identity of Joe E. Nunes, it could be argued that evidence that the deceased intended a stranger in blood and not a blood nephew was not admissible. But because there is no one person that completely fits the description of "Joe E. Nunes, a nephew of mine," there exists a latent ambiguity as to the identity of the named legatee. Once it is determined that Joseph and Joe are not necessarily the same name, extrinsic evidence is admissible to show who was intended. That includes evidence, here proffered but refused admission, that the deceased by the word "nephew" intended to identify appellant.

[6, 7] Once it is determined that extrinsic evidence is admissible because of the latent ambiguity as to identity, the limitations of section 105 of the Probate Code

do not apply to instructions given to the drafter of the will by the testator. Such declarations, where admissible as here, may be used to prove intent. Estate of Dominici, 151 Cal. 181, 185, 90 P. 448; Estate of Little, 170 Cal. 52, 54, 148 P. 194.

The evidence here offered should have been admitted. Its exclusion requires a reversal.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.

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123 Cal.App.2d 209

In re SHERWOOD'S ESTATE.

McLELLAN et al. v. SHERWOOD et al.

Civ. 4839.

District Court of Appeal, Fourth District, California.

Feb. 16, 1954.

Will contest by strangers to the blood of testator. On proponents' motion, the Superior Court, San Diego County, John A. Hewicker, J., entered judgment dismissing the petition, and contestants appealed. The District Court of Appeal, Griffin, J., held, inter alia, that where will contestants, claiming to be persons interested because lost will named them as beneficiaries, consented to trial of issue of their interest by motion to dismiss their contest, and all evidence available on such issue was presented and demonstrated that contestants had no interest, contestants were not deprived of any substantial right by dismissal of the contest on the motion, rather than on trial.

Affirmed.

1. Wills ⚷302(8)

In proving existence of lost will, relied upon as establishing interest necessary to maintain will contest, contestants must at least make prima facie showing that they have some reasonable expectation of being able to probate lost will, and to that end, must not only show its existence but must produce two witnesses to its contents. Probate Code, § 350.

2. Wills ⚷400

Where will contestants, claiming to be person interested because lost will named them as beneficiaries, consented to trial of issue of their interest by motion to dismiss their contest, and all evidence available on such issue was presented and demonstrated that contestants had no interest, contestants were not deprived of any substantial right by dismissal of the contest on the motion, rather than on trial. Probate Code, § 350; Rules for the Superior Courts, rule 6(a).

3. Wills ⚷396

Where motion to dismiss will contest because contestants were not parties interested was brought on by due notice to contestants, and evidence was taken on issue of interest without objection to method of procedure, and contestants were afforded every opportunity to produce any evidence available on such issue, and were not prejudiced or deprived of any substantial right by dismissal of contest on the motion, contestants would not be heard to complain for first time on appeal that proponents had not complied with Superior Court rule providing that no civil case shall be set for trial until it is at issue and unless party thereto has served and filed memorandum. Probate Code, § 350; Rules for the Superior Courts, rule 6(a).

John Dean Barrick, Pasadena, for appellants.

Gray, Cary, Ames & Frye, San Diego, for respondents.

GRIFFIN, Justice.

Contestants and appellants, father and son, strangers to the blood of decedent Franklin P. Sherwood who died on January 20, 1952, filed a petition to contest his last will and testament and codicils thereto, on the ground of incompetency of deceased to execute a will, and on the further ground of undue influence.

The will and codicils were admitted to probate on February 18, 1952. This contest was not filed until August 1, 1952. The citation thereon was not served until November 19, 1952, on the respondent Bank of America National Trust and Savings Association, the coexecutor. It has never been served on any other named respondents. The only interest of contestants in the matter, as set forth in an amended petition, is alleged upon information and belief to be that there existed a prior will or document, the contents of which are said to be unknown, except that the contestants claim they were beneficiaries under certain writings which they alleged constituted decedent's will and which were delivered by decedent to one Antoine E. Windson, a trusted employee of deceased, on a date unknown to petitioners, but during his lifetime, in which there was devised to petitioner Douglas Hull McLellan a certain parcel of real estate adjoining decedent's residence in La Jolla, valued at $25,000, and that they also provided a "substantial" fund for the education of contestant Douglas B. McLellan, the son; that said writings, constituting the last will and testament of decedent, were destroyed or suppressed by Windson, acting in concert with decedent's brother, Howard C. Sherwood, and without the knowledge of Franklin P. Sherwood; and that such will was never revoked.

Defendants and respondents Bank of America National Trust and Savings Association, Antoine E. Windson, and Emma Feldman on February 24, 1953, answered and denied generally the allegations of the petition in reference to the claimed undue influence and unsound mind of deceased, and specifically denied that deceased ever made a will or other instruments constituting a will in which petitioners were ever devised any property or in which they were ever mentioned, and specifically denied the petitioners' allegation that contestants were interested parties by reason of being legatees or beneficiaries under any purported last will and testament of deceased.

The contestants never took steps to bring the action to trial and refused to stipulate to taking, by written interrogatories, the deposition of Howard C. Sherwood, the brother, residing in New York. They also refused to stipulate to the taking of the deposition of Windson, to determine the truth of contestant's allegations in reference to the existence of any such claimed documents or of their claimed destruction thereof.

Thereafter, the executor, after due notice, did take steps to obtain these depositions, which resulted in the testimony that no such will ever existed, and these witnesses knew of none. Finally, on April 14, 1953, the coexecutor served notice on contestants that it and Howard C. Sherwood, the other coexecutor, would move the court on a day certain, to first hear and determine the question of the interest of contestants and their right to maintain the will contest before determining the other issues raised by the answer, and to dismiss the contest if the court concluded they had no such interest, and also for the reason that the alleged contest was groundless, fictitious and sham, and an abuse of the process of the court. It averred that the motion would be based on the depositions of contestants, taken by respondents, as well as those of Windson and Sherwood, and upon the affidavits submitted, as well as the papers on file in the probate proceedings.

Contestants appeared and, without objections to the method of proceeding, filed an affidavit of Douglas Hull McLellan, in opposition to the motion, in which he recited generally that decedent had been a friend of his for many years and had, prior to April, 1948, informed him that he proposed to leave affiant a "substantial amount of property", including the property indicated, and to leave a fund for the education of his son, and that this property would be available to him at the time of his death; that when decedent became ill in April, 1948, it was exceedingly difficult for affiant to visit Mr. Sherwood because of the interference of Windson, who assumed great authority over these matters; that after Sherwood's death, about February 6, 1952, Windson called affiant and was complaining about unfair treatment of him, and affiant asked him if he (affiant) was provided for in the will, and that Windson said: "I will not make any statement until I have seen Howard Sherwood, but if Mr. Howard Sherwood does not make things right, I will have something very interesting to say to you"; that later, in May, 1952, Windson told him that he had in his possession an instrument or instruments signed by Franklin P. Sherwood, in which provision had been made for affiant in reference to the real estate mentioned and the fund for the education of his son, and that he had medical records that "would sure tell a story"; that Windson said that Howard Sherwood was shown the instruments and demanded that they be turned over to the attorney for deceased, Mr. Gray; that Windson said he was so upset he took a match and burned them up in the presence of Howard Sherwood, and that Howard Sherwood said that he would remember him in his will to the extent of $10,000 for so doing; that the next day Windson said: "Please forget everything I told you yesterday. I cannot go through with it."

Respondents' affidavits, in support of the motion, recite generally that the time for filing claims against the estate expired on August 8, 1952, and that all debts and claims of decedent were paid; that the Federal estate tax would be due April 20, 1953, and if not paid on or before that date would become delinquent; that neither the amount of the Federal estate tax nor the California inheritance tax could be determined until the validity of decedent's will had been established, and that further delay would result in penalties and interest and in damage and loss to the estate and to the persons entitled thereto.

The attorney for decedent, Mr. Gray, filed an affidavit in which he stated that he had been attorney for decedent for many years; that decedent on many occasions counselled with him in reference to his estate and its disposition, and that never did decent mention contestants or indicate a desire to remember them in his will, and never mentioned making a will in their favor nor exhibit any instruments that would indicate any such intention. He also showed that he had been a member of the firm of attorneys who drew deceased's will which was admitted to probate, and all the codicils thereto.

The depositions of contestants show generally that the only knowledge the son had of the affair was what his father told him. The father reiterated the statements he claimed Windson made to him.

The deposition of Antoine Windson was taken on April 7, 1953. He was extensively cross-examined by counsel for contestants. He stated that he had been estate manager for deceased for over 20 years. He identified a typewritten note, dated January 17, 1951, and initialed by deceased, reading:

> "Antoine, Mesa Grande Property, Union Oil property & Stocks.
> "Emma. Cash and Stocks.
> "Dr. and nurses, small bequest
> "Cousins.
> "Friends.
> "Personal belongings.
> "San Diego Mission Orphanage.
> "Deed the Mesa Grande house to Antoine immediately.
> "Lots south of my house?
> "FPS."

He testified this note was prepared by him at decedent's request. A similar memoranda dated January 31, 1951, was also identified by him, in which Antoine and many other persons were named, but which memorandum did not include the names of contestants. He then identified a memoranda of March 16, 1951, which he said was a typewritten copy of a memorandum signed by F. P. Sherwood, reading as follows:

> "Antoine E. Windson, Union Oil Property, Mesa Grande Property & Stocks
> "Emma Feldman*n*. Cash & Stocks.
> "Dr. W. E. Diefenbach.
> "Douglas McLellan.
> "Catherine C. Hitchcock. Nurse.
> "B. G. Rawley. "
> "Harriet Okey "
> "Frank Jaques Gardner.
> "Dr. D. W. Vanasen.
> "A large sum to be left to my brother Howard so as to enable him to dispense of any bequests to certain individuals,

> clubs or organizations which I consider advisable for him to look after.
>
> "Deed the Mesa Grande property over to Antoine now so as to avoid reappraisal of any additional assessment.
>
> "My house at La Jolla.
>
> "Ocean front.
>
> "The above matter has to be discussed further."

It was Antoine's testimony that the decedent, during the last year of his illness, continually called him in after he had made certain notes and asked him to prepare a typewritten copy of his notes, and that the decedent then studied them over and initialed them and asked him to file them for future reference; that at that time he believed the decedent was formulating his will but that decedent told him that he was awaiting the arrival of his brother Howard C. Sherwood who was a lawyer in New York, for further discussion in reference to its preparation; that on occasions he would again call for these notes, destroy some, and supplant others; that he never had anything to do with the preparation of Mr. Sherwood's final will, and and that he never had in his possession nor did he ever see a will or codicil or a copy of a will or of a codicil in which Douglas Hull McLellan or his son was named in any capacity; that when the name of Mr. McLellan was mentioned to him by deceased at the time of making the memoranda above indicated there was no indication as to what property, if any, he was to receive, but that deceased told him that he wished to discuss "a certain matter with his brother when he came in regard to Mr. McLellan"; that he wrote to Howard Sherwood asking him to come west because his brother wished to see him, but that his brother did not do so; that he did not turn over this memorandum to Mr. Gordon Gray, the attorney, because he was not authorized to do so; that subsequently, on April 6, 1951, the decedent's will was executed but that he had no knowledge of its terms or of the disposition of the property by the decedent.

When examined as to the claimed conversations the witness had with Mr. McLellan shortly after the death of the decedent, his answers to the questions propounded were quite evasive and equivocal. He stated, in most instances, instead of denying such conversations, that he did not remember such conversations due to his nervousness and general mental and physical condition. He recalled having a conversation but stated: "I don't remember discussing a will". He admitted having the memoranda above referred to in his possession at the time of his conversation with Mr. McLellan but feeling, at that time, they were of no further value, he destroyed them by putting them in the fireplace, and that Howard Sherwood had read them and saw him do it. He did state that he and Howard Sherwood did show these notes or memoranda to Gordon Gray about May 12th, but they were subsequently burned for the reasons expressed. It now appears that the witness Antoine died prior to the perfection of this appeal.

The order and judgment of dismissal following this hearing recited that the motion was made in open court for a dismissal of the will contest, and that "evidence having been produced, the court having fully considered all of the records and files herein, including but not limited to the depositions taken in the above entitled matter and on file herein, and the matter having been fully tried, argued and submitted, and the court, being fully advised in the premises" granted said motion. The court particularly found that neither of contestants had any interest in the estate of Franklin P. Sherwood, deceased, nor any right to maintain the contest, and found that the contest was groundless, vexatious, fictitious and sham, and an abuse of the processes of the court, and dismissed it with prejudice.

It is contestants' argument on this appeal from that order (1) that the hearing of the motion to dismiss did not constitute a trial of the action on an issue of fact, citing Code of Civil Procedure, section 594; (2) that the judgment of dismissal is not within the provisions of sections 581 to 583 of the Code of Civil Procedure; and (3) that the judgment of dismissal could not be upheld on the ground that the will contest was fictitious or sham.

Contestants concede that only a person "interested" may maintain a contest to an alleged will, either before or after probate, Probate Code, §§ 370 and 380; and In re Estate of Land, 166 Cal. 538, 137 P. 246, and that they had no right to have the question of their interest determined by a jury, In re Estate of Land, supra.

It is claimed, however, that the question whether they were "persons interested" was an issue of fact raised by the pleadings and must be tried by the court, and to bring the matter to trial, compliance with Rule 6(a) of the Rules for Superior Courts was not followed, i. e., "No civil case shall be set for trial until it is at issue and unless a party thereto has served and filed a memorandum as provided herein; * * *." It is conceded that no memorandum as provided by this rule, was filed in this matter. The judgment of dismissal was entered following the hearing on the motion made pursuant to a notice filed on behalf of respondents. Contestants concede that it is within the discretion of the court to control the order of proof and require them first to establish their interest, but argue that the court cannot deny the contestants the right to a trial of the issue of interest on a motion without compliance with the rule above mentioned, unless the granting of such motion can be justified either (1) under Code of Civil Procedure sections 581 to 583; or (2) under the court's inherent power to dismiss sham or fictitious proceedings; or (3) under Code of Civil Procedure section 437c, relating to summary judgments.

Contestants concede that certain cases, such as In re Estate of Land, supra; and Capital National Bank v. Smith, 62 Cal. App.2d 328, 144 P.2d 665, cited by respondents, uphold the granting of a motion to dismiss after a consideration of the evidence by the trial court in respect to the claimed "interest" of the contestant, but state that they have not discovered any case of a will contest where a motion to dismiss for lack of interest was granted prior to trial.

It is contestants' position that they are "persons interested" only if a prior will can be produced in which they are named; that that is a question of fact which can be determined only by a trial of that issue and that issue may not be disposed of by motion, citing In re Estate of Edelman, 148 Cal. 233, 82 P. 962; In re Estate of Munfrey, 61 Cal.App.2d 565, 143 P.2d 414, 144 P.2d 370; and Byer v. Arguello, 96 Cal.App.2d 92, 214 P.2d 556.

Section 350 of the Probate Code provides that:

> "No will shall be proven as a lost or destroyed will unless proved to have been in existence at the time of the death of the testator, or shown to have been destroyed fraudulently or by public calamity in the lifetime of the testator, without his knowledge; nor unless its provisions are clearly and distinctly proved by at least two credible witnesses."

Section 597 of the Code of Civil Procedure provides for the "Trial of special defenses not on the merits", i. e., that "When the answer pleads that the action is barred * * * or sets up any other defense not involving the merits of the plaintiff's cause of action but constituting a bar or ground of abatement to the prosecution thereof, the court may, upon the motion of either party, proceed to the trial of such special defense or defenses before the trial of any other issue in the case * * *." (See new legislation on the subject, Section 437c, Code of Civil Procedure, as amended by Stats.1953, chapter 908.)

The question of contestants' interest in the estate was not the real issue in the case, and the motion was not directed to the merits of the case. In re Estate of Bily, 96 Cal.App.2d 333, 215 P.2d 78, 15 A.L.R.2d 861; In re Estate of Garcelon, 104 Cal. 570, 38 P. 414, 32 L.R.A. 595; In re Estate of Edelman, 148 Cal. 233, 82 P. 962.

Olwell v. Hopkins, 28 Cal.2d 147, 168 P.2d 972, was a case where the court decided the question of the right of a corporation to sue, which was brought on by a motion to dismiss the action. It was heard upon documentary evidence. It was there established that the corporation had no such right, and the court dismissed the action without making any findings, and the judgment became final. Later, plaintiffs brought a similar action and by demurrer it was contended that plaintiffs were bound by the former judgment under the claim of res judicata. The court held that although such issue was properly raised by answer, it refused to reverse the judgment on the ground that to do so would serve no useful purpose since the record of the former action made it clear that plaintiffs could not overcome that defense. So it may be here said that a reversal of the judgment of dismissal in the instant proceedings would result in no different judgment from that heretofore entered if the trial court followed Rule 6(a), supra.

[1] It is only reasonable to require that in proving the existence of a lost will, relied upon as establishing the interest necessary to maintain a will contest, the contestants at least must make a prima facie showing that they have some reasonable expectation of being able to probate it in accordance with section 350 of the Probate Code, and to that end, not only to show its existence but to produce two witnesses to its contents. In re Estate of Arbuckle, 98 Cal.App.2d 562, 220 P.2d 950, 23 A.L.R.2d 372. The record leaves no doubt that contestants actually had no interest in the estate. They were unable to produce any competent evidence of any prior will. Their own testimony shows that they had never seen any will naming them and had no knowledge of any such will, and were basing their claim upon very vague hearsay. The evidence presented was all that appeared to be available. Everything contestants knew was in their depositions, which were presented at the hearing. Windson's deposition was before the court and counsel had the opportunity to cross-examine him. No competent evidence was produced that would support the finding pertaining to any lost or destroyed will. The desposition of Howard Sherwood adds nothing in support of contestants' claim. The affidavit of Mr. Gray negatives the existence of any last will and testament indicating that contestants were beneficiaries under any other will. Since Windson is dead and his testimony, other than the deposition, would not be available at a subsequent trial, contestants would not be benefited by a reversal of the judgment.

[2] We conclude that the contestants have not been deprived of any substantial right, particularly where they consented to the trial of the issue of contestants' interest by motion. Under such circumstances no useful purpose would be served by going through the usual process of a trial. The modern trend of authority and of legislation is to permit unfounded litigation to be exposed and disposed of at an early stage, rather than subjecting the parties to the delay and expense involved in waiting for and in holding a formal trial. The court did not lack jurisdiction to hear and determine the motion. Whether in a given case a disregard of the rule would amount to a reversible error or irregularity would necessarily depend on the facts and circumstances of that particular case, and which may be reviewed on appeal. See White v. Superior Court, 110 Cal. 60, 42 P. 480; Callahan v. Hickey, 63 Cal. 437; 7 Cal.Jur. 625, sec. 36; Helbush v. Helbush, 209 Cal. 758, 290 P. 18; and Capital National Bank v. Smith, 62 Cal.App.2d 328, 144 P.2d 665, where it is said that where formal adherence to a rule of court requiring the filing of a memorandum is waived, an objection to the noncompliance with such rule may not be made for the first time on appeal.

[3] Since the motion to dismiss was brought on by due notice to the parties concerned, and evidence was taken on the subject without objection to the method of procedure, and since contestants were afforded every opportunity to produce any evidence they may have had available to establish this claimed interest in the estate, and since they were not prejudiced thereby nor deprived of any substantial right, they may not now be heard to complain for the first time on appeal that respondents have not fully complied with Rule 6(a) of the Rules for Superior Courts. Gury v. Gury, 219 Cal. 506, 27 P.2d 758; Baxter v. Boston-Pacific Oil Co., 81 Cal. App. 187, 253 P. 185; 4 Cal.Jur. Ten-Year Supp. p. 493, Sec. 36. Although there is

authority, Cunha v. Anglo California National Bank, 34 Cal.App.2d 383, 93 P.2d 572, for the dismissal of such an action by motion on the ground that it is sham and fictitious, in view of the previous determination it becomes unnecessary to determine whether or not the evidence supports the finding of the court that the will contest was groundless, vexatious, fictitious and sham.

Judgment of dismissal affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

123 Cal.App.2d 365

SATTINGER v. NEWBAUER et al.

CODD v. NEWBAUER.

Civ. 19654.

District Court of Appeal, Second District,
Division 3, California.
Feb. 18, 1954.

Action for damages for breach of an alleged contract of defendants as partners wherein one defendant filed a cross-complaint against his co-defendant seeking damages and an amended cross-complaint seeking declaratory relief. From an adverse judgment in the Superior Court of Los Angeles County, Ellsworth Meyer, J., the defendant and cross-complainant appealed. The District Court of Appeal, Shinn, P. J., held that a denial of declaratory relief under the circumstances was an abuse of discretion.

Judgment reversed.

1. Declaratory Judgment 🔑384

Fact that no judgment had been rendered against cross-complainant did not justify denial of relief under declaratory judgment procedure since very purpose of procedure was to enable the cross-complainant to obtain a declaration as to the obligations of the cross-defendant to him if any with respect to the claim involved before the merits thereof had been adjudicated. Code Civ.Proc. § 1060.

2. Declaratory Judgment 🔑46

Procedure under the Declaratory Judgment Act is anticipatory. Code Civ.Proc. § 1060.

3. Declaratory Judgment 🔑323

Where cross-complainant had a right to prosecute a claim for declaratory relief, filing of another action against cross-complainant and cross-defendant respecting the agreement involved did not take away or postpone enforcement of such right. Code Civ.Proc. § 1060.

4. Declaratory Judgment 🔑390

A declaratory judgment may establish a right or duty as affirmatively and effectively as a judgment establishing title to property. Code Civ.Proc. § 1060.

5. Declaratory Judgment 🔑143

Where a judgment on a cross-complaint for declaratory relief in favor of cross-complainant would determine that the claim of plaintiff if established was one that was covered by the cross-defendant's warranty, relief sought by the cross-complaint was not merely defensive but was "affirmative" and a proper subject for declaratory relief. Code Civ.Proc. §§ 442, 1060.

See publication Words and Phrases, for other judicial constructions and definitions of "Affirmative Relief".

6. Pleading 🔑147

Reason for allowing cross-complaints is to have a complete determination of the controversy among the parties in the one action, thus avoiding circuity of action.

7. Pleading 🔑147

If defendant's pleading sets forth matter inextricably related to matter forming basis of plaintiff's complaint, it meets statutory requirements of a "cross-complaint" and it is immaterial that relief sought thereby is independent of that prayed for in the complaint.

See publication Words and Phrases, for other judicial constructions and definitions of "Cross-Complaint".

8. Pleading 🔑147

Where cross-complaint related to transaction upon which the plaintiff had founded his action for breach of contract with partners and the issues of contract in breach were tendered by the cross-complaint and the same evidence would be adduced under both pleadings, the amended complaint met the statutory requisites for a valid cross-complaint. Code Civ.Proc. § 442.

9. Declaratory Judgment 🔑323

In considering the application of the statute authorizing court to refuse declaratory relief when its declaration is not necessary or proper under all the circumstances no distinction should be drawn between the application for declaratory relief by way of a proper cross-complaint and one asserted by an independent action. Code Civ.Proc. § 1061.

10. Declaratory Judgment 🔑6, 394

Although wide powers of discretion for declaratory relief have been conferred upon the trial court by the statute, its discretion is not unlimited but it is a legal or judicial discretion and its exercise is subject to appellate review. Code Civ.Proc. § 1061.

11. Declaratory Judgment 🔑323

Where plaintiff sued for damages for breach of an alleged contract of defendants as partners, and defendant filed a cross-complaint against cross-defendant and an amended cross-complaint seeking only declaratory relief, denial of declaratory relief was an abuse of discretion, where transaction to which the cross-complaint related was alleged contract for which plaintiff sought damages, and declaratory relief would determine whether there was a contract with the partners and whether they incurred an obligation and liability thereunder and the evidence and issues would probably be the same. Code Civ.Proc. §§ 442, 1061.

Adams, Duque, Davis & Hazeltine, Los Angeles, for appellant.

Paul Gordon, Los Angeles, for respondent.

SHINN, Presiding Justice.

Appeal by Walter Newbauer from a judgment against him after the demurrer of Benjamin Codd to Newbauer's cross-complaint was sustained without leave to amend.

Sattinger sued Newbauer and Codd, individually, and as partners doing business as Keene Packing Company. The suit was for damages for breach of an alleged contract of Newbauer and Codd, as partners, to can dog food for plaintiff, and also to require defendants to make available to plaintiff for that purpose a portion of suitable tin cans manufactured by defendants under allocation of metal to them by a U. S. Government executive order limiting the use of metal for various purposes. Newbauer and Codd answered separately, denying the main allegations of the complaint and asserting special defenses.

Newbauer filed a cross-complaint against Codd, by which he sought damages, and an amended cross-complaint which sought only declaratory relief. It was alleged that the partnership had been dissolved, and certain provisions of the dissolution agreement were set out. The provision which furnished the basis of the cross-complaint and the amended cross-complaint was one by which each partner covenanted and agreed that he had not contracted "any debt or obligation which can or may charge Newbauer" or the partnership, except such as appeared on the books of the partnership or were mentioned in the agreement. No obligation or liability to Sattinger was shown or listed. By his amended cross-complaint Newbauer sought to have it determined whether Codd had entered into an agreement with Sattinger as alleged in the latter's complaint, on behalf of the partnership. It was alleged that the "dealings and negotiations" between Sattinger and Codd, if any, constituted or resulted in a "debt or obligation" of the partnership contracted and incurred by Codd, and which was not shown on the books of the partnership or listed in the agreement; a controversy existed between Newbauer and Codd; the former contended that any obligation or liability in favor of Sattinger was one within the foregoing provision of the dissolution agreement; Codd contended that if an obligation or liability existed it was not one within the scope of the partners' agreement. The prayer was for a declaration of the "rights and duties of the parties under and by virtue of, and as a result of the said agreements hereinabove alleged."

[1] As a reason for the ruling on the demurrer Codd says that the cross-complaint was filed prematurely; Newbauer should have waited until the Sattinger claim had been adjudicated, and if he should be hurt by the judgment, he could then sue Codd for damages, setting up the facts he now alleges in his amended cross-complaint. This would have been a good reason for sustaining a demurrer to the original cross-complaint, which did not seek a declaration of rights and duties under the dissolution agreement, but only damages. But the amended cross-complaint sought only declaratory relief. The fact that no judgment has been rendered against Newbauer in favor of Sattinger furnishes no reason for denying the former equitable relief under the declaratory relief procedure. The very purpose of that procedure, if given effect here, would enable Newbauer to obtain a declaration as to the obligation of Codd to him, if any, with respect to the Sattinger claim, before the merits of that claim had been adjudicated. To deny him that right would be to relegate him to the redress that would have been available to him before the declaratory relief procedure was adopted.

[2, 3] If Newbauer had a right to prosecute a claim for declaratory relief, which we do not doubt, the filing of the Sattinger action did not take away or postpone enforcement of the right. By express provision of section 1060, Code of Civil Procedure, "Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought." The procedure is anticipatory. Kessloff v. Pearson, 37 Cal.2d 609, 613, 233 P.2d 899. Newbauer did not have to wait until it had been determined whether Codd had broken his agreement by obligating the partnership in a matter that was covered by his warranty. The amended cross-complaint was not a premature attempt to obtain declaratory relief.

[4, 5] Respondent argues further that declaratory relief, alone, may not be sought by way of cross-complaint, for the reason that under section 442, Code of Civil Procedure, a cross-complaint is allowed only when affirmative relief is sought, and he says that declaratory relief is not affirmative relief. One who is proceeding under section 1060, Code of Civil Procedure, "* * * may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time." Respondent says "other relief" means "affirmative relief" and that unless something other than declaratory relief is sought there is no demand which could be the subject of a cross-complaint. But the declaratory relief sought here is affirmative relief. A delaration of rights and duties has the force of a final judgment. Section 1060 so provides. A declaratory judgment may establish a right or duty as affirmatively and effectively as a judgment establishing title to property. See Aten v. Aten, 69 Cal.App.2d 589, 159 P.2d 672. One does not bring an action for declaratory relief except to have some right or duty established for his benefit. Here a judgment on the cross-complaint in favor of Newbauer would determine that the claim of Sattinger, if established, was one that was covered by Codd's warranty. There is nothing in Newbauer's cross-complaint that is merely defensive, or negative. Quite the reverse.

The first sentence of section 442, Code of Civil Procedure, is authority for the cross-complaint: "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. * * *" The transaction to which the cross-complaint relates is the one upon which Sattinger has founded his action, namely, an alleged contract with the partners, and an alleged breach of the contract, for which Sattinger seeks damages. It will be determined in the action whether there was a contract with the partners and whether they incurred an obligation and a liability thereunder. If the court should determine there was a contract the evidence, as far as we can tell, will develop who the negotiating and contracting parties were. Those issues were tendered by the cross-complaint. With respect to the making of the alleged agreement the same evidence would be adduced under the cross-complaint as under the complaint and the answers.

[6–8] As stated in Humboldt County **v.** Kay, 57 Cal.App.2d 115, 117, 134 P.2d 501, 504: "The fundamental reason for allowing cross-complaints is to have a complete determination of a controversy among the parties in the one action, thus avoiding circuity of action." In that case suit was brought against a corporate surety under one bond and certain individuals under a later bond given for the same purpose. The corporate surety, by cross-complaint against its codefendants, sought to enforce an agreement with the sureties on the later bond by which they undertook to hold it free from loss. An order striking the cross-complaint was reversed. The reasoning of the court and the authorities cited are applicable to our case. The cross-complaint meets the test stated in Lori, Ltd. v. Wolfe, 85 Cal.App.2d 54, 62, 192 P.2d 112, 117: "The applicable principle is stated in Kent v. Clark, 20 Cal.2d 779, 786, 128 P.2d 868, 873, 142 A.L.R. 576: 'If the defendant's pleading sets forth matter inextricably related to the matter forming the basis of the plaintiff's complaint, it meets the statutory requirements of a cross-complaint, and it is immaterial that the relief sought thereby is independent of that prayed for in the complaint.'" The amended cross-complaint clearly met the requirements of section 442.

[9, 10] Respondent further relies upon section 1061, Code of Civil Procedure, which reads: "The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." In considering the application of the section, which vests in the court a discretionary power, no distinction should be drawn between an application for declaratory relief by way of a proper cross-complaint and one asserted by an independent action. Newbauer's right to equitable relief would be the same in either case. The controversy exists, the necessity for its determination has been brought to a focus by the institution of the suit by Sattinger, and we can conceive of no tenable ground for holding that a determination of the issues raised by the cross-complaint would be either unnecessary or improper. Where the right to declaratory relief is withheld it must be for some good reason. No reason has been suggested by respondent except the claim first mentioned that Newbauer should wait until he has to respond to a judgment against him in favor of Sattinger, when he may sue Codd for breach of his warranty in the dissolution agreement. It seems clear to us from the statute, and the history of its application, that it was just the sort of delay and circuity of action which would result from denying Newbauer equitable relief that led to the development of the declaratory procedure. It was said in Columbia Pictures Corp. v. DeToth, 26 Cal.2d 753, 762, 161 P.2d 217, 221, 162 A.L.R. 747: "Although under the declaratory relief statute, Code Civ.Proc., secs. 1060–1062a, wide powers have been conferred upon the trial court, its discretion is not unlimited. It is a legal or judicial discretion, hardened by experience into rule, and its exercise is subject to appellate review. Borchard, Declaratory Judgments, p. 299. * * * Where, therefore, a case is properly before the trial court, under a complaint which is legally sufficient and sets forth facts and circumstances showing that a declaratory adjudication is entirely appropriate, the trial court may not properly refuse to assume jurisdiction; and if it does enter a dismissal, it will be directed by an appellate tribunal to entertain the action. Declaratory relief must be granted when the facts justifying that course are sufficiently alleged."

[11] We are convinced that were we, in the position of trial judges, called upon to decide the question, we would regard a denial of the right to prosecute a claim for declaratory relief upon the amended cross-complaint of Newbauer as an abuse of discretion. Being so convinced, we must rule accordingly. It was error to sustain the demurrer to the cross-complaint without leave to amend.

The judgment is reversed.

WOOD and VALLÉE, JJ., concur.

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123 Cal.App.2d 243

HOOPER et al. v. BRONSON et al.

Civ. 15568.

District Court of Appeal, First District,
Division 2, California.
Feb. 17, 1954.

Driver and owner of automobile brought action against truck driver and owner for injuries and property damage sustained when automobile was struck in rear by truck when driver of automobile stopped in intersection to wait for opportunity to make left turn. The Superior Court of the County of San Mateo, Murray Draper, J., entered judgment adverse to driver and owner of automobile, and they appealed. The District Court of Appeal, O'Donnell, J. pro tem., held that evidence sustained verdict for truck driver and owner.

Judgment affirmed.

1. Automobiles ⇨242(1)

In action against truck driver and owner by driver and owner of automobile for injuries and property damage sustained when automobile was struck in rear by truck when driver of automobile stopped in intersection to wait for opportunity to make left turn, there was a presumption that truck driver, who was dead at time of trial, exercised due care. Code Civ.Proc. § 1963, subd. 4.

2. Negligence ⇨121(1)

Where alleged negligent acts of deceased are in issue, he is entitled to presumption of due care unless evidence, which is produced by party seeking to invoke presumption, is wholly irreconcilable with presumption. Code Civ.Proc. § 1963, subd. 4.

3. Negligence ⇨121(1)

Presumption of due care on part of deceased is sufficient to support a finding in accordance therewith. Code Civ.Proc. § 1963, subd. 4.

4. Automobiles ⇨244(12)

In action against truck driver and owner by driver and owner of automobile for injuries and property damage sustained when automobile was struck in rear by truck when driver of automobile stopped in intersection to wait for opportunity to make left turn, evidence sustained finding that truck driver, who was dead at time of trial, and who therefore presumably exercised due care, was not negligent. Code Civ.Proc. § 1963, subd. 4.

5. Appeal and Error ⇨1032(3)

Appellants had burden of showing that they were prejudiced by inclusion of allegedly improper language in instruction.

6. Death ⇨58(1)

In order to defeat prima facie case made by plaintiff by presumption that deceased exercised due care, defending party need only produce evidence which balances presumption, but where presumption resides with defending party, it is necessary for party having affirmative of issue to overcome presumption by preponderance of evidence. Code Civ.Proc. § 1963, subd. 4.

7. Automobiles ⇨246(60)

In action against truck driver and owner by driver and owner of automobile for injuries and property damage sustained when automobile was struck in rear by truck when driver of automobile stopped in intersection to wait for opportunity to make left turn, wherein defendants relied on presumption of due care on part of truck driver because truck driver was dead at time of trial, instruction that if there was evidence conflicting with presumption, it was jury's duty to weigh that evidence against presumption and any evidence that might support presumption, to determine which, if either, preponderated, was proper. Code Civ.Proc. § 1963, subd. 4.

8. Trial ⚷194(17)

In action against truck driver and owner by driver and owner of automobile for injuries and property damage sustained when automobile was struck in rear by truck when driver of automobile stopped in intersection to wait for opportunity to make left turn, wherein there was evidence which made it a question for jury to determine whether condition of traffic and surrounding circumstances were such as to permit making of left turn, court properly refused to give requested instruction of driver and owner of automobile that statute permits making of left turn on highway under conditions, which were present, since requested instruction told jury, in effect, that automobile driver was free from contributory negligence as a matter of law. Vehicle Code, § 525(b).

9. Trial ⚷241

In action against truck driver and owner by driver and owner of automobile for injuries and property damage sustained when automobile was struck in rear by truck when driver of automobile stopped in intersection to wait for opportunity to make left turn, trial court did not err in reading to jury statutory provision permitting a motorist to turn left across markings on highway "at any intersection or private driveway," though no private driveways were involved. Vehicle Code, § 525(b).

10. Automobiles ⚷246(11)

In action against truck driver and owner by driver and owner of automobile for injuries and property damage sustained when automobile was struck in rear by truck when driver of automobile stopped in intersection to wait for opportunity to make left turn, wherein trial court gave instruction that a motorist is permitted to make left turn across markings on highway at intersection or private driveway, court properly gave instruction defining an intersection in accordance with statute. Vehicle Code, §§ 86, 525(b).

11. Negligence ⚷12

Under "imminent peril doctrine", a person who, without negligence on his part, is suddenly and unexpectedly confronted with peril arising from either actual presence, or appearance, of imminent danger to himself or to others, is not expected or required to use same judgment and prudence required of him in exercise of ordinary care in calmer and more deliberate moments.

See publication Words and Phrases, for other judicial constructions and definitions of "Imminent Peril Doctrine".

12. Automobiles ⚷246(48)

In action against truck driver and owner by driver and owner of automobile for injuries and property damage sustained when automobile was struck in rear by truck when driver of automobile stopped in intersection to wait for opportunity to make left turn, evidence authorized instruction on doctrine of imminent peril.

13. Automobiles ⚷246(57)

In action against truck driver and owner by driver and owner of automobile for injuries and property damage sustained when automobile was struck in rear by truck when driver of automobile stopped in intersection to wait for opportunity to make left turn, evidence authorized instruction on unavoidable accident.

14. Appeal and Error ⚷1064(1)
Trial ⚷234(8)

Where one of the plaintiffs testified as an eyewitness to collision of automobile and truck, but plaintiffs failed to call another eyewitness, it was improper to instruct that if jury should find that it was within power of a party to produce stronger and more satisfactory evidence than that which was offered on material point, jury should view with distrust any weaker or less satisfactory evidence actually offered by such party on that point was improper, since testimony of one eyewitness, even though he be a party to the action, is no weaker than that of any other eyewitness, but giving of instruction was not prejudicial error.

15. Automobiles ⚷246(58)

In action against truck driver and owner by driver and owner of automobile for injuries and property damage sustained when automobile was struck in rear by truck when driver of automobile stopped in intersection to wait for opportunity to make left turn, evidence justified giving of instruction concerning statute providing that no motorist shall make turn until it can be made in reasonable safety and after giving of signal and shall not stop or suddenly decrease speed without giving signal. Vehicle Code, § 544.

16. Automobiles ⚷246(58)

In action against truck driver and owner by driver and owner of automobile for injuries and property damage sustained when automobile was struck in rear by truck when driver of automobile stopped in intersection to wait for opportunity to make left turn, evidence justified giving of instruction on contributory negligence.

17. Automobiles ⚷246(24)

In action against truck driver and owner by driver and owner of automobile for injuries and property damage sustained when automobile was struck in rear by truck when driver of automobile stopped in intersection to wait for opportunity to make left turn, instruction that one who has exercised ordinary care may assume that others will do likewise, but that one may not so assume when it is or should be apparent to him that another is not going to perform such duty, was proper.

18. Automobiles ⚷246(58)

In action against truck driver and owner by driver and owner of automobile for injuries and property damage sustained when automobile was struck in rear by truck when driver of automobile stopped in intersection to wait for opportunity to make left turn, evidence justified giving of instruction that one who is exercising ordinary care may assume that others will do likewise, but that one may not so assume when it is or should be apparent to him that another is not going to perform such duty.

19. Trial ⚷253(4)

In action for injuries and property damage sustained when automobile was struck in rear by truck, requested instruction of driver and owner of automobile that they were not required to show particularly what specific act of negligence was that produced accident, but were only required to show that accident could not have ordinarily occurred had due care been employed by truck driver, was properly refused because it failed to include prerequisite that driver of automobile was free from contributory negligence.

20. Trial ⚷260(1)

A party is not entitled to have jury instructed in any particular phraseology, and may not complain on ground that requested instructions are refused, if court, of its own motion or otherwise, correctly announces substance of law applicable to case, even though requested instructions state principles involved more clearly and definitely than those given.

21. Appeal and Error ⚷1067

In action for injuries and property damage sustained when automobile was struck in rear by truck, wherein court instructed that it is duty of every person using public highway to exercise ordinary care to avoid placing himself or others in danger and to avoid collision and defined negligence and ordinary care, refusal of plaintiffs' requested instructions that care required of motorist is relative and in proportion to danger to be anticipated, that motorist must be vigilant and anticipate presence of others on highway, and that motorist must keep his vehicle under control was not prejudicial error.

22. Appeal and Error ⚷1050(1)

In action against truck driver and owner by driver and owner of automobile for injuries and property damage sustained when automobile was struck in rear by truck when driver of automobile stopped in intersection to wait for opportunity to make left turn, it was not prejudicial error to permit police officer to express his opinion as to point of impact.

23. Evidence ⚷471(2)

In action against truck driver and owner by driver and owner of automobile for injuries and property damage sustained when automobile was struck in rear by truck when driver of automobile stopped in intersection to wait for opportunity to make left turn, court properly sustained objection of owner of truck to question put by owner and driver of automobile to police officer as to whether or not he had issued any citations as result of the accident on ground question called for a conclusion.

◆

Thomas L. Bocci, Jr., Daly City (W. L. A. Calder, Abraham Glicksberg, San Francisco, of counsel), for appellants.

Ropers & Majeski, Redwood City, for respondents.

O'DONNELL, Justice pro tem.

At midday on June 26, 1950, plaintiff Mary Hooper was driving her husband's sedan on Bayshore Highway when it was struck from the rear by a truck owned by defendant John Wagner and operated by defendant Chester Bronson. This action for damages for injuries allegedly sustained by Mrs. Hooper and for damage to Mr. Hooper's car ensued. After a trial by jury a verdict for defendants was returned, upon which judgment for defendants was entered. Plaintiffs appeal from that judgment.

Bayshore Highway is a four-lane highway. A double white line in the center of the highway separates northbound and southbound traffic. San Bruno Avenue extends from the west line of Bayshore Highway in a westerly direction to the community of Brisbane. The avenue is only 20 feet wide, except that as it approaches its junction with Bayshore it fans out in a wide arc, so that at the junction of the two roads it has a width of approximately 100 feet. For a distance of 57 feet there is a break, or opening, in the Bayshore double white line opposite the San Bruno Avenue junction, at either end of which a large white dot is painted on the pavement.

While there was no sign or legend to such effect, the obvious purpose of the opening was to indicate the area in which a left turn from Bayshore onto San Bruno Avenue could be executed. As Mrs. Hooper put it: "* * * I felt that the opening in the road was where one should turn."

The only witnesses who testified to the circumstances of the collision were Mrs. Hooper and Highway Patrol Officer Rakestraw. Bronson, the truck driver, had died before the trial. One Garcia, a passenger in the Hooper car, did not testify.

Mrs. Hooper testified that on the occasion in question she was traveling north on Bayshore. Her destination was the lumber yard located at the northwesterly corner of Bayshore and San Bruno Avenue. About half a block south of the junction of Bayshore Highway and San Bruno Avenue she moved from the outer to the inner, or "fast", lane to traffic preparatory to making a left turn onto the Avenue. She gave a hand signal indicating a stop and brought her car to a halt at the south end of the break in the double white line. She remained in this position for about "half a minute" to allow a southbound car to pass through the intersection. At about this time she observed a second southbound car approaching so she drove forward on Bayshore a distance of approximately 64 feet to a point that was about 7 feet north of the north end of the break in the double white line where she again brought her car to a stop. At the time of the second stop Mrs. Hooper was giving a hand signal for a left turn. She was in this position for another "half a minute" when her sedan was struck from the rear by the truck driven by Bronson. At no time before the collision did she see the truck or hear the sounding of a horn or the screeching of brakes. Officer Rakestraw, who investigated the accident, testified that the truck had left 156 feet of skid marks, terminating at a point 15 feet north of the north end of the break in the double white line. At this point he also found glass and debris. He stated that, in his opinion, this was the point of impact. The only evidence introduced by defendants was a certified copy of the death certificate of Bronson. They thereupon rested.

[1-4] Plaintiffs' initial contention on this appeal is that the evidence is insufficient to support the verdict for defendants.

They argue that Mrs. Hooper's testimony discloses that she was acting with due care and circumspection at all times and that the collision could only have occurred as a result of Bronson's negligence. It is not necessary at this juncture to evaluate Mrs. Hooper's testimony. We need only call attention to the presumption of due care which attends the deceased Bronson. Code Civ.Proc. § 1963, subd. 4. It is settled law that where alleged negligent acts of a decedent are in issue he is entitled to the presumption of due care unless evidence which is produced by the party seeking to invoke the presumption is wholly irreconcilable with the presumption. Such a presumption is sufficient to support a finding in accordance therewith. Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529; Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590; Scott v. Burke, 39 Cal.2d 388, 247 P.2d 313. The application of this rule is well illustrated in the Smellie case. In that case Smellie was killed in a collision between the truck of defendant Ireland, in which Smellie was riding as a guest, and a train of defendant Southern Pacific Company. His heirs sued for damages for his death. The only eye-witness account of the accident was that given by Ireland. His uncontradicted testimony was to the effect that the deceased was contributorily negligent. The Supreme Court held that the deceased was entitled to the presumption of the exercise of due care, and that therefore, notwithstanding the uncontradicted testimony of Ireland, it was error to direct a verdict in favor of defendants. On page 558 of 212 Cal., on page 536 of 299 P. of the opinion in that case the court says: " 'A presumption, even if disputable, will raise a conflict which is sufficient to support a finding made in accordance therewith, even though there be evidence to the contrary. Whether a presumption has been controverted is a question of fact.' " And on page 559 of 212 Cal., on page 537 of 299 P.: "* * a jury may disregard the testimony of such a witness (an adverse party) as against a presumption if the latter satisfies them."

Plaintiffs next urge that error was committed by the trial court in the giving and refusal of certain jury instructions.

At defendants' request, the trial court gave the following instruction to the jury: "The law presumes that Chester Bronson, now deceased, the defendant John Wagner's driver in this action, in his conduct at the time of and immediately preceding the accident here in question, was exercising ordinary care and was obeying the law.

[5] "These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of evidence to the contrary. When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption *and any evidence that may support the presumption* to determine which, if either, preponderates. Such deliberations, of course, shall be related to, and in accordance with, my instructions on the burden of proof." (Italics added.) Plaintiffs contend that the inclusion in the instruction of the italicized phrase, "and any evidence that may support the presumption", was error because there was no such supporting evidence. Assuming that there was no such supporting evidence, yet plaintiffs have not shown, nor attempted to show, wherein they were prejudiced by the inclusion of this language in the instruction. The burden of showing prejudice is on plaintiffs. (4 Cal.Jur.2d pp. 501–503.) No prejudicial error appears.

[6, 7] Plaintiffs further contend that the last sentence of the above quoted instruction is a misstatement of the law. They quote the following from Odden v. County Foresters etc. Board, 108 Cal.App.2d 48, 50, 238 P.2d 23, 24: "In rebuttal of a presumption it is not necessary to produce preponderant evidence to overcome it. A presumption is overcome if sufficient evidence is introduced to balance the presumption." To the same effect they cite Estate of Eakle, 33 Cal.App.2d 379, 91 P.2d 954 and Estate of Erickson, 140 Cal.App. 520, 35 P.2d 628. Plaintiffs' argument is that the instruction tells the jury that plaintiffs' evidence must preponderate over the presumption; whereas, they say, under the authorities just cited their evidence need only balance the presumption. However, in each

of those cases the presumption involved was one that ran *in favor of the party carrying the burden of proof*, and served to establish for such party a prima facie case. In order to defeat the prima facie case made by such presumption the defending party need only produce evidence which balances the presumption. But where the presumption resides with the defending party, it is necessary for the party having the affirmative of the issue to overcome the presumption by a preponderance of the evidence, and an instruction to that effect is proper. Westberg v. Willde, supra, 14 Cal. 2d 360, 94 P.2d 590; Olsen v. Standard Oil Co., 188 Cal. 20, 204 P. 393.

[8] Plaintiffs claim the trial court erred in refusing to give their requested instruction No. 23, which reads: "You are instructed that Section 525 of the Vehicle Code of the State of California, which controls in this case, permits the making of a left turn on a highway such as the Bayshore Highway, *under the conditions as are herewith present*. I further instruct you that the plaintiff was entitled to make a left turn at any point upon the said Bayshore Highway, across any markings thereon, at any intersection entering into said Bayshore Highway." The italicized language makes the instruction fatally defective. In effect it tells the jury that plaintiff Mary Hooper was free from contributory negligence as a matter of law. It was, of course, for the jury to decide whether the condition of traffic and other surrounding circumstances were such as to permit the making of a left turn at the time and place in question.

[9] In lieu of plaintiffs' requested instruction No. 23, the trial court, on its own motion, read to the jury subdivision (b) of section 525 of the Vehicle Code, which provides: "(b) The State Department of Public Works shall by regulation determine a distinctive roadway marking which shall indicate no driving over such marking, and is authorized * * * to designate any portion of a state highway where the volume of traffic * * * renders it hazardous to drive on the left side of such marking * * *. When such markings * * * are in place, the driver of a vehicle shall not drive along the highway to the left thereof, but this shall not prevent turning to the left across any such markings at any intersection or private driveway." Plaintiffs claim error was committed in giving this instruction because it makes reference to turning at private driveways, as well as at intersections. Plaintiffs assert that this was confusing to the jury because no private driveways are involved in the instant case. The contention is obviously without merit.

[10] Plaintiffs also complain of the following instruction, contending that it was unnecessary: "You are instructed that Section 86 of the Vehicle Code, which was in full force at the time and place of the accident herein, provided, and still provides, as follows:

"'Intersection' is the area embraced within the prolongation of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways, of two highways which join one another at approximately right angles or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict."

The trial court having read to the jury (and properly so) subdivision (b) of Section 525 of the Vehicle Code, it was entirely appropriate that it define the term "intersection". Moreover, the instruction is favorable to plaintiffs.

[11, 12] An instruction was given by the court on its own motion on the doctrine of imminent peril. Under that doctrine a person who, without negligence on his part, is suddenly and unexpectedly confronted with peril arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected or required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments. See Leo v. Dunham, 41 Cal.2d 712, 264 P.2d 1 and authorities therein cited. Plaintiffs urge that error was committed in giving this instruction. They claim that there is no

evidence that Bronson was suddenly confronted with peril. However, the evidence in the case admits of at least two interpretations which would make this instruction applicable. Examining the facts in the light of the presumption of due care which attended Bronson's actions, it must be assumed that he was driving his truck at a reasonable speed and at a safe distance behind the Hooper car and that he was observant of the movements of Mrs. Hooper and her car. When Mrs. Hooper proceeded northward past the north end of the opening in the double white line after making her first stop it might reasonably appear to one observing her movements that she had abandoned her intention to turn onto San Bruno Avenue and had decided to continue northward on Bayshore. True, she testified that she signaled a left turn. But she did not state for what distance. Moreover, the jury, being the sole judges of her credibility, might disbelieve her statement that she gave a signal. Again, accepting Mrs. Hooper's testimony that she did signal, her signal was for a left turn. But instead of turning she came to a dead stop. Thus Bronson would have been confronted with a situation where the movement of the car he was following was in contradiction of the directional signal given by its operator. Under either of these interpretations of the evidence Mrs. Hooper's action in bringing her car to a stop could not reasonably have been anticipated. Therefore, when she did stop it could reasonably be inferred that Bronson was confronted with a sudden emergency. Thus the defendants were entitled to have the prudence of Bronson's subsequent actions scrutinized in the light of the imminent peril doctrine and the instruction thereon was properly given. See Leo v. Dunham, supra; Emery v. Los Angeles Ry. Corp., 61 Cal.App.2d 455, 462, 143 P.2d 112; De Ponce v. System Freight Service, 66 Cal.App.2d 295, 152 P.2d 234; Jolley v. Clemens, 28 Cal.App.2d 55, 82 P.2d 51.

[13] The trial court instructed the jury that the verdict should be for defendants if the jury believed the collision was the result of an unavoidable accident. Plaintiffs contend that there was no evidence that the collision was the result of an unavoidable accident and that therefore the giving of the instruction was prejudicial error, citing Hyman v. Market Street Ry. Co., 41 Cal.App.2d 647, 107 P.2d 485. In that case the plaintiff, a passenger on a Market Street Railway street car, was injured in a collision between that street car and one operated by the Municipal Railway. The court held that the giving of an instruction on unavoidable accident, was prejudicial error. However, as the Supreme Court pointed out in Parker v. Womack, 37 Cal.2d 116, 122, 230 P.2d 823, 827, in discussing and distinguishing the Hyman case, "* * * the evidence (in the Hyman case) established the negligence of the defendant as a matter of law. Under the evidence there was no question of negligence for the jury to decide. Here no claim is made that Womack was negligent as a matter of law. Upon the evidence it was the duty of the jury to decide which, if either, of the drivers failed to use due care in entering the intersection and the Womacks were entitled to have the jury instructed in regard to the rule of unavoidable accident." In our case Bronson was not negligent as a matter of law. To the contrary, he carried a presumption of freedom from negligence. The instruction was therefore proper.

[14] The trial court also gave the following instruction on its own motion: "If and when you should find that it was within the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point you should view with distrust any weaker and less satisfactory evidence actually offered by him or her on that point." Plaintiffs contend that this instruction prejudiced their case because of the following incident which occurred during the course of the trial: "Mr. Bocci (Plaintiffs' attorney): We will call Mr. Garcia. Mary Hooper: He is not here. He came yesterday." Plaintiffs say that because of their failure to produce the testimony of Garcia, the jury must have considered this instruction as an admonition to view the

testimony of Mrs. Hooper with distrust. It is established that the testimony of one eye-witness, even though he be a party to the action, is no "weaker" than that of any other eye-witness. In such a situation there is, therefore, no occasion for giving the instruction. Lawyer v. Los Angeles Pacific Co., 23 Cal.App. 543, 138 P. 920; Gibson v. Kennedy Extension Gold Min. Co., 172 Cal. 294, 156 P. 56; Brown v. Sharp-Hauser Contracting Co., 159 Cal. 89, 112 P. 874; Wilson v. Crown Transfer etc. Co., 201 Cal. 701, 258 P. 596; Koon v. Sher, 98 Cal.App.2d 530, 220 P.2d 784. As it was said in the Gibson case, supra, 172 Cal. at page 305, 156 P. at page 61: "But this is not a case of producing weaker evidence where stronger is within the power of the party. The disqualification of parties as witnesses has been removed by our law, and the plaintiff, in testifying to the signals given, was giving evidence which was not in a legal sense 'weaker' than that of any other eyewitness. (Citing case.) Furthermore, it was no more within the power of the plaintiff than of the defendant to produce the testimony of Bianchinotti." These cases further hold that such an instruction is not prejudicial in that situation. Thus, in the Lawyer case, supra, 23 Cal.App. at pages 547–548, 138 P. at page 922: "The fact, as claimed by respondent, that defendant knew the names and addresses of persons who were at the time passengers on the car, and who were not called as witnesses, did not tend to prove that, had they been called, their testimony would have been other than cumulative, or that it would have been more satisfactory in support of defendant's contention than was the evidence of witnesses produced on its behalf. Presumably defendant offered the strongest evidence within its power to produce. * * *

"Since, however, the jury were instructed to view with distrust the evidence offered only in case it appeared to be within the power of the party offering it to produce stronger and more satisfactory evidence than that offered, and there was no evidence tending to show such fact, it is apparent that defendant's substantial rights were not affected by the error in giving the instruction. In other words, there was no evidence tending to prove the existence of the conditions under which the jury were told to distrust the testimony." (Citing cases.) That reasoning is fully applicable here. We hold that the trial court's error in giving the instruction was not prejudicial to plaintiffs' case. (For a case involving aggravated circumstances where the giving of this instruction constituted prejudicial error, see Boyd v. Theetgee, 78 Cal.App.2d 346, 177 P.2d 637.)

[15] Plaintiffs contend that there is no evidence in the record to justify the trial court's giving the following instruction: "You are instructed that Section 544 of our Vehicle Code, which was in full force at the time and place of the accident herein, provided, and still provides, as follows:

"'(a) No person shall turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided herein in the event any other vehicle may be affected by such movement.

"'(b) Any signal of intention to turn right or left shall be given continuously during the last 50 feet traveled by the vehicle before turning.

"'(c) No person shall stop or suddenly decrease the speed of a vehicle on a highway without first giving an appropriate signal in the manner provided in this chapter to the driver of any vehicle immediately to the rear when there is opportunity to give such signal.'" The instruction goes to the very core of the case. The contention is without merit.

[16] The court on its own motion gave an instruction on contributory negligence. Plaintiffs say that there is no evidence of contributory negligence in the case. Mrs. Hooper's conduct and the possible inferences that may be drawn therefrom have already been discussed and need not be repeated here. Suffice it to say, additionally, that the single circumstance that Mrs.

Hooper neither saw nor heard the truck until it collided with her car is sufficient to justify the inference that she was negligently inattentive. The instruction was fully warranted.

[17, 18] The trial court refused to give plaintiffs' instruction No. 9 relative to responsibility for failure to use ordinary care. The subject matter thereof was covered by other instructions given by the court. Also refused, in the form submitted, was plaintiffs' requested instruction No. 10 which states that one who is exercising ordinary care may assume that others will do likewise. The court gave an instruction that included this statement of the law, but added the qualification that one may not so assume when it is or should be apparent to him that another is not going to perform his duty. Plaintiffs argue that there was nothing in the evidence to justify the qualification. The instruction, as given, correctly stated the law, Angier v. Bruck, 56 Cal.App.2d 55, 131 P.2d 876, and the evidence, hereinabove recited, fully warrants it.

[19] Plaintiffs submitted and the court refused the following instruction: "The plaintiffs are not required to show particularly what the specific act of negligence was which produced the injury. They are only required to show, by a preponderance of the evidence that the accident could not have ordinarily occurred had due care been employed by the defendant and you are instructed that, if the testimony in this case shows, by a preponderance of the evidence, that the plaintiffs' injuries were sustained by reason of the negligent acts of the defendant, and that those negligent acts were the proximate cause of the injury, then it will be your duty to return a verdict for the plaintiffs." This was a formula instruction which was properly refused because it fails to include the prerequisite that plaintiffs, in order to recover, be free from contributory negligence.

[20, 21] The trial court refused to give plaintiffs' proposed instruction No. 17 (the care required of a motorist is relative and in proportion to the danger to be anticipated), their proposed instruction No. 21 (a motorist must be vigilant and anticipate the presence of others on the highway), and their proposed instruction No. 22 (a motorist must keep his vehicle under control). The instructions as proposed correctly state the duties of the operator of a motor vehicle. However, the trial court in its instructions defined "negligence" and "ordinary care" and told the jury that, "It is the duty of every person using a public highway to exercise ordinary care at all times to avoid placing himself or others in danger and to avoid a collision." The three proposed instructions were merely variations on the theme of the last quoted instruction. "A party is not entitled to have the jury instructed in any particular phraseology, and may not complain on the ground that his requested instructions are refused if the court, of its own motion or otherwise, correctly announces the substance of the law applicable to the case; this is true even though the requested charges state the principles involved more clearly and definitely than those given." (24 Cal.Jur. pp. 806–810, quoted with approval in McNulty v. Southern Pacific Co., 96 Cal.App.2d 841, 855, 216 P.2d 534. See, also, to the same effect: Gladstone v. Fortier, 22 Cal.App.2d 1, 12, 70 P.2d 255; Luis v. Cavin, 88 Cal.App.2d 107, 115, 198 P.2d 563; Mullanix v. Basich, 67 Cal.App.2d 675, 680, 155 P.2d 130; People v. Barber, 62 Cal.App.2d 206, 213, 144 P.2d 371.) In any event, we fail to see where plaintiffs were prejudiced by the trial court's refusal to give the three requested instructions. Any juror of normal intelligence would appreciate, without being told, that the duty of ordinary care imports the obligation to be vigilant, to keep one's vehicle under control, and to be increasingly alert as danger increases. It is incumbent on plaintiffs to show prejudicial error. (Cases cited supra, this paragraph.) This they have not done.

[22] Plaintiffs next contend that the trial court committed prejudicial error in allowing Officer Rakestraw to express his opinion as to the point of impact of the truck and sedan. The opinion was elicited on cross-examination over the objection of plaintiffs' counsel. Plaintiffs rely on People v. Haeussler, Cal.App., 248 P.2d

434, in support of this contention. The District Court of Appeal (Second District) held that the point of impact of two colliding cars is a question of fact for the jury's determination and that it was error for the trial court to permit a police officer to state an opinion on the subject. However, the Supreme Court granted a hearing in that case and in its opinion expressly held that where the exact point of impact is in dispute a police officer experienced in investigating accidents may express his opinion thereon, basing such opinion on the physical facts, such as the location of skid marks, broken glass and other debris. People v. Haeussler, 41 Cal.2d 252, 260 P.2d 8. Apart from this, on direct examination by plaintiffs' counsel Officer Rakestraw at the very outset of his testimony stated that the collision took place 15 feet north of San Bruno Avenue. It is true that the answer was not responsive to the question put to him, but no motion was made to strike it. In any event, it would seem to be unimportant whether she stopped 7 feet or 15 feet beyond the opening. No prejudicial error appears.

[23] Plaintiffs' final contention is that the trial court erred in sustaining defendants' objection to the question put to Officer Rakestraw as to whether or not he had issued any citations as a result of the accident. They cite Dorman v. Taylor, 113 Cal. App.2d 505, 248 P.2d 441. That case, far from supporting plaintiffs' contention, holds directly to the contrary. The court, in speaking of a similar question, said, 248 P. 2d at page 509, 248 P.2d at page 443: "The question in that form was certainly objectionable as it clearly called for the conclusion of the witness as to whether or not there were any law violations and the objection was properly sustained." Moreover, earlier in the trial defendants' counsel had sought to elicit the same information from Officer Rakestraw and the objection of plaintiffs' counsel was sustained.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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123 Cal.App.2d 226

PEOPLE v. WILLIAMS et al.

Cr. 796.

District Court of Appeal, Fourth District, California.

Feb. 16, 1954.

Defendants were convicted of robbery The Superior Court, San Diego County, John A. Hewicker, J., entered judgment, and defendants appealed. The District Court of Appeal, Barnard, P. J., held, inter alia, that where court made a lengthy statement to jury preliminary to giving of instructions but clearly told jury that the preliminary statement was to be considered in light of specific instructions which followed, and where court followed such preliminary statement with full and definite instructions correctly covering every element of case, erroneous expressions in preliminary statement, although they should not have been used, could not reasonably be believed to have misled jury, or to have resulted in miscarriage of justice such as would require reversal, in view of fact that evidence of guilt was clear and convincing.

Affirmed.

1. Criminal Law ⚿543(2)

Court did not abuse its discretion in permitting testimony of witness given at preliminary hearing to be read into evidence, upon showing that such witness had gone to Mexico City upon being informed that his mother was dying and that he had not yet returned.

2. Criminal Law ⚿544

Where record showed that, at preliminary hearing, witness was cross examined separately by three attorneys, no prejudice appeared from court's action in permitting transcript of testimony of such witness at preliminary hearing to be read into evidence.

3. Criminal Law ⚿531(3), 781(5)

In prosecution for robbery, wherein defendants contended that admissions or confessions were improperly admitted because of insufficient showing that they were voluntarily made, evidence supported judge's determination of initial question of admissibility, and his submission to jury of voluntariness, under instruction that it was for them to determine whether confessions were made and whether they were voluntary, and that they must disregard them unless found to have been voluntarily made.

4. Witnesses ⚷256

In robbery prosecution, court did not err in refusing to permit defendant's counsel to lay a foundation for, and to examine, notes which witness for state said he had made while taking confessions, where witness did not use such notes on the stand.

5. Criminal Law ⚷396(2)

Rule that where a part of a conversation has been shown in evidence, the whole of it may be brought out by the other side, is subject to qualification that portion of conversation not relevant to matter in question may be excluded.

6. Criminal Law ⚷382

Ordinarily, the subject of penalty is not the jury's concern.

7. Criminal Law ⚷531(2)

In robbery prosecution, court did not err in excluding as immaterial any reference to the penalty while defendant was being examined with respect to voluntariness of confession, and in insisting that no mention of what had been said regarding penalty be brought out unless it was contended that penalty stated by officer taking confession was greater than it would actually be.

8. Criminal Law ⚷1171(1)

In robbery prosecution where defendant took stand for purpose of showing that his confession was not free and voluntary, question asked by district attorney on cross examination, as to whether defendant was induced to tell truth about case, or induced to lie about it, had a direct bearing on testimony given by defendant on direct examination, and the asking of such question did not constitute prejudicial misconduct.

9. Criminal Law ⚷829(11)

In robbery prosecution, court did not err in refusing to give defendant's requested instruction as to voluntariness of confession, where matter was fully and adequately covered in written instructions given.

10. Criminal Law ⚷1186(4)

Where court, in robbery prosecution, made a lengthy statement to jury preliminary to giving of instructions but clearly told jury that the preliminary statement was to be considered in light of specific instructions which followed, and where court followed such preliminary statement with full and definite instructions correctly covering every element of the case, erroneous expressions in preliminary statement, although they should not have been used, could not reasonably be believed to have misled jury, or to have caused miscarriage of justice such as would require reversal of convictions, in view of fact that evidence of guilt was clear and convincing. Const. art. 6, § 4½.

Clifford L. Duke, Jr., Myron Kaminar, Augustine, Bryans, Ragen & O'Connor, and Alpha L. Montgomery, San Diego, for appellants.

Edmund G. Brown, Atty. Gen., Norman H Sokolow, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

These defendants were jointly charged with robbery. In the first count it was charged that on April 9, 1953, they took $90 from Jesus Carrillo by force and fear. The second count charged them with taking $50.50 from Demetrio Avina by force and fear. As to each count it was charged that they were armed with a deadly weapon, a .22 rifle and a 20-gauge shotgun. A jury found each defendant guilty of first degree robbery on each count, and further found that two of them had been armed with a deadly weapon. A motion for a new trial was denied and all five defendants have appealed from that order and from the judgment.

The five defendants were represented by four attorneys at the trial, and the one who represented the defendant Leon was appointed by this court to represent him on this appeal. While some of the appellants raise points which are not raised by others, it will be unnecessary to differentiate between them in this regard.

It appears from the evidence that Carrillo and Avina, with a number of other Mexicans, were employed on a ranch in the Borrego Valley. On April 8, 1953, all of the appellants except Leon talked of going to Borrego Valley to see if they could pick up some "wetbacks". On April 9, they started out in a car, having a .22 rifle and a 20-gauge shotgun, and on the way they picked up Leon. About 7:00 p. m. on that day, they drove to a certain point near this ranch where Kretlow, Krom and Villareal got out. Krom had the .22 rifle and Villareal the shotgun. Williams and Leon then drove to the ranch where they picked up Carrillo and five other Mexican aliens, promising to take them to Los Angeles and collecting $10 from each of them for the trip. They then drove to the point where Kretlow, Krom and Villareal were waiting, and stopped the car. The defendants then took such money as they had left from the aliens and told them to run, firing a shot or shots for the purpose of frightening them and holding them together. They then drove to another point near the ranch where Krom, Kretlow and Villareal again got out of the car. Williams and Leon then drove to the ranch, picked up Avina and four other aliens and returned to the point where the other three were waiting. They then went through the same procedure as with the first group, robbing the aliens, firing a shot, and telling them to run.

On April 10, a deputy sheriff went to the location pointed out by Carrillo as the scene of the first robbery and there found a .22 caliber cartridge. Later, the officers found a .22 rifle which Krom admitted was the one he had used on the night of the robberies. A ballistics expert compared six cartridges fired from this gun with the one found by the officers, and testified that all seven were fired from the same gun. A jacket with peculiar markings, testified to as having been worn by one of the robbers, was found in the possession of Williams and admitted by him to be his. Shortly after the robberies an officer, Isbell, talked to all five of the appellants. Leon denied knowing anything about the robberies. The other four told in detail how the robberies were planned and executed, their statements corresponding fully with the statements made by the victims with respect to how the robberies were committed. None of the appellants took the witness stand, except on voir dire on the one issue as to whether or not their statements had been given voluntarily.

[1, 2] Carrillo and two of the other victims testified at the trial but Avina was not present, and the transcript of his testimony at the preliminary hearing was read into evidence. Appellants' first contention is that it was error to admit the testimony of this absent witness since no sufficient showing was made of due diligence to secure the presence of Avina. In this connection it appears that at the time of the preliminary hearing the district attorney had stated that he had every reason to believe that all of these witnesses would be available for the trial, since they had placed a "hold" on the immigration service and arrangements were made to keep them in this country for the trial; that on May 27, the case was set for trial on July 8; that on May 27, all the victims were under a "hold" of the immigration department and had been placed at various farms in the county to remain pending trial; and that those special arrangements were made for the purpose of keeping them here for trial. It was stipulated that a deputy sheriff, if called, would testify that he received a subpoena on June 20 and went to the ranch of a Mr. Nichols where Avina was employed; that Nichols told him that on June 15, Avina had received a telegram from Mexico City saying that his mother was dying, that arrangements were made to fly Avina from Tijuana on June 16, that Avina was presently in Mexico City, that Avina said he would probably be back in time for the trial and would try to do so, and that he had not yet arrived. The showing of diligence was sufficient under the circumstances, and no abuse of discretion appears in this connection, People v. Cavazos, 25 Cal.2d 198, 153 P.2d 177; People v. Dunn, 29 Cal.2d 654, 177 P.2d 553. Moreover, no prejudice appears, as the record shows that at the preliminary hear-

ing Avina was cross-examined separately by three attorneys.

[3] Some of the appellants further contend that the court erred in admitting into evidence the testimony of the officer Isbell, as to the admissions or confessions made by four of the appellants, since it was not sufficiently shown that these admissions were voluntarily made; that the direct testimony of the appellants showing that promises of reward and immunity were made were not denied; and that the only evidence to the contrary was the conclusions and opinions of the officer. Isbell first testified, with respect to his talk with the individual appellants, that no threats were made and that no promises or grants of immunity were made by him, or by ony one else in his presence. In several of the instances counsel put his client on the stand, on voir dire, and the client testified to the effect that Isbell had said that if the individual would cooperate with the police it would go much easier with him; that by cooperating with the police it would be much better for him and go much easier with respect to probation; and that because of these promises he answered the questions asked but otherwise would not have made any statements as to the robbery. Thereafter, Isbell testified in detail as to the respective conversations, telling what was said, and that this was all of the conversation. In effect, Isbell thus denied the statements made by the individual appellants, and the evidence was sufficient to support the court's ruling in this regard. The evidence, while conflicting, supports the judge's determination on the initial question as to whether the confessions were admissible and the jurors were instructed that it was for them to determine whether the confessions were made and whether they were voluntary, and that they must disregard them unless it was found that they were voluntarily made. People v. Logan, 41 Cal.2d 279, 260 P.2d 20.

[4–8] In connection with these confessions several other contentions are made. One appellant argues that the court erred in not permitting his counsel to lay a foundation for, and to examine, the notes which Isbell said he had made while taking the confessions of the appellants. Isbell had admitted that in one instance he had been confused and had said that a certain statement was made by one of the appellants when it was actually made by another. Counsel tried to bring in these notes which had not been used by Isbell in his testimony, and an objection was sustained. Counsel said he would like to make an offer of proof and the judge told him he could make this offer in the absence of the jury, and he would then permit counsel to reopen if the offer of proof appeared to be material. It does not appear that any such offer of proof was ever made. Not only was the offer of proof not followed through but no error appears since the witness had not used these notes on the stand. People v. Gallardo, 41 Cal.2d 57, 257 P.2d 29. This same appellant also urges that the court erred in excluding any reference to the penalty as being immaterial. While this appellant was being examined on voir dire, with respect to the voluntariness of the confession, the court insisted that no mention of what had been said regarding the penalty be brought out unless it was contended that the penalty stated by the officer was greater than it would actually be. It is argued that this was error under the rule that where a part of a conversation is given in evidence the whole of it may be brought out by the other side. This rule is subject to the qualification that the portion of the conversation which is not relevant to the matter in question may be excluded. People v. Hymer, 118 Cal.App.2d 28, 257 P.2d 63. Ordinarily, the subject of penalty is not the jury's concern and no prejudice appears. Another appellant contends that the district attorney was guilty of prejudicial misconduct in asking him one question. This appellant took the stand on voir dire for the purpose of showing that his confession was not free and voluntary. On cross-examination he was asked "Did they induce you to tell the truth about the case or induce you to lie about it?" An objection was overruled and he answered, "I would say I was induced to lie about it." It is argued that the question was improper as going to the merits of the action. This question had a direct bearing on the testimony given by this witness on his direct examination, People v. Kynette, 15 Cal.2d 731, 104 P.2d 794, a part of which could well be considered as bearing on the merits of the action. In any event, no prejudice appears.

[9] Error is assigned in the refusal to instruct the jury that if it found from the evidence that the officers had told one of the defendants that if he would cooperate and answer their questions things would be better for him and it would go easier on him, and if it found that this defendant relied on said promises and by reason thereof made a confession, that as a matter of law said confession was not free and voluntary and must be disregarded. This instruction was refused as covered. Neither error nor prejudice appears as the matter was fully and adequately covered in the written instructions given.

[10] It is further contended that the court misdirected the jury and erred in giving several instructions, as hereafter noted. At the beginning of his instructions the court said: "Now, I want to make a preliminary statement before I give you the actual instructions in this case which are in writing. * * * What I say at this time as to this offense, and so forth, I want you consider that in the light of the instructions which I will give you and it is given to conform" therewith. The court then went on to make a long statement pointing out that this was an unusual case, with five defendants and four attorneys, commenting on a number of matters which had been talked about during the trial, and making some general observations with respect to those matters. At the conclusion of that statement the judge went on to read the written instructions, which were very complete and which thoroughly covered every point of law involved in the case. The matters here complained of were all matters appearing in the preliminary statement thus made by the judge, and no complaint is made with respect to the real instructions which followed.

1. The first four relate to the finding of a knife. The appellants were charged with armed robbery in that they were armed with a rifle and shotgun. There was some evidence that they also had a knife but, while the rifle and shotgun were found and produced in evidence, no knife was found. In commenting on this phase of the case the judge stated that if the jury found that none of these articles were found this would be no reason for finding that the defendants were not armed "if you believe that the defendants were present at the time and place in question." He also stated that the mere fact that a weapon was not found does not make any difference "so long as there is proof that the weapon such as has been described was used"; that the mere fact that a knife was not produced would make no difference "if you feel from the evidence in this case that the knife was used"; and "If you find that there was a robbery perpetrated down there you will have to find whether or not these defendants, or any of them, were present at the time of the robbery. If they were, you will find them guilty, and if they weren't, you will find them not guilty." It is argued that the use of the words "think" and "feel" in some of these statements were improper because proof must be "beyond a reasonable doubt"; that the presence of a defendant at the scene of the crime would not be sufficient proof of guilt; and that erroneous statements of law thus clearly appear. Obviously, these were erroneous statements of law but they were made in connection with the discussion of certain incidents and in connection with other portions of the same general discussion showing that other things were necessary, the entire discussion being preceded by a statement that this was a preliminary discussion and was to be considered in the light of the specific instructions which were to be later given. While the matters complained of appear serious when taken out of the context, a reading of the entire preliminary statement strongly indicates that the jury could not have been misled and must have understood that what was there being said was intended for a limited purpose, was confined to a part of one issue, and was to be modified and controlled by the regular instructions which followed.

2. In connection with the long discussion of another matter which the judge thought might mislead the jury the judge said: "Your only purpose is to determine

what the facts are in this case and if you think they are innocent under the evidence you will acquit them and if you think any or all of them are guilty, you will find them guilty." The complaint here made is that the word "think" was used rather than language to the effect that there must be a finding beyond a reasonable doubt. This was thoroughly covered in other instructions. Some suggestion is also made that a part of this portion of the statement would tend to indicate to the jury the judge's own view as to the matter of guilt or innocence. No such expression of opinion appears, and the judge fully instructed the jurors that they should disregard any expression he might have used which might seem to indicate any opinion held by him with respect to the facts, or which might have suggested that he was inclined to favor the claims of either party.

3. It is contended that the court trespassed on the province of the jury during this preliminary statement by saying that the appellants were not deceived by what Isbell told them about the punishment; that the only respect in which Isbell did not tell them the truth was what he told them with reference to probation, in that he made it worse than it was and that this was done through inadvertence; that it was up to them to determine whether Isbell had told the truth; and that if there was any material discrepancy between the testimony at the preliminary hearing and at the trial, the jury should, of course, consider it. It is argued that these remarks showed the court's approbation of the officer's testimony, and was an interference with the jury's exclusive province to determine the matter of Isbell's credibility. These statements were made during the course of a long explanation of why the court had endeavored to keep the matter of what the penalty would be out of the testimony given by the appellants while being examined on voir dire, with respect to whether or not the confessions were voluntary or not. The statements objected to could hardly be prejudicial when taken in connection with the context, and were not necessarily improper under the circumstances. People v. Gosden, 6 Cal.2d 14, 56 P.2d 211. Moreover, the court instructed the jury that "with the questions of fact, the weight of the evidence and the credit you should give to any witness sworn in the case, the court has nothing to do. These are matters entirely within your province which you, as jurors, must determine for yourselves."

4. Complaint is also made of the part of the preliminary statement in which the court told the jury that whether the appellants were represented by counsel at the time they made the confessions or whether they were in custody at the time would not, of itself, make their confessions voluntary or involuntary; that the mere fact that an officer tells a defendant in a particular case that they have the goods on him would not make it involuntary; and that regardless of the fact that Mr. Isbell may have told the appellants that he had certain information would not make a confession involuntary if, in fact, he did not have that information. It is argued that the court thus emphasized the various items that would make a confession voluntary, but refused to instruct the jury as to items which would make the confession involuntary. The jury was instructed fully and at great length on that element. Among other things, the jury was instructed that "A confession is involuntary when it is obtained by any sort of violence or threats, or by any direct or implied promises of immunity or benefit, or by any improper influence which might induce in the mind of the defendant the belief or hope that he would gain or benefit or be better off by making a statement * * *".

While some of the expressions used in this preliminary statement are erroneous, and while they should not have been used, it cannot reasonably be believed that the jury may have been misled thereby. The jury was clearly told in the beginning that this preliminary discussion was to be considered in the light of the specific instructions which followed, and it was then given full and definite instructions covering every element of the case, the correctness of which is not questioned. This is not a close case, the evidence of guilt was clear and convincing, and it would be unreasonable to believe that these errors could have affected the result. No miscarriage of justice appears, and the provisions of section 4½ of Article VI of the Constitution are applicable.

GRIFFIN and MUSSELL, JJ., concur.

123 Cal.App.2d 199

TAYLOR et al. v. JACKSON.

Civ. 15692.

District Court of Appeal, First District, Division 2, California.

Feb. 16, 1954.

Action arising out of accident in which infant, who ran from between two stopped automobiles at or near pedestrian crosswalk, was struck by defendant's automobile. The Superior Court, Alameda County, A. J. Woolsey, J., entered judgment for defendant, and plaintiffs appealed. The District Court of Appeal, Nourse, P. J., held that whether defendant violated statute requiring motor vehicle operator to yield right of way to pedestrian crossing street at pedestrian crosswalk was for jury under the evidence.

Judgment affirmed.

1. Automobiles 🔑160(4)

Violation of Vehicle Code provision requiring driver of vehicle to yield right of way to pedestrian crossing within any marked or unmarked crosswalk at an intersection constitutes negligence per se. Vehicle Code, § 560(a).

2. Negligence 🔑6

Although violation of a statute imposing a standard of care may be negligence as a matter of law, circumstances still may be shown in excuse or in justification of such conduct.

3. Automobiles 🔑245(8)

In action to recover for injuries received by infant who ran from between two stopped automobiles at or near pedestrian crosswalk into defendant's oncoming automobile, whether defendant's violation of statute, requiring motor vehicle operator to yield right of way to pedestrian crossing street at pedestrian crosswalk was excusable was for jury under the evidence. Vehicle Code, § 560(a).

4. Automobiles 🔑246(35)

In action to recover for injuries received by infant who ran from between two stopped automobiles at or near pedestrian crosswalk into defendant's oncoming automobile, instruction that infant could not, by reason of his age, be guilty of contributory negligence was not misleading or improper.

5. Trial 🔑260(8)

In action to recover for injuries received by infant who ran from between two stopped automobiles at or near pedestrian crosswalk into defendant's oncoming automobile, requested contributory negligence instruction was correctly refused in view of other instruction adequately covering subject thereof. Vehicle Code, § 560(a).

6. Trial 🔑260(8)

In action to recover for injuries received by infant who ran from between two stopped automobiles at or near pedestrian crosswalk into defendant's oncoming automobile, trial court's alleged failure to instruct that violation of statute requiring motor vehicle operators to yield right of way to pedestrian at pedestrian crosswalk was negligence per se did not constitute prejudicial error in view of other instructions covering subject of negligence per se. Vehicle Code, § 560(a).

7. Negligence 🔑141(11)
Parent and Child 🔑7(14)

In action to recover for injuries received by infant who ran from between two stopped automobiles at or near pedestrian crosswalk into defendant's oncoming automobile, consolidated with cause of action by infant's mother for medical expenses resulting from infant's injury, instruction advising jury that if mother was guilty of negligence in allowing child to be in the street unattended verdict must be in favor of defendant did not convey to jury that if mother was contributorily negligent neither mother nor child could recover, and correctly stated law as to mother's complaint. Vehicle Code, § 560(a).

* * *

James A. Johnstone, Emeryville, and William B. Mead, Oakland, for appellants.

Theodore Tamba, San Francisco, for respondent.

NOURSE, Presiding Justice.

MacArthur Taylor, a minor, through his mother, Clara Taylor, as his guardian ad litem, brought suit for injuries suffered when he came in contact with defendant's automobile. Clara Taylor joined in said suit her cause of action for medical and hospital expenses incurred in the treatment of the injuries of her son. The jury rendered a verdict for defendant and plaintiffs appeal.

The accident happened in or near the intersection of West street and 37th street in Oakland. The streets intersect at right angles, West street running north and south, 37th street east and west. West street has one traffic lane for each direction. Defendant was proceeding southward on West street in the direction of and across 37th street. In front of him his lane was free of traffic, but in the northbound lane was a solid line of cars stopped because of a traffic light at the next cross-street to the north of 37th street, MacArthur Boulevard. This line extended bumper to bumper from MacArthur Boulevard south far across 37th street. The minor plaintiff, then 5 years old, tried to cross West street from east to west, running from between the stopped cars into the southward bound lane. There is a conflict in the evidence as to the exact place where the child tried to cross, whether in the southerly unmarked pedestrian crosswalk across West street at the 37th street intersection or somewhat to the south of it, defendant and his wife, who was with him in his car, testifying that the place of impact was to the south of the crosswalk, two eyewitnesses to the effect that it was in the southerly part of said crosswalk.

There was further strong evidence that the child came running from between two stopped cars and took only a few running steps, probably not more than two, after he emerged from between these cars until he was hit by the left forefender of defendant's automobile. Defendant testified that he looked left and right when he came to the southern crosswalk of the intersection but did not see the child; he was going 15 to 20 miles an hour; he got only a sudden glimpse of the child when he saw his head and shoulders over the top of his left fender. He immediately braked, approximately at the same time as the impact occurred. The skid marks were measured to be 23 feet. The street was dry. It was daylight with clear visibility.

[1, 2] Appellants' main contention is that the evidence is insufficient, as a matter of law, to support a judgment for respondent, because it shows as a matter of law that defendant violated section 560 subd. (a) of the Vehicle Code which requires the driver of a vehicle to yield the right of way to a pedestrian crossing within any marked or unmarked crosswalk at an intersection, the violation of which section constitutes negligence per se. Nicholas v. Leslie, 7 Cal.App.2d 590, 594, 46 P.2d 761; Fischer v. Keen, 43 Cal.App.2d 244, 249, 110 P.2d 693. That violation of section 560(a) by failure to yield the right of way is considered negligence per se is true and the rule of said section is in some cases even extended to pedestrians crossing just without the boundary of a crosswalk. Nicholas v. Leslie, supra, 7 Cal.App.2d at page 595, 46 P.2d 761; Woods v. Eitze, 94 Cal.App.2d 910, 917, 212 P.2d 12. "However, though violation of a statute imposing a standard of care may be negligence as a matter of law, circumstances still may be shown in excuse or in justification of such conduct." Driver v. Norman, 106 Cal.App.2d 725, 727, 236 P.2d 6, 8. In that case appellant, driver, hit a pedestrian crossing within an unmarked crosswalk. The driver, who closely followed another car, saw the pedestrian only when the first car suddenly swerved to avoid striking her. Appellant also swerved but nevertheless hit her. The court further said: "Prima facie, appellant herein was negligent in violating Vehicle Code section 560 but from the evidence introduced it was still a question for the trier of fact as to

whether his conduct in failing to yield the right of way was not that of any ordinarily prudent person. (Citation.)

"Under all the circumstances the jury could properly have determined that appellant was not negligent in failing to yield the right of way since his vision was obscured by the Cadillac which preceded him. For the same reason, his failure to see respondent might be excused since she appeared suddenly from in front of the other vehicle. At the least, the evidence is not such that the court is impelled to say reasonable men could and must draw only the inference of negligence. Under such circumstances, violation of a statute is not negligence *per se* proximately contributing to the accident. (Citation.)"

[3] In the case before us the jury could properly come to the same conclusion because of the sudden appearance of the running child from between the stopped cars, and from the evidence that the accident did not occur in a crosswalk. Whether under these circumstances the violation of the statute was excusable was a question of fact for the jury, see also Smith v. City and County of San Francisco, 117 Cal.App.2d 749, 751, 256 P.2d 999, and we cannot disturb its implied conclusion where it can reasonably be drawn from the evidence.

[4-6] Appellants' further grievances relating to errors in instructions are without merit. Appellants first complain of an instruction with respect to the effect of possible negligence of Clara Taylor, allegedly given at the request of defendant. The transcript does not show that any instruction like the one attacked has been given. Next appellants urge that the following instruction given: "I instruct you that MacArthur Taylor cannot, by reason of his age, be guilty of any contributory negligence", is misleading because it could be inferred from it that he might be guilty of contributory negligence by reason of some other feature than his age. No reasonable man could so understand the instruction. The clear meaning of the instruction is that the minor could not be held guilty of contributory negligence. Another instruction to the same purport which appellants asked to be included in the transcript is merely repetitious. It is contended that the court's alleged failure to instruct that violation of section 560(a) Vehicle Code is negligence *per se,* as requested by plaintiffs, constituted prejudicial error. The court gave the following instruction: "You are instructed that any violation of the provisions of the Vehicle Code of the State of California to be read to you shortly is presumptively an act of negligence, and conclusively so until rebutted by evidence that it was justifiable or excusable under the circumstances." Among the sections read was section 560 (a). This instruction sufficiently covers the subject of negligence *per se.*

[7] After the cause was submitted for decision the appellants filed their motion to augment the record to show that defendant's proposed instruction Number 15 was given. The record shows that the proposed instruction was not given and the parties are in dispute as to that fact. However, assuming that it was given it was not reversible error. The mother sued separately for medical and hospital expenses. The disputed instruction advised the jury that if the mother was guilty of negligence in allowing the child to be in the street unattended their verdict must be in favor of the defendant. The appellants now argue that this means that neither the mother nor the child could recover because of the mother's contributory negligence. We do not so interpret the instructions. Both parties were suing separately for damages. The defendant was entitled to instructions covering every phase of both causes of action. It is generally impossible to cover all issues in one instruction, particularly when two separate causes of action are being tried. Here the proposed instruction, assuming that it had been given, correctly stated the law as to the mother's complaint.

The motion to augment the record is denied. The judgment is affirmed.

DOOLING and KAUFMAN, JJ., concur.

122 Cal.App.2d 624

KUNDE v. KUNDE.

Civ. 19928.

District Court of Appeal, Second District, Division 1, California.

Jan. 19, 1954.

As Modified on Denial of Rehearing Feb. 15, 1954.

Hearing Denied March 17, 1954.

In action by husband against his estranged wife to quiet title to certain realty which was husband's separate property prior to his marriage to estranged wife, the Superior Court, Los Angeles County, Arthur Crum, J., entered judgment for the husband, and the wife appealed. The District Court of Appeal, Doran, J., held that evidence showed that deeds to the property were not delivered to the wife or to third person for the wife with husband's consent or at his direction.

Affirmed.

Husband and Wife ⚷47(1)

In action by husband against his estranged wife to quiet title to certain realty which was husband's separate property prior to his marriage to estranged wife, evidence showed that deeds to the property were not delivered to the wife or to third person for the wife with husband's consent or at his direction.

◆

William Katz, Los Angeles, for appellant.

Macbeth & Ford, Norman Macbeth, Patrick H. Ford, Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from the judgment.

Plaintiff and defendant were married October 13, 1950. Each had been married before and each possessed separate property. They separated June 9, 1951.

As stated in respondent's brief, "Plaintiff sued defendant, his estranged wife, to quiet title to certain parcels of real estate, which were plaintiff's separate property owned prior to his marriage to defendant. Defendant's claim rested upon the validity of five deeds, signed on or about May 31, 1951, but not recorded until February 4, 1952. The issue in the case was, were these deeds ever delivered to defendant, or to a third person for defendant, with plaintiff's consent or at his direction? The trial court found that there was no delivery. Judgment was accordingly entered for plaintiff quieting his title." The controversy results from an arrangement between the parties to place their respective properties in joint tenancy.

It is contended on appeal that "The material findings are unsupported by the evidence" and that "the judgment is contrary to law".

The facts are sufficiently summarized in the trial judge's review of the evidence and comments thereon, as follows:

" 'The Court: I don't think that it is controllingly important in this case as to whether Mr. Kunde signed these deeds in blank and the description was later put in or whether the description was in the deeds at the time that he signed them. The fact of the matter is that when Mr. Kunde went to Mr. McManus he went to him for the purpose of having the five deeds made out and for the purpose of signing the five deeds when made out among other things, one of the other things being the getting of inheritance tax releases. So whether the deeds were actually filled out when signed or whether they were in blank I think makes no difference because I think at that time I have no inference from the evidence except that Mr. Kunde had authorized Mr. McManus to make out such deeds. There is no doubt in my mind about that. However, I think Mr. McManus mistakes the position that he occupied in respect to these matters. He now seems to take the position that he was merely an escrow holder or a stake holder and as such was compelled after the deeds were made out to deliver them to the grantee, at least his acts and conduct show that that is what he thought his duties were, because finally in January, following the May in which the deeds were signed, seven months later, at a time when he apparently had ceased to represent Mr. Kunde as an attorney and had then taken on the unqualified employment of Mrs. Kunde as her attorney, he proceeds to go ahead and record the deeds.

" 'Now, I think Mr. McManus was not in the position of a mere escrow holder with respect to these deeds. I think that at the time Mr. Kunde went into Mr. McManus' office and employed him to get the inheritance tax affidavits and get the releases from the California State Inheritance Tax Department and make out the deeds the relationship of attorney and client was there definitely established. It is all well and good for Mr. McManus to contend that he was acting for attorney for both of these parties. Personally, I don't think he was, but even if he was, the fact remains that he was attorney for Mr. Kunde. Mr. McManus seeks to raise the point that he does not know who paid him. The checks show that Mr. Kunde paid him, maybe out of the joint account—probably out of the joint account—but the evidence seems to show that the joint account was monies that Mr. Kunde had before he was married. So there is no doubt in my mind whatsoever that the relationship of attorney and client was established when Mr. Kunde went in and paid Mr. McManus and employed him to do the things mentioned here.

" 'Now, I don't believe that there was ever any valid delivery of those deeds, either actually or constructively. I think that under the law, the deeds being in the hands of Mr. McManus who was the attorney for Mr. Kunde is the same thing as saying that the deeds had never left Mr. Kunde's possession because the attorney is the agent of the client, a confidential agent . . . I have no doubt in my mind that Mr. Kunde had a perfect right to do just what he did do, to instruct Mr. McManus to return the deeds to him and not to go any further with the transaction, not once but several times, as shown by the evidence. Mr. McManus then goes ahead and records the deeds. . . .

" 'I am satisfied that there was no delivery of the deeds. The execution of the deeds requires that there shall be not only the signing of them but that there shall be a delivery, either actual or constructive, and I believe that there was neither type of delivery in this case. I believe that the recording of the deeds under the circumstances as shown by this evidence . . . conveyed absolutely nothing. I am satisfied that the plaintiff is entitled to a decree of this Court quieting his title to the property and canceling the deeds of record and quieting title in and to the deeds. That is under the cause of action for quieting title and for declaratory relief. You can prepare appropriate findings to support the judgments as indicated by the Court orally from the bench and I will sign them.' "

In connection with the foregoing, appellant argues that, "The decision of the trial court herein can only be explained as the emotional reaction of the trial judge to the psychological and what he deemed to be the ethical error on the part of counsel for the defendant in undertaking to represent her in this litigation after having acted as the attorney for both parties in the drafting of the deeds."

On the contrary, as pointed out by respondent, the law is well settled that the findings will be upheld if supported by substantial evidence and that the evidence must be viewed only in the light most favorable to respondent.

A review of the record discloses substantial evidence in support of the trial judge's conclusions and the law is well settled with relation to the issues involved. There being no errors in the record, the judgment appealed from is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

123 Cal.App.2d 333

LOUIS WEINBERG ASSOCIATES, Inc.
v.
NEWMAN et al.

Civ. 19742.

District Court of Appeal, Second District,
Division 2, California.
Feb. 18, 1954.

Seller brought action against buyer to recover contract price for merchandise. The Superior Court of Los Angeles County, Arthur B. Coates, J., entered judgment for seller, and buyer appealed. The District Court of Appeal, McComb, J., held that seller did not, by bringing action for amount of contract price, thereby waive right to sell merchandise and apply amount obtained from sale to unpaid balance of contract price.

Affirmed.

1. Appeal and Error ⚷931(1)

District Court of Appeal on appeal from judgment for plaintiff after trial before court without jury would view evidence in light most favorable to plaintiff.

2. Sales ⚷332

Seller did not, by bringing action against buyer, who had repudiated contract for sale of merchandise, for amount of contract price, thereby waive right to sell merchandise and apply amount obtained from sale to unpaid balance of contract price.

3. Sales ⚷177

Where buyer's letter of cancellation of contract for purchase of merchandise was predicated solely on ground that merchandise was not up to warranty with samples shown him, but evidence repudiated such claim, and there was no evidence to sustain finding that proper quantity had not been shipped to buyer, buyer could not properly refuse to accept merchandise on ground that quantity ordered was not delivered.

Samuel A. Miller, Los Angeles, and Harry M. Fain, Beverly Hills, for appellants.

Eugene L. Wolver, Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover for the value of merchandise purchased from plaintiff by defendant, defendant appeals.

[1] Viewing the evidence as we must in the light most favorable to plaintiff (respondent) pursuant to the rules set forth in Isenberg's Estate, 63 Cal.App.2d 214, 216 [2], 146 P.2d 424, the record discloses that defendant, whose place of business was in Los Angeles, visited plaintiff in the City of New York for the purpose of purchasing merchandise; that plaintiff showed him certain samples of milan straw imported from Italy; that thereupon defendant ordered from plaintiff five cases of such straw which was thereafter, pursuant to defendant's instructions, shipped by plaintiff to the Monte Christi Corporation at Rahway, New Jersey, who were dyers of straw.

On July 20, 1948, such shipment was made and an invoice designating the five cases and indicating that they contained 1,881 pieces, was sent by plaintiff to defendant. The merchandise was received on July 20, 1948, by the Monte Christi Corporation, which forwarded to defendant an invoice indicating the number of cases received, and also that there were an aggregate of 1,881 pieces contained in them.

It was the business practice in the industry, when purchasing by the case, to purchase the number of pieces or skeins in a case. The merchandise was sold to defendant by plaintiff to be billed as of December 4, 1948. Although defendant at no time visually observed any of the merchandise, he wrote a letter to plaintiff cancelling his order on the ground that the samples did not conform with the warranty of samples shown him. Upon receipt of the letter plaintiff showed it to the officials of the Monte Christi Corporation. The merchandise was examined and found not to be defective, which information was conveyed to defendant who still refused to accept it.

Subsequently plaintiff instituted the present action to recover the sum of $3,197.70, the contract price of the merchandise. After instituting the action the merchandise was sold by plaintiff at the best available price, the sum of $1,222.65.

[2] Defendant does not question the sufficiency of the evidence to sustain the trial court's finding that the contract was made; that the merchandise was up to standard; and that defendant repudiated it. He does, however, present the following questions:

First: *Did plaintiff by bringing its action against defendant for the amount of the contract price thereby waive its right to sell the merchandise and apply the amount obtained from the sale to the unpaid balance of the contract price?*

No. The rule is accurately stated in 46 Am.Jur. (1943) Sales, section 525, p. 682, as follows: "After the seller's lien has been lost by delivery of the goods to the buyer, the return of the goods by the buyer to the seller in wrongful repudiation of the sale ordinarily restores the seller to the position of a lien holder for the unpaid purchase price, provided the seller makes it clear in accepting the goods from the buyer that he is not assenting to a rescission of the sale * * * according to some authority, a revival of the seller's lien is not effected upon the return of the property by the buyer, where the seller repudiates the return through the commencement of an action against the buyer for goods sold and delivered * * *".

See also Cohen v. John Curtin, Inc., 107 Misc. 622, 177 N.Y.S. 246 at page 249, wherein the court says, "After the return of the bills of lading and the attempted rejection of the goods by the defendant, plaintiffs, under their right of lien for the unpaid purchase price, were entitled to sell the goods and recover from the defendant the difference between the amount realized on the resale and the contract price."

Jones v. Lemay-Lieb Corp., 301 Mass. 133, 16 N.E.2d 634, 118 A.L.R. 562, cites Cohen v. John Curtin, Inc., supra, with approval and applies a similar rule.

In the instant case the trial court specifically found that possession and the right thereto was in the plaintiff and that plaintiff had the right to sell the merchandise. This finding was supported by the facts set forth above.

A case on all fours with the case at bar is Higgins v. California Prune & Apricot Growers, 2 Cir., 16 F.2d 190. The rule is also well stated in Urbansky v. Kutinsky, 86 Conn. 22, 84 A. 317, at page 320, where the court says, "Our conclusion is that when one has commenced an action for goods sold and delivered, under circumstances which then entitled him to recover the full purchase price, and afterwards, by a proper and valid resale of the goods under a lien, recovers part of that price, he is not, for that reason, required to abandon the action thus commenced and bring a suit for damages for breach of contract, in order to recover the balance of the purchase price, but that he may recover it in the pending suit."

[3] Second: *Did the defendant properly refuse to accept the goods on the ground that the quantity which he had ordered was not delivered to him?*

No. Defendant's letter of cancellation was predicated solely upon the ground that the merchandise was not up to warranty with the samples shown him. The evidence repudiated this claim. There is no evidence in the record to sustain a finding that the proper quantity was not shipped to defendant.

In view of our conclusions other questions discussed by counsel need not be considered.

Affirmed.

MOORE, P. J., and FOX, J., concur.

123 Cal.App.2d 352

STAFFORD
v.
REALTY BOND SERVICE CORP. et al.

Civ. 19916.

District Court of Appeal, Second District, Division 2, California.

Feb. 18, 1954.

Rehearing Denied March 5, 1954.

Hearing Denied April 14, 1954.

Plaintiff, after appealing unsuccessfully from judgment for defendant and after a subsequent petition for rehearing was denied by Supreme Court, moved in Superior Court to vacate and set aside the judgment. The Superior Court, Los Angeles County, Ellsworth Meyers, J., entered minute order denying motion, and plaintiff appealed. Defendant moved to dismiss appeal. The District Court of Appeal, McComb, J., held that if the grounds upon which a party seeks to have judgment vacated existed before entry of judgment and before time for appeal elapsed, aggrieved party's remedy is by motion for new trial or by an appeal from the judgment, and an order thereafter made denying motion to set judgment aside is nonappealable.

Motion granted and appeal dismissed.

Appeal and Error 🔑113(1)

If grounds on which a party seeks to have a judgment vacated existed before entry of judgment and before time for appeal elapsed, aggrieved party's remedy is by motion for new trial or by an appeal from judgment, and an order thereafter made denying a motion to set judgment aside, is nonappealable.

◆

Guy N. Stafford, in pro. per.

John F. Bender, Compton, and Gizella M. Allen, Los Angeles, for respondents.

McCOMB, Justice.

This is a motion to dismiss an appeal from a minute order denying plaintiff's motion to vacate and set aside a final judgment.

Facts: May 31, 1950, judgment was entered in favor of defendant. Plaintiff thereupon appealed and the Supreme Court on October 28, 1952, affirmed the judgment of the trial court. (Stafford v. Realty Bond Service Corp., 39 Cal.2d 797, 249 P.2d 241.) A subsequent petition for rehearing by the Supreme Court was denied November 25, 1952.

On February 2, 1953, plaintiff made a motion in the superior court to vacate and set aside the judgment entered May 31, 1950, which motion was denied.

Question: Is the instant order an appealable order?

No. If the grounds upon which a party seeks to have a judgment vacated existed before the entry of judgment and before the time for appeal has elapsed, the aggrieved party's remedy is by a motion for new trial or by an appeal from the judgment, and an order thereafter made denying a motion to set the judgment aside is nonappealable. (Reynolds v. Reynolds, 191 Cal. 435, 437, 216 P. 619; People v. Ramirez, 139 Cal.App. 380, 383 [4] 33 P.2d 848.)

The motion is granted and the appeal is dismissed.

MOORE, P. J., and FOX, J., concur.

PEOPLE v. BANKS.

Cr. 14.

Appellate Department, Superior Court, San Bernardino County, California.

Dec. 3, 1953.

Prior opinion 261 P.2d 362.

PER CURIAM.

The petition to recall remittitur in this matter and to reopen the case is denied.

COUGHLIN, P. J., and HILLIARD, J., concur.

123 Cal.App.2d 328

WEBER
v.
MARINE COOKS' AND STEWARDS' ASS'N OF THE PACIFIC COAST, etc., et al.

Civ. 15680.

District Court of Appeal, First District,
Division 2, California.
Feb. 18, 1954.

Suit by ex-member of union for reinstatement in union and for damages for allegedly wrongful expulsion. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., granted judgment of nonsuit on ground of laches, and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that, absent a showing of prejudice from delay, member's suit, which was brought within statutory period, was not barred by laches.

Judgment reversed.

1. Trial ⚷165

A nonsuit may only be granted where, as a matter of law, the evidence would not support a judgment for plaintiff.

2. Labor Relations ⚷116, 117

Absent a showing of prejudice from delay, ex-member's suit, which was for reinstatement in union and for damages for wrongful expulsion, and which was brought within statutory period, was not barred by laches.

3. Equity ⚷87(2)

Where an express statute of limitations applies to a suit in equity, mere delay to commence suit for period of less than that of statute of limitations is never a reason for dismissing the proceedings.

4. Action ⚷63

Defense of laches is not available in an action at law for damages.

◆

Edward E. Pencevich, San Francisco, for appellant.

Gladstein, Andersen & Leonard, San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for reinstatement in the defendant union after an alleged wrongful expulsion. He also asked for damages in the loss of wages and for mental suffering. The complaint alleges that the officers of the union continued to operate under a purported amended constitution which was illegal and void and was expressly held void in August, 1949, in Weber v. Marine Cooks' & Stewards' Ass'n, 93 Cal.App.2d 327, 208 P.2d 1009. It was then alleged that, notwithstanding said decision, the defendants continued to refuse plaintiff membership in the union contrary to his rights under the old constitution. The prayer of the complaint is that these officers be compelled to recognize his membership and to admit him to full standing. This is one of several similar actions, all resulting in judgments favorable to the respective plaintiff and all involving the claim that the members had been illegally removed from their membership because the union officials had failed to follow the terms of the union constitution relating to the trial and dismissal of its members. Here the claim is made that plaintiff was "expelled" without trial and that such act was contrary to the existing constitution.

The complaint herein was filed July 30, 1951. The alleged "expulsion" occurred in August, 1948. Allegations were made, followed by proof, that from the date of the expulsion this plaintiff, and other former members of the union, had been continuously litigating the validity of their expulsion. Reference is here made to Weber v. Marine Cooks' & Stewards' Ass'n, 93 Cal.App.2d 327, 208 P.2d 1009; Harris v. National Union of Marine Cooks & Stewards, 98 Cal.App.2d 733, 221 P.2d 136; Hopson v. National Union of Marine Cooks, Stewards, 116 Cal.App.2d 320, 253 P.2d 733; and Taylor v. Marine Cooks & Stewards Ass'n, 117 Cal.App.2d 556, 256 P.2d 595. (N. B. The several names of defendants all designate the same union which is made defendant herein.) All those cases involved the main issue raised here—the validity of the amended constitution. In all those cases the plaintiff herein was involved, either as party plaintiff or as a confederate of the plaintiff named. All resulted in judgments against the union on the main ground that the amended constitution was invalid.

When plaintiff's case was called for trial, a similar case by one Wilmert as plaintiff was before the same court. After the motion for nonsuit had been granted the court entered its orders ex parte that the two cases be consolidated for trial. This was made without plaintiff's consent. Wilmert was either incompetent or feeble minded and his testimony was unfavorable to this appellant. This consolidation is cited as one of the grounds for a reversal, but we do not need to decide it as a more substantial ground appears.

At the conclusion of Wilmert's testimony the defendants made a motion for a nonsuit on the ground of plaintiff's laches. The motion was granted on that ground alone. This was error.

Since his dismissal from the union plaintiff was engaged with other discharged members in litigating the question of the new constitution. Plaintiff had every reason to believe that if that question was settled in favor of the discharged members [as it was in the cases heretofore cited], the union would comply with the court decisions and reinstate those who had been illegally discharged. That the union refused to treat the nonsuing members in accordance with these court decisions can form no basis for a plea of laches herein. It was fully aware that the litigation affected all members who had been discharged under the invalid constitution. It was aware that this plaintiff had precisely the same grounds for complaint as those who had commenced legal proceedings. It was also aware of the fact that it could not and did not suffer the slightest damage from the delay in the commencement of this action.

The appeal is controlled by two well-settled principles of law—(1) On a motion for a nonsuit the reviewing court must view the evidence most favorably to the plaintiff, applying every legitimate inference and presumption in his favor. (2) The defense of laches is an equitable defense depending not alone on the lapse of time, but on delay that works a disadvantage or causes an injury to the defendant.

[1] The first proposition is fully covered in the recent opinion of our Supreme Court in Raber v. Tumin, 36 Cal.2d 654, 656, 226 P.2d 574, 575, where the court said:

> "The granting of a motion for nonsuit is warranted '* * * when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff.' (Citing cases.) 'Unless it can be said as a matter of law, that * * * no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury.' (Citing cases.) In other words, while in most appeals it is the duty of the reviewing court to indulge every reasonable intendment in favor of sustaining the trial court, substantially the reverse is true when the appeal is from an order of nonsuit. In the latter case the appellate court must view the evidence as though judgment had gone in favor of the appellant, and order a reversal if such a judgment can be sustained."

[2] The second proposition has two phases: (a) Laches is an affirmative defense and must be proved as well as pleaded. 10 Cal.Jur. p. 556. This was not done. (b) Since mere delay in bringing the action is not laches per se, the burden is on the defendant to show injury. Here no evidence on that issue was offered. The motion for nonsuit was based solely on plaintiff's case in which no such injury appears. To the contrary, the evidence was that plaintiff was one of a large group of members who were contesting their dismissal on the single ground of an illegal procedure. It would

have been no aid to the defendants if this suit had been filed, or brought to trial, at an earlier day.

We may rest our decision on our former opinion in Hopson v. National Union of Marine Cooks, Stewards, 116 Cal.App.2d 320, 326, 253 P.2d 733, 736, where in reply to the same contention we said: "The precise issues involved in the plaintiff's case, except for the amount of damages, were being litigated in the Harris case. It would not seem unreasonable for the plaintiff to assume that the determination of that case would determine the primary issue of liability here and that it would not have to be relitigated. Having in mind all the circumstances we cannot say that the delay resulted in a manifest injustice to the defendant or that the trial court abused its discretion." In that case the motion for a nonsuit, made on the same grounds, was denied. The same order should have been made here.

Judgment reversed.

DOOLING and KAUFMAN, Justices.

We concur in the order reversing the judgment of nonsuit. However we do not agree with certain statements in the main opinion. The complaint in this action alleges an arbitrary exclusion of plaintiff from the defendant union and an arbitrary refusal to accept his dues. His testimony is in accord with these allegations. There is not a word in pleading or proof that there was any trial or purported trial of plaintiff. Hence we cannot agree that "this is one of several similar actions * * * all involving the claim that the members had been illegally removed from their membership because the union officials had failed to follow the terms of the union constitution relating to the trial and dismissal of its members."

If, so far as appears from pleading and proof, plaintiff was excluded from the union arbitrarily and without any pretence of a trial or hearing the case bears no similarity to the other cases against the defendant union cited in the main opinion, which dealt with the question whether the trial committees in those cases were chosen in the manner provided by the constitution of the union.

[1–3] We are content to rest our concurrence on the rule that a nonsuit may only be granted where as a matter of law the evidence would not support a judgment for plaintiff. In this case the mere delay of less than the statutory period, without any affirmative showing of prejudice to defendants therefrom, does not amount to such a showing of laches as would meet this test, because as said in Hopson v. National Union of Marine Cooks, Stewards, 116 Cal.App.2d 320, 326, 253 P.2d 733, 736, quoting from Newport v. Hatton, 195 Cal. 132, 137, 231 P. 987: "Where an express statute of limitations applies to a suit in equity, *mere delay* to commence a suit for a period less than that of the statute of limitations is never a reason for dismissing the proceeding, and a party cannot be refused a hearing if he shall bring his action within the prescribed period." (Emphasis ours.)

[4] The action was one for declaratory relief and damages. Insofar at least as the action for damages is concerned laches is no defense in any event. Mandracio v. Bartenders Union, Local 41, 41 Cal.2d 81, 256 P.2d 927.

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123 Cal.App.2d 289

In re LAPIDUS' ESTATE.

LAPIDUS v. FENDEL et al.

Civ. 15908.

District Court of Appeal, First District,
Division 2, California.
Feb. 17, 1954.

Petition by surviving wife of testator to contest will which had been executed prior to petitioner's marriage to testator and which expressly mentioned future wife and contemplated marriage and excluded her from all participation in testator's estate. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., entered order and judgment denying and dismissing surviving wife's contest of the will and she appealed. The District Court of Appeal, Nourse, P. J., held that the will mentioned a future spouse in such a way as to show an intention not to provide for her, and, therefore, the will was not revoked as to petitioner.

Order and judgment affirmed.

Wills ⟹191

Where will expressly mentioned future wife and contemplated marriage and excluded her from all participation in testator's estate, such will mentioned future wife in such way as to show intention not to provide for her, and, therefore, will was not revoked as to surviving wife by marriage. Probate Code §§ 70, 103.

◆

Aaron N. Cohen, Allen M. Singer, San Francisco, Dinkelspiel & Dinkelspiel, San Francisco, for appellant.

Samuel L. Fendel, San Francisco, Steiner, Goldstein & Brann, San Francisco, for respondents.

NOURSE, Presiding Justice.

This is an appeal by Lee Lapidus, surviving widow of decedent Abraham Lapidus, from an order and judgment denying and dismissing her contest of the premarital will of said decedent based on section 70 of the Probate Code which reads: "If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received."

The facts are undisputed. The contested will was executed on February 11, 1952. It provides in part: "I hereby declare that I intend to be married to Lee Friedman on or about the 16th day of February, 1952; that this instrument is made in contemplation of my said marriage; that my said marriage shall not revoke or affect this will in any respect." It disposes of his property in behalf of close relatives, without any provision for Lee Friedman, testator's wife. The last provision of the will reads in part: "I have purposely made no provision for any other person, whether claiming to be an heir of mine or not, and if any person, whether a beneficiary under this will or not mentioned herein, shall contest this will or object to any of the provisions hereof, I give to such person so contesting or objecting the sum of one dollar ($1.00) and no more, in lieu of the provision which I have made or which I might have made herein for such person so contesting or objecting." Decedent married Lee Lapidus, the contestant, then known as Lee Friedman, on February 16, 1952, and he died on June 29, 1952, contestant surviving him.

The court found that the will mentions the contestant, surviving spouse, in such a way as to show an intention not to make provision for her.

Appellant's only contention is that the will "does not indicate the essential intention not to provide for the future wife." The contention is devoid of all merit. "All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole * *." § 103, Probate Code. If this rule of construction is applied to the stated provisions of the will they demonstrate on their face that decedent, in contemplation of his marriage with contestant on a named date (on which it thereafter actually took place), excluded her from all participation in his estate, expressly declaring that he did so on purpose. No clearer showing of an intention not to make provision for her is conceivable.

In Estate of Duke, 41 Cal.2d 509, 261 P.2d 235, the latest expression of our Supreme Court on this subject, it was held that the intention not to provide for the surviving spouse which excludes revocation under section 70, Probate Code, can even be expressed by an exclusionary clause referring to a future spouse in general terms. In our case there is an express mention of the future wife and the contemplated marriage. The ruling of the trial court was sound.

Order and judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

123 Cal.App.2d 361

PEOPLE v. BROWN.

Cr. 5103.

District Court of Appeal, Second District,
Division 2, California.
Feb. 18, 1954.

Defendant was prosecuted for bookmaking. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction and defendant appealed. The District Court of Appeal held that evidence was sufficient to sustain conviction.

Affirmed.

1. Gaming 🔑98(3)

In prosecution for bookmaking, testimony that certain individuals entered house of defendant, called names of horses that were running that day in specified races, delivered to defendant currency which he accepted whereupon he made notations of the bettor, amount of his wager, number of his horse, name of track, all in cipher or secret symbols, constituted sufficient proof of defendant's guilt in the absence of an explanation. Pen.Code, § 337a, subd. 1.

2. Criminal Law 🔑260(11)

Before trial court's finding can be set aside it must be made to appear clearly that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in court below.

3. Gaming 🔑98(3)

Where small sheets of paper were taken from accused upon his arrest, and papers contained various notations, numbers, written letters and symbols written on small sheets indicating the track, horse, and amount wagered, followed by initials, name or code symbol for bettor, proof that defendant made notations was not indispensable to conviction of bookmaking. Pen.Code, § 337a, subd. 1.

4. Criminal Law 🔑407(1)

In prosecution for bookmaking, trial court was entitled to consider defendant's silence under accusation as an indication of truth of evidence received against him and in his presence. Pen.Code, § 337a, subd. 1.

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Max Solomon, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., Los Angeles, for respondent.

MOORE, Presiding Justice.

Convicted of bookmaking, Penal Code, § 337a, subd. 1, defendant appeals from the judgment and the order denying his motion for a new trial. He demands a reversal on the ground of the insufficiency of the evidence. He maintains that "no testimony was introduced to establish any of the conversation amounted to a wager on a horse race."

Prior to his arrest on February 20, 1953, appellant had been under surveillance for about 45 minutes in his own kitchen on Gladys Avenue in Los Angeles by Officer Fusilier of the police force. The officer is an expert in the knowledge of the equipment, methods and practices of the bookmaker in Los Angeles County. He sat in a room adjoining the kitchen and observed the acts of appellant and his visitors. As Mr. Jones entered he was greeted with appellant's salutation: "My two horses came in. * * * Jones come in." Jones replied, "You owe me seventeen fifty—no, it was forty—no, it is thirty." Thereupon, appellant delivered some currency to Jones. The statement that his "two horses came in" indicated a bettor was talking and his horses had won.

At 3:05 p. m. Messers A and B entered. Appellant asked: "Which one do you want?" Mr. A replied: "Seven, Bar Key," and passed to appellant some currency. Two minutes later Mr. B said: "I will take that one," and pointed to certain papers on the drain board which appellant had taken from the curtained space beneath the sink. They included a newspaper, a National Daily Reporter[1] and a green sheet.

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[1] The Reporter publishes the events at the major tracks in America showing the horses, their weights, probable odds and jockey.

After a few minutes had passed, Madam X entered and engaged appellant in conversation. She laid some bills on the drainboard and said: "Terry's Man, five on it." At that appellant pulled some white sheets of paper from his stocking, placed them on the Daily Reporter and with a pencil went through the motions of writing. The stack of currency on the drainboard contained about ten bills. Appellant took them and wrapped them around other currency he removed from his pocket to which he returned the augmented roll.

About 3:30 p. m. the officer saw Mr. C hastily enter the kitchen and yell out: "Sam it's a raid." At that signal, appellant inserted the small pieces of paper into his right stocking, picked up the other papers and restored them to their earlier shelter behind the curtained area beneath the sink as other officers entered. Appellant was then placed under arrest and searched. From his right stocking the officers removed "small sheets of paper" which contained "various notations, numbers and written letters." It was established that the symbols written by appellant on the small sheets of paper indicate the track, the horse, the amount wagered. They are followed by the initials or name or a code symbol for the bettor. Such a paper is part of the bookmaker's paraphernalia and one of his means and methods of recording bets. It is common practice for bets to be recorded in cipher and for the names of bettors to be recorded on a betting marker by using a code sign or the initials of the bettor. The copy of the National Daily Reporter was the edition of the very day of the arrest. It contains the name of the horse, "Terry's Man" running at Santa Anita Park in the eighth race; also the name of "Bar Key" in the same race.

Appellant sat silent at the trial and offered no evidence in explanation of the incriminating proof.

[1, 2] From the facts that certain individuals entered the house of appellant, called the names of horses that were running that day in specified races and delivered currency to appellant; that he accepted such moneys, made notations of the bettor, the amount of his wager, the number of his horse, the name of the track, all in cipher or secret symbols—constitute sufficient proof of appellant's guilt in the absence of an explanation. From such it was fairly inferable that the words exchanged between appellant and his visitors were with reference to wagers on horse races run on that day as advertised in the National Daily Reporter carefully kept by appellant beneath his kitchen sink. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780. It is for the trial court to determine the ultimate fact and before its finding can be set aside " 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below.' " Ibid.

[3] No other words were necessary than those uttered by Mr. Jones, Messers. A and B and Madame X to place a bet on the horse designated by each of them so long as their words were accompanied by the delivery of money to the person accused of bookmaking. People v. Rubin, 115 Cal.App.2d 186, 187, 251 P.2d 374. Proof that appellant made the notations on the small sheet of white paper is the inference from its presence in appellant's stocking at the time of his arrest, his act in going through writing motions at the time he received the moneys and that the memoranda made contain records of the bets called for by each bettor. But proof that appellant made the notations was not indispensable to a conviction. People v. Panzick, 118 Cal.App.2d 621, 623, 258 P.2d 537.

[4] The facts at issue are closely akin to those in People v. Burch, 118 Cal.App.2d 122, 257 P.2d 44, wherein this court concluded that the accused was engaged in bookmaking. See also People v. Panzick, supra. The trial court was entitled to consider appellant's silence under accusation as an indication of the truth of the evidence received against him and in his presence. People v. Smith, 113 Cal.App.2d 416, 419, 248 P.2d 444.

Appellant complains that Officer Fusilier could not find on exhibit A any symbol that he could interpret to mean "Terry's Man."

A complete, intelligible record of the bookmaker's transactions is not necessary to the proof of his guilt. Subdivision 1 provides that one is guilty of bookmaking "with or without writing," if he takes a wager on a contest of speed of man or beast, etc. Complaint is made that no testimony was introduced to prove a conversation amounted to a wager. That is an ultimate fact which the court found from the conversation as reported by the officer. The notations made by a bookmaker might fail to include symbols for one or more facts. There is no required amount of writing to be done by a solicitor.

Judgment and order denying the motion for a new trial are affirmed.

McCOMB and FOX, JJ., concur.

SHOEMAKE v. WILSEY et al. *

Civ. 8310.

District Court of Appeal. Third District. California.

Feb. 19, 1954.

Hearing Granted April 14, 1954.

Action to recover damages for personal injuries sustained when pedestrian, who was crossing street intersection, was struck by motorist, who was making left-hand turn in intersection free from traffic. The Superior Court, Mendocino County, Lilburn Gibson, J., entered judgment for motorist and pedestrian appealed. The District Court of Appeal, Peek, J., held that under uncontradicted evidence motorist was negligent.

Reversed.

Automobiles ⚷160(4), 217(2)

Motorist, who was making left-hand turn in intersection free from traffic, and who struck pedestrian crossing street intersection, was negligent and pedestrian was not contributorily negligent. Vehicle Code, § 560.

Burke & Rawles, John E. Nelson, Ukiah, for appellant.

Mannon & Brazier, Ukiah, for respondent.

PEEK, Justice.

Plaintiff appeals from a judgment in favor of defendant in an action instituted by him for damages resulting from personal injuries sustained when he was struck by an automobile operated by defendant, Phyllis Wilsey. In view of the evidence which is without serious conflict, it appears the case comes squarely within the rule enunciated in Gray v. Brinkerhoff, 41 Cal.2d 180, 258 P.2d 834, and hence must be reversed.

The record shows that while plaintiff was crossing State Street from west to east at the intersection with Perkins Street in the City of Ukiah, he was struck by defendant's car which was being driven from east to west on said Perkins Street, and at the time of impact was being turned left into State Street. The defendant driver testified she did not see plaintiff until she was so close she could not stop before hitting him. The intersection was free of traffic at the time. Plaintiff's testimony was that defendant's car was stopped at the intersection when he stepped into the street. Defendant driver testified that no one was in the intersection when she started to turn. Plaintiff further testified that just before the impact he started to run to avoid the collision. A witness who was seated in a cafe at the corner testified on direct examination that when he first saw plaintiff he was running, that at no time did he see plaintiff walking. On cross examination he testified that he did not know if the curb line or sidewalk could be seen from where he was sitting in the cafe, that he did not know whether he saw plaintiff leave the sidewalk or not, but that when he first saw him he was running.

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* Subsequent opinion 277 P.2d 17.

The portion of Vehicle Code section 560 pertinent to the sole question herein reads as follows:

> "The driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, except as otherwise provided in this chapter."

In view of the uncontradicted facts as shown by the record and the mandatory provisions of the above section, there can be no question but that the defendant driver was negligent as a matter of law. Gray v. Brinkerhoff, 41 Cal.2d 180, 258 P.2d 834; Ducat v. Goldner, 77 Cal.App.2d 332, 175 P.2d 914; and People v. Lett, 77 Cal. App.2d 917, 177 P.2d 47. It necessarily follows that the determination of this appeal is dependent upon the sole question as to whether or not the plaintiff was contributorily negligent, thereby taking himself without the rule.

In the Gray case [258 P.2d 837], wherein the facts were quite similar, the Supreme Court held that it was the duty of a driver of a vehicle "* * * in starting up and driving his vehicle into and through the crosswalk to ascertain whether *plainly visible* pedestrians were using such crosswalk and it was his obligation to yield the right of way to them." The facts in that case showed traffic at the intersection. Here there was no traffic. There the driver did not see plaintiff until after his truck had hit her. Here defendant did not see plaintiff until immediately prior to the impact. There the defendant saw no one in the crosswalk but suggested his attention was diverted by an oncoming car. Here there was no traffic to divert defendant's attention. In summary the court, in the Gray case, held that such evidence "* * * establishes that defendant was negligent as a matter of law"; and that it was "* * * equally apparent that plaintiff was free from negligence proximately contributing to her injuries." 41 Cal.2d at page 185, 258 P.2d at page 837. We are unable to distinguish the facts in the Gray case from those disclosed by the record herein. Hence we likewise conclude that plaintiff was not contributorily negligent and that defendant was guilty of negligence as a matter of law.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

123 Cal.App.2d 325

STUBBLEFIELD et al. v. FICKLE et al.

Civ. 4670.

District Court of Appeal, Fourth District, California.

Feb. 17, 1954.

Quiet title action by lessors to remove cloud upon title created by oil and gas lease. The Superior Court, Kern County, Norman F. Main, J., entered judgment quieting title in plaintiffs, but denied plaintiffs allowance of attorney's fees provided for by lease, and plaintiffs appealed from portion of judgment denying them attorney's fees. The District Court of Appeal, Barnard, P. J., held that where oil and gas lease obligated lessees to restore property to lessors free from cloud of lease and to pay reasonable attorney's fees if action should become necessary to accomplish such purpose, disclaimer of interest in the property filed by lessees after action was brought did not relieve lessees from their contractual obligation to pay reasonable attorney's fees.

Reversed and remanded with directions.

1. Costs 🔑47

Attorney's fees are not "costs" within statute providing that plaintiff can not recover costs where defendant disclaims any interest or estate in property which is the subject of litigation. Code Civ.Proc. § 739.

See publication Words and Phrases, for other judicial constructions and definitions of "Costs".

2. Quieting Title ⟹54

Where oil and gas lease obligated lessees to restore property to lessors free from cloud of lease and to pay reasonable attorney's fees if action should become necessary to accomplish such purpose, disclaimer of interest in the property filed by lessees after quiet title action was brought by lessors did not relieve lessees from their contractual obligation to pay reasonable attorney's fees. Code Civ.Proc. § 739.

◆

Marion A. Smith, Robert L. Trapp, Santa Maria, for appellants.

No appearance for respondents.

BARNARD, Presiding Justice.

On October 28, 1948, the appellants executed an oil and gas lease in favor of the respondents Fickle, Hink and David. The lease provided, among other things, that the lessees should be obligated to drill upon the premises; that their interest might be forfeited for a violation of any of the terms of the lease; that upon any quitclaim, termination or surrender of the lease the lessees would restore the land to the lessors free of the cloud of this lease and of any encumbrances made, done or suffered by the lessees; and that, in the event any action should be brought to quiet title as against any such clouds, the lessees would pay to the lessors the reasonable attorney's fees incurred whether or not said action was prosecuted to judgment.

On August 23, 1950, the appellants served notice of default, as required by the lease, demanding that respondents either commence drilling within 30 days or deliver to appellants a quitclaim deed releasing their interest, and further notifying respondents that in the event of a continued default or failure to deliver a quitclaim deed within thirty days the appellants would pursue their remedy at law for the recovery of damages and for the termination and forfeiture of the respondents' interest in this land.

The respondents paid no attention to this notice of default and the appellants brought this action on November 21, 1951. The complaint, with appropriate allegations, sought a judgment quieting the appellants' title in the land and also damages in the amount of $1,500, which was alleged to be the reasonable attorney's fees incurred in connection with the action. On December 18, 1951, Fickle, Hink and David filed a disclaimer, disclaiming any interest in the land covered by this lease, and praying that the action be dismissed as to them.

The appellants filed notice of a motion for a default judgment and for an order fixing attorney's fees as prayed for in the complaint. This motion was heard on affidavits and on respondents' contention that any recovery of attorney's fees was prevented by section 739 of the Code of Civil Procedure, which provides that where a defendant in such an action disclaims any interest in the property, or suffers judgment to be taken without answer, the plaintiff cannot recover costs. The court adopted this theory and entered a judgment quieting title to the property as prayed for, but refusing to allow any attorney's fees to the appellants. The appellants have appealed from that part of the judgment which denied any allowance of attorney's fees.

[1] The matter of attorney's fees is not considered a part of the costs referred to in section 739 of the Code of Civil Procedure, but is a matter separate and distinct therefrom. Schallert-Ganahl Lumber Co. v. Neal, 94 Cal. 192, 29 P. 622. Attorney's fees are not costs allowed by section 739 to the prevailing party. Brooks v. Forington, 117 Cal. 219, 48 P. 1073. In City Investment Co. v. Pringle, 49 Cal.App. 353, 193 P. 504, it is said: "Where the right to attorney's fees, as in this case, is based upon contract and not upon statute, recovery, if at all, must be had upon that contract, and such fees cannot be taxed as costs." In Eastman v. Sunset Park Land Co., 35 Cal.App. 628, 170 P. 642, 643, the court said: "This conclusion results from the fact that expenditures made for attorney fees in an action based upon a contract containing a stipulation for such fees are in the nature of special damages incidental to the breach of the contract and which, according to the terms of the contract, are to be compen-

sated for in addition to recovery of the principal sum due."

[2] While no "principal sum" was due here, the respondents had agreed in the contract to restore the property to the appellants free from the cloud of this lease, and to pay reasonable attorney's fees if an action should become necessary to accomplish that purpose. They refused to comply with their agreement for more than a year after notice, and the disclaimer filed after the action was brought did not relieve them from their contractual obligation. Under the circumstances, the appellants were entitled to reasonable attorney's fees and this element of the action was not covered by section 739, or barred thereby.

The portion of the judgment appealed from is reversed, and the cause remanded to the trial court for the sole purpose of taking evidence and awarding to the appellant's attorney's fees in the amount found to be reasonable.

GRIFFIN and MUSSELL, JJ., concur.

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123 Cal.App.2d 358

PEOPLE v. RIVERA.

Cr. 5093.

District Court of Appeal, Second District.
Division 2, California.
Feb. 18, 1954.

Defendant was convicted of assault with intent to commit robbery. From a judgment rendered and sentence imposed on the verdict by the Superior Court, Los Angeles County, Charles W. Fricke, J., defendant appealed. The District Court of Appeal, Moore, P. J., held that the evidence was sufficient to sustain the conviction.

Appeal from sentence dismissed, and judgment affirmed.

1. Robbery 🔑24(6)

Evidence was sufficient to sustain conviction of assault with intent to commit robbery. Pen.Code, § 220.

2. Criminal Law 🔑1122(5)

An assignment of prejudicial error in trial court's refusal of defendant's requested instructions to jury on circumstantial evidence affords no ground for reversal of judgment on verdict of conviction, where no instruction offered by either party and rejected is found in either transcript. Rules on Appeal, rule 33(b).

3. Criminal Law 🔑1122(5)

An appellant, seeking reversal of judgment on verdict of conviction because of trial court's rejection of requested instructions to jury, must cause such instructions to be included in record. Rules on Appeal, rule 33(b).

4. Criminal Law 🔑814(17)

Where proof is not entirely circumstantial, trial court's refusal of defendant's requested instruction, requiring jury to adopt interpretation of evidence which would admit of defendant's innocence and reject that pointing to his guilt, is not error.

5. Criminal Law 🔑1023(10)

A sentence imposed on jury's verdict of conviction is nonappealable, and purported appeal therefrom must be dismissed.

◆

Cletus J. Hanifin, Los Angeles, for defendant, appellant.

Edmund G. Brown, Atty. Gen., James D. Loebl, Deputy Atty. Gen., Ojai, for respondent.

MOORE, Presiding Justice.

Convicted of assault with intent to commit robbery, Penal Code, sec. 220, appellant demands a reversal of his sentence and of the judgment on the grounds of (1) insufficiency of the evidence and (2) the court's rejection of requested instructions.

[1] There is no want of inculpating proof. By the prosecutrix it was established that having left her work at 2:00 a. m.

she rode a street car homeward bound and arrived at Avenue 54 about 3:30 o'clock. As she proceeded along that street, two automobiles halted at the curb in front of her. As she saw defendant about twelve feet from her, he hailed her with the inquiry, "Hi, doll. Where are you going?" Although she made no reply and continued in silence, he struck her down with a blow on the chin. As he closed his hands around her throat she emitted a scream which brought forth the occupant of a nearby home, and a passing motorist stopped to inquire. The bandit took an amatite ring from her left hand and speedily departed. But he left traces of his recent presence. The young woman suffered from injuries, bruises and abrasions to her neck and chin, and soreness over her entire body.

The witness Charleston, motorist, testified that she related her experience; that he took notice of the license number on the black coupe as 1V26813 and conveyed her to the Highland Park Police Station. He observed the bruises on her neck and testified that the photographs exhibited to him in court were of the coupe from which he had taken the license number at the scene of the crime.

Officer Lehman met the prosecutrix at the police station, saw the bruised spots on her neck and arm. He testified that he and three other officers, having completed a vain search of the vicinity of the attack, drove to the street address recorded on the license; that on failing to find the car, they patrolled the vicinity and found it parked, still hot, in front of an apartment house on Brooklyn Avenue; that on entering the building they found appellant still up and dressed at 5:15 a. m. with two adults and some children present; that appellant and one Salazar were taken to the City Hall by other officers. The witness escorted the victim of the attack to the City Hall; as they passed along a corridor, she told him and his partner that the man who had attacked her on the street was in the room with its door open; they arranged six men together to have her observe them; she identified appellant as the man who had knocked her down and removed the ring from her finger.

Such testimony is in no respect lacking in the proofs essential to a conviction. The victim of the crime positively identified him as her assailant. Mr. Charleston and the two officers observed the bruises on her throat and elbow. Mr. Charleston took the license number on the coupe as it stood on Avenue 54 and it was found about two hours later seven miles distant standing in front of the apartment where appellant was found. It was registered in the name of his friend. The facts that it had moved such a distance and was still warm, and appellant was still out of bed are additional proof of his guilt. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

[2, 3] The assignment that the court prejudicially erred in refusing to give the instructions on circumstantial evidence affords no ground for reversal. Not an instruction offered by either party and rejected is found in either transcript. When an appellant intends to seek reversal on a question concerning instructions rejected, it is incumbent on him to cause them to be included in the record. People v. Brickman, 119 Cal.App.2d 253, 259 P.2d 917; People v. Frye, 117 Cal.App.2d 101, 108, 255 P.2d 105; Rule 33(b), Rules on Appeal; 4 Cal. Jur.2d 441.

[4] But conceding appellant's right to raise the question here, he is reminded that where the proof is not entirely circumstantial, it is not error to refuse an instruction requiring the jury to adopt that interpretation which would "admit of defendant's innocence and to reject that which would point to the guilt of the accused." People v. Savage, 66 Cal.App.2d 237, 247, 152 P.2d 240, 245.

[5] The sentence is nonappealable, and the purported appeal therefrom is dismissed.

The judgment is affirmed.

McCOMB and FOX, JJ., concur.

123 Cal.App.2d 274

HALLMAN v. RICHARDS.

No. 15671.

District Court of Appeal, First District, Division 2, California.

Feb. 17, 1954.

Hearing Denied April 14, 1954.

Action by guest for personal injuries sustained in automobile accident allegedly due to wilful misconduct of motorist-host. The Superior Court, City & County of San Francisco, Daniel R. Shoemaker, J., entered judgment of nonsuit, and guest appealed. The Court of Appeal, Kaufman, J., held that evidence on questions of whether motorist-host was guilty of wilful misconduct in driving, after drinking, 60 miles per hour on damp road, in attempting to pass vehicles in presence of danger signals, and in striking abutment, was sufficient to take case to jury.

Judgment reversed.

1. Automobiles ⚷245(24)

Propriety of nonsuit, on ground of lack of evidence, in action by guest for injuries sustained in automobile accident, depended upon whether evidence, viewed in light most favorable to guest, established as matter of law that there was no willful misconduct on motorist-host's part.

2. Automobiles ⚷181(1)

Deliberate intention to injure guest is not a necessary element of such willful misconduct as will render motorist-host liable to guest for injuries sustained in accident arising from motorist-host's misconduct.

3. Automobiles ⚷181(1)

To render motorist-host liable to guest by reason of willful misconduct, motorist-host's knowledge of probable injury to guest must be actual or that which, in contemplation of law, will be deemed equivalent to actual knowledge.

4. Automobiles ⚷181(7)

Fact that motorist was drinking before driving was material to question of whether 60 miles per hour was such excessive speed, under conditions, as would render injury to guest in automobile probable, and render motorist guilty of willful misconduct and liable to guest for such injury.

5. Automobiles ⚷181(1, 7)

In determining whether motorist is guilty of such willful misconduct as to render him liable to guest for injuries sustained in accident resulting from such misconduct, his entire course of conduct, including his speed, is to be considered.

6. Automobiles ⚷245(87)

Nonsuit in action by guest against motorist-host for injuries sustained in accident may be granted if guest's evidence establishes, as a matter of law, that guest assumed risk of motorist's conduct.

7. Automobiles ⚷224(5)

Where guest had no opportunity to protest against motorist-host's action in driving out of traffic lane and into abutment, fact that guest had not protested against motorist-host's speed did not constitute such assumption of risk as would bar guest's action against motorist-host for injuries sustained in the accident.

8. Automobiles ⚷245(24)

In action by guest against motorist-host for injuries sustained in accident, evidence on questions of whether motorist was guilty of willful misconduct in driving, after drinking, 60 miles per hour on damp road, in attempting to pass vehicles in presence of danger signal, and in striking abutment, was sufficient to take case to jury.

◆

Allan, Miller & Groezinger, San Francisco, for appellant.

Hadsell, Murman & Bishop, San Francisco, for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment of nonsuit in favor of defendant, respondent herein, following defendant's motion at the completion of plaintiff's evidence in a personal injury action by a guest based on a claim of wilful misconduct on the part of the driver.

On the night of August 4, 1951, respondent, Jack Richards, invited plaintiff Hallman to ride with him as a guest in his 1951 Ford coupe. Hallman had finished his duties as desk clerk at a San Francisco hotel at about 12 p. m. that night. He and respondent then drove across the Golden Gate Bridge to Sausalito to play shuffle board at a bar and recreation center known as The Plaza, where they had been a couple times before. They played shuffle board and appellant drank three beers while Richards, according to appellant, had three or four bourbons. Respondent appeared sober to appellant when they left for San Francisco at about 2 a. m.

Appellant testified that Richards was driving at between 55 and 60 miles per hour after they made the stop at the toll gate and before they reached the point on the bridge approach where the accident occurred. The surface of the road was damp. At the point where the highway divides to continue by way of Doyle Avenue northeasterly to Marina Boulevard and by way of Richardson Avenue southeasterly into the City, respondent's automobile struck with great force the concrete pier located at the center point where the highway divides, causing severe personal injuries to appellant.

The only issue on this appeal is whether appellant offered sufficient evidence of wilful misconduct on the part of the respondent to take the case to the jury.

Appellant had testified that as they left the toll plaza and proceeded toward the City, respondent was driving at between 55 and 60 miles per hour. As they approached the abutment dividing the highway, he increased the speed, and must have been going over 60 miles per hour. He was driving in the center lane of the three lanes proceeding eastward. There was one car on the right and one on the left as they left the toll plaza. Richards was in the middle lane of the three east-bound lanes. As to the position of the car on the right, appellant stated on cross-examination, that they were "running pretty much neck and neck." The car to the right was traveling at a speed which he estimated at between 55 to 60 miles per hour before Richards speeded up. He recalled the car at the left traveling at about the same speed, but did not recall its position just before the accident occurred. Appellant's deposition taken on January 11, 1952, was read from on cross-examination. He had there stated that respondent was in the center position between the two cars and had speeded up trying to get ahead of them, that he would slow up and then speed up to get ahead.

The witness Carver, the driver of the car to respondent's right, had driven onto the bridge approach from the Fourteenth Avenue entrance. He testified that he was driving at about 50 miles per hour, that respondent passed him up, that then he did better than 50, about 55 "because he passed me and I passed him up." Then respondent drew up even with Carver again, and they were then about 25 feet from the abutment. After he passed the abutment he heard a crash and realized there had been an accident. He stopped his car and backed up to the abutment. He saw that the passenger in respondent's car was badly injured, and told a passing motorist to notify the Highway Patrol. The front end of the Ford was badly damaged, the right side shattered where it had hit the abutment, the frame was bent up, and hot water was spouting up from the engine.

Officer Morgan of the State Highway Patrol, an officer of 16 years experience, testified that when he arrived at the scene he noted that the engine of the Ford was demolished and caved in, the windshield on the right side was cracked, and the doors of the car could not be closed. Respondent's passenger was cut up and bleeding badly, and was squeezed down to the level of the dashboard and crumpled up. He described the abutment as a little over 3 feet 2 inches wide and 3 feet high. A square of concrete had been chipped off by the impact. There is a large light on the abutment which flashes intermittently about 36 times to the minute and has a beam of about 500 feet. The officer stated that the night was misty, the pavement wet in spots, and that windshield wipers were necessary.

The skid tracks caused by the application of respondent's brakes were described by the officer as a solid strip of heavy rubber marks for 19 feet back from the rear of the vehicle. At the end of the heavy mark of 19 feet there were lighter rubber markings in an unbroken line for 160 feet back. The skid marks crossed the lane and proceeded straight to the abutment.

The officer questioned respondent who first replied that he had been run off the road. When the officer told him it was pretty hard to get run off this road and asked him what he had been doing, he said "I don't know." Respondent told him not to talk to his partner, that he was asleep and wouldn't know anything. Respondent stated to the officer that he had been driving 35 miles per hour. When the officer said he was going to ask his partner about going to the hospital, respondent said "please don't do that, he's been drinking and I have been drinking and I don't know what he will tell you." The officer wanted to know how sober respondent was, so asked him to make a balance test. He couldn't maintain his balance without some assistance. The answers he made were rambling.

[1] Unless it can be said that the evidence herein viewed in the light most favorable to plaintiff establishes that there was no wilful misconduct as a matter of law, it was the duty of the trial court to deny the nonsuit. Hoff v. Los Angeles Pacific Co., 158 Cal. 596, 112 P. 53; Amendt v. Pacific Electric R. Co., 46 Cal.App.2d 248, 115 P.2d 588; Newton v. Cox, 73 Cal.App. 695, 239 P. 54. Appellant contends that there was evidence presented which could give rise to the inference of wilful misconduct and that it was therefore for the jury to decide whether or not such inference should be drawn. Miller v. Cookson, 89 Cal.App. 602, 265 P. 374; Kirk v. Los Angeles Ry. Co., 26 Cal.2d 833, 161 P.2d 673, 164 A.L.R. 1.

It is conceded that plaintiff was a guest, but respondent contends that the evidence shows at most, negligence on his part, and fails to show that element of actual knowledge of the peril to be apprehended from his conduct. The Supreme Court in Porter v. Hofman, 12 Cal.2d 445, 85 P.2d 447, 448, pointed out that wilful misconduct means something different from and more than negligence, however gross. To constitute wilful misconduct "there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. (Citation.) To this must be added the element included in the definition approved in Meek v. Fowler, 3 Cal.2d 420, 425, 45 P.2d 194, and cases following it, of actual knowledge or its equivalent that an injury to a guest will be a probable result." In the cited case the accident occurred when the woman driving the car turned her head momentarily to look at the children in the back seat when she was driving at a speed of 45 miles an hour. In Meek v. Fowler, supra, it was held not to be wilful misconduct, but a mistake in judgment as to whether or not a driver could cross an intersection before the arrival of another vehicle.

Appellant contends that the cited cases are very different from the present case where respondent drove forward for 179 feet (as shown by the skid marks) straight into a stone abutment, clearly illumined, and with five lanes of highway immediately adjacent into which he could have guided the vehicle had his speed been reasonable—and this on a highway which was familiar to him and where it must be implied that he had knowledge of the peril of the abutment dividing the two approaches to the City.

[2] There need not be a deliberate intention to injure the guest. Hagglund v. Nelson, 23 Cal.App.2d 348, 73 P.2d 265; Van Fleet v. Heyler, 51 Cal.App.2d 719, 125 P.2d 586: Otherwise it would seldom be possible to prove a case of wilful misconduct if it were necessary to have an admission of intent on the part of the driver to injure his guest. Wright v. Sellers, 25 Cal.App.2d 603, 78 P.2d 209. Appellant points to evidence from which a consciousness of misconduct on the part of respondent may be inferred—his statement to the highway patrolman that he was "run off the road", then his abandonment of that excuse and his statement that he could not make up his mind which way to go.

[3] The driver's knowledge of probability of injury may be either express or implied, there must be either actual knowl-

edge or that which in contemplation of law will be deemed equivalent to actual knowledge. Hastings v. Serleto, 61 Cal.App.2d 672, 143 P.2d 956. Appellant's testimony discloses that on the highway to San Francisco there are three eastbound lanes from the toll plaza to a point approaching the abutment, where the road widens, 3 lanes going to the right to Richardson Avenue and 2 broadening out to the left to Doyle Street. There was testimony that the driver speeded up as he approached the abutment. He was apparently attempting to pass the Carver car which was traveling at least 50 miles per hour about 30 yards from the dividing pier. A high rate of speed can be inferred from the demolished condition of the car.

[4] Respondent points out that speed alone does not amount to wilful misconduct, but that special circumstances must be shown bringing the case within the definition of wilful misconduct. Such circumstances must make an accident probable. Rhoads v. Studley, 15 Cal.App.2d 726, 59 P.2d 1082; Robertson v. Brown, 37 Cal. App.2d 189, 99 P.2d 288. The state speed limit of 55 miles per hour applies to the stretch of highway where the accident occurred. While there was dampness on the highway, there was no evidence that visibility was impaired. Other automobiles were traveling at the same speed. The evidence shows that the yellow flashing light on the abutment was visible for 500 feet, but, respondent says, there is no evidence as to whether or not respondent saw it, and even if he did not see it, this would amount to mere inattention which does not in law amount to wilful misconduct. Stacey v. Hayes, 31 Cal.App.2d 422, 88 P.2d 165; Porter v. Hofman, supra; People v. McNutt, 40 Cal.App.Supp.2d 835, 105 P.2d 657. It does seem, however, that respondent's inference is not the only one which can be drawn from these facts. Appellant argues that the speed of 55 miles per hour is subject to the basic rule of Section 510, Vehicle Code, that the speed must not be "greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property." The dangerous nature of this portion of the highway is warned againt by a large flashing lamp with a 500 foot beam. It is true that there is no direct testimony that respondent did or did not see the light, but the skid marks for 179 feet to the point of impact would warrant an inference that he did. In Johnson v. Marquis, 93 Cal.App.2d 341, 209 P.2d 63, it was held that there was sufficient evidence of wilful misconduct where a woman with full knowledge of the hazards of a highway with sharp curves and grades deliberately and recklessly drove her car on a dark and misty night which required the use of windshield wipers, at 80 miles per hour around a curve and down a grade, crashing into the rear of a parked truck which had red warning lights burning, without seeing it. In the instant case, respondent was familiar with the highway, and must be presumed to have been aware of the danger. He had been drinking intoxicants, which is a circumstance to be considered as bearing on whether 60 miles per hour with such road conditions should be considered as conduct making it not improbable that injury to his passenger might result. Fisher v. Zimmerman, 23 Cal.App. 2d 696, 73 P.2d 1243; Van Fleet v. Heyler, 51 Cal.App.2d 719, 125 P.2d 586. In Jones v. Harris, 104 Cal.App.2d 347, 231 P.2d 561, it was said that it could not be held as a matter of law that there was no evidence to support the verdict where there was evidence that Harris was driving at an excessive rate of speed (60 miles per hour) in heavy traffic, that he "crowded" the white line, that although he was requested by plaintiff to pull over a "little bit" before meeting another car, he refused to do so and deliberately continued straight toward it until it was too late to avoid the crash.

Respondent cites the following cases in which it was held that there was no evidence of wilful misconduct: McLeod v. Dutton, 13 Cal.App.2d 545, 57 P.2d 189; Hall v. Mazzei, 14 Cal.App.2d 48, 57 P.2d 948; Stacey v. Hayes, 31 Cal.App.2d 422, 88 P.2d 165; Lennon v. Woodbury, 3 Cal. App.2d 595, 40 P.2d 292; Weir v. Lukes, 13 Cal.App.2d 312, 56 P.2d 987; Katz v. Kuppin, 44 Cal.App.2d 406, 112 P.2d 681. In his reply brief, appellant successfully distinguishes all these cases from the present one on the facts.

Respondent says that appellant's contention that he drove in a straight line for 179 feet into the abutment is not supported by the facts, since when Officer Morgan was asked if the skid marks proceeded in one lane in an unbroken line, he answered: "No, they crossed. They were crossing from this lane to here, as I indicated they do curve somewhat here for 160 feet and 19 solid." It is to be remembered that the lane at that point was curving somewhat toward the right.

In De Loss v. Lewis, 78 Cal.App.2d 223, 177 P.2d 589, 590, this court in reversing a nonsuit in a wilful misconduct case quoted the following language of Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868; "'Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn, in any given case, is a question of fact for the jury.'"

It was said in Wright v. Sellers, 25 Cal. App.2d 603, 607, 78 P.2d 209, 212, "on the one hand are numerous cases in which the appellate and Supreme Courts found no difficulty in holding that the acts of a driver of an automobile constituted willful misconduct. On the other hand are an equal, if not a greater number of cases where the acts relied upon were held, as a matter of law, not to constitute willful misconduct. Between these two fairly well defined zones of decision appears another class composed of what may be called border line cases. * * * In this class of cases, frequently, though not always, it has been held that the question of the existence of willful misconduct is one of fact addressed to the trier of fact and not one of law for the appellate court."

[5] In determining whether the driver of a car is guilty of wilful misconduct, his entire course of conduct including his speed is to be considered by the court. 7 Cal.Jur. 2d 232, § 337; Anderson v. Newkirch, 101 Cal.App.2d 171, 225 P.2d 247; Hollingum v. Moore, 102 Cal.App.2d 509, 227 P.2d 845.

[6, 7] It has been held that the duty of a guest to remonstrate or to withdraw from the vehicle is not absolute, but depends upon the particular circumstances, 7 Cal.Jur.2d 245, sec. 340. In the instant case the guest did not raise any objection to the manner in which respondent was driving. Even if there is evidence from which an inference of wilful misconduct could be drawn, a nonsuit could still properly be granted if plaintiff's evidence establishes assumption of risk as a matter of law. It might be said here that the failure to remonstrate could be considered evidence of assumption of risk as to the speed, but the danger has resulted not from the speed alone, but the driving out of the traffic lane and into the abutment, making it a situation where there was no opportunity on the part of the guest to protest against the dangerous conduct. 7 Cal.Jur.2d 245, § 340; McSweeney v. East Bay Transit Co., 60 Cal.App.2d 807, 141 P.2d 787; Swink v. Gardena Club, 65 Cal.App.2d 674, 151 P.2d 313.

[8] In the instant case there is evidence that the respondent traveled at a high rate of speed; he was traveling on a highway that was damp in spots; the night was misty, windshield wipers were being used; he attempted to pass other vehicles in the presence of a conspicuous danger signal and approaching curves and then drove 179 feet straight into a concrete abutment. Further, there is evidence that respondent was familiar with the highway and it must be presumed would have been aware of the danger. He had been drinking whiskey, which is a circumstance to be considered as bearing on whether 60 miles per hour under such road conditions should be considered as conduct making it not improbable that injury to appellant might result.

In view of the foregoing evidence we conclude that it was for the jury to determine whether or not an inference of wilful misconduct should be drawn and that it was prejudicial error to enter a judgment of nonsuit.

Judgment reversed.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

NELSON v. BLACK.*

Civ. 15447.

District Court of Appeal, First District,
Division 2, California.
Feb. 18, 1954.

Hearing Granted April 14, 1954.

Action for damages for personal injuries sustained in an automobile collision wherein defendant admitted negligence and liability. From a judgment in the Superior Court for the City and County of San Francisco, Frank T. Deasy, J., for the defendant, plaintiff appealed. The District Court of Appeal, Dooling, J., held that the verdict for defendant was unauthorized in law in view of evidence of injuries to the nerves of plaintiff, and that a new trial was required.

Judgment reversed.

1. Appeal and Error ⚷294(1)

In negligence action where plaintiff claimed not that inadequate damages had been awarded to plaintiff but that the judgment had been given to the wrong party or the defendant when the evidence required a judgment for plaintiff in some amount, fact that plaintiff made no motion for new trial did not preclude plaintiff from raising the contention on appeal. Code Civ.Proc. § 956.

2. Damages ⚷49

Where collision of defendant's automobile with plaintiff's truck actually occurred, even if plaintiff suffered no actual physical injury as a result of the collision if as a result thereof his nervous system was affected the injury was none the less compensable.

3. Damages ⚷33

A tort-feasor must take the person whom he injures as he finds him, and if by reason of some pre-existing condition his victim is more susceptible to injury, tort-feasor is not thereby exonerated from liability.

4. Damages ⚷49

Where collision between automobile of defendant and truck of plaintiff actually occurred, whether plaintiff suffered a whip injury to the nerve of his neck or because of pre-existing neurotic tendencies suffered only traumatic neurosis, his injury was an actual one for which he was entitled to a reasonable award of such damages as would compensate him for whatever damages were proximately caused by the collision.

5. New Trial ⚷68

Where defendant admitted liability for an automobile collision and jury returned a verdict for defendant notwithstanding evidence that plaintiff suffered a whip injury to a nerve of his neck or because of pre-existing neurotic tendencies suffered only a traumatic neurosis, jury verdict was unauthorized in law and a new trial was required.

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Leonard J. Bloom, James M. French, Kennedy & Bloom, San Francisco, for appellant.

Boyd, Taylor & Reynolds, San Francisco, for respondent.

DOOLING, Justice.

Plaintiff appeals from a judgment for defendant following the verdict of a jury. The action was for damages for personal injuries which resulted when the automobile driven by defendant collided with the rear of the truck driven by plaintiff while plaintiff's truck was stopped at an intersection. By an amendment to his answer filed before the trial defendant admitted his negligence, withdrew his plea of plaintiff's contributory negligence and (quoting): "admits his liability for any and all damages sustained by the plaintiff proximately resulting from the accident." In this state of the pleadings the jury must have found that plaintiff sustained no damages proximately resulting from the accident in order to bring in its verdict for the defendant. The sole claim of plaintiff on appeal is that the verdict and judgment are not supported by the evidence.

[1] Plaintiff made no motion for new trial and respondent cites the cases holding that the claim of a party that the damages are excessive, Bate v. Jolin, 206 Cal.

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* Subsequent opinion 275 P.2d 473.

504, 274 P. 971, or inadequate, Alexander v. McDonald, 86 Cal.App.2d 670, 195 P. 2d 24, cannot be urged on appeal unless his claim has first been presented to the trial judge by motion for new trial. These cases are not in point. The claim here is not that inadequate damages have been awarded to plaintiff, but that the judgment has been given to the wrong party, the defendant, when the evidence requires a judgment for the plaintiff in some amount. The rule applicable was settled by our Supreme Court in Smith v. Lightston, 182 Cal. 41, at page 43, 186 P. 769, at page 770, in which the court said of sec. 956, Code Civ.Proc.: "This clearly gives this court authority to consider the sufficiency of the evidence to support the verdict or findings in every case where the evidence is properly included in the record on appeal * * * without regard to the question of there having been a motion for a new trial."

The evidence shows without substantial contradiction that the plaintiff suffered some injury as a result of the collision. He testified that his head bumped the back of the cab of his truck resulting at once in a stiff neck. He at first regarded the injury as trivial and told defendant to forget about it. A few minutes after leaving the scene of the accident, however, his neck started hurting so badly that he telephoned to his doctor's office and made an appointment with the office nurse to see the doctor. He then proceeded immediately to the doctor's office where the doctor examined him and had X-rays taken. The X-rays were negative but the doctor diagnosed his condition as a "whip" injury to a right nerve of the neck with a possible slight concussion (injuries which an X-ray would not disclose) and advised complete rest until the pain subsided. Plaintiff drove from the doctor's office to the service station which he owned and arranged for a relief man to take his place there and then went to his home. Thereafter he visited the doctor frequently complaining of pain in his neck and headaches.

The accident occurred on March 27, 1950. The pains and headaches were gradually ameliorated and after they began to slacken off plaintiff returned to his service station where he has worked continuously since. At the trial in November, 1951 he testified that he suffered from headache only once in every two or three weeks. During the first two months plaintiff was hospitalized twice, once for one-half day when he was given a novocaine injection in the neck, and again for two days for further tests and diagnosis. During this time he had X-ray and therapy treatments. At all times he visited his service station at least once a day, the rest of the time he just loafed around his home. Medical and hospital bills totaling over $600 were introduced at the trial.

Defendant argues that because plaintiff's symptoms were all subjective and because of certain respects in which his testimony was impeached the jury was entitled to disbelieve all of his testimony and to conclude that his entire testimony was false, and that he received no injury in the collision. The facts cannot be contradicted that almost immediately following the collision he visited his doctor and described to him his injury and resulting pain, that on the same day he hired a man to take his place in his business and went home as the doctor directed. His physician testified to plaintiff's suffering and when asked if he did not rely entirely on what the plaintiff told him he answered: "You can tell by the looks of a person if he is in severe pain."

Entirely apart from this, however, the only medical testimony produced by the defendant established without question that the plaintiff suffered a compensable injury as a result of the collision. An expert in neurosis and psychiatry examined plaintiff for the defendant on October 19, 1951. This was over a year and a half after the collision. He found at that time no evidence of nerve injury in the neck nor any other physical effect of trauma. When it was called to his attention that plaintiff had been discharged from the navy for somnambulism and as a psychoneurotic of the anxiety type, he testified: "Patients who have had a past history of emotional illnesses and psychoneuroses—which means an individual reacts with more emotional feeling to situations than the average person—that this patient did, because of his present injury, would be prone to remember—the patient undoubtedly had some discomfort in his neck from this injury temporarily, and a patient who has a previous history of emotional instability or unstable emotional behavior is more inclined to continue the memory of this discomfort long after the actual cause of it has healed and disappeared * * *. I believe his complaint is due to a pre-existing quality of the emotional stability of his personality."

The expert for the defendant in this testimony was describing the typical case of traumatic neurosis or traumatic hysteria. The sufferer from traumatic neurosis is not a malingerer. His disability is not feigned but real, although no basis for it can be found in any physical injury. "Hysteria is a disease and the hysterical patient actually suffers the disabilities of paralysis, anaesthesia, loss of power, or paroxysm, which he claims. Many physicians do not understand hysteria, and because they can not see any demonstrable evidences of organic disease, deny the existence of disease and claim that the hysterical patient is simulating or malingering." (Herzog, Medical Jurisprudence, § 388, p. 291.)

[2] The jury may have concluded, as Dr. Herzog suggests that even physicians who are not experts on the subject may do, from the testimony of the defendant's medical witness that plaintiff's entire complaint of pain and suffering was false. The witness was careful not to say this, however, and any such conclusion from his testimony is unwarranted. It is admitted that the collision actually occurred and even if plaintiff suffered no actual physical injury as a result of the collision the effect on his nervous system testified to by defendant's only witness on the subject was none the less compensable. Webb v. Francis J. Lewald Coal Co., 214 Cal. 182, 4 P.2d 532, 77 A.L.R. 675; Cook v. Maier, 33 Cal.App.2d 581, 92 P.2d 434; cf. State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal.2d 330, 240 P.2d 282.

Our Supreme Court in Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, 44 P. 320, 32 L.R.A. 193 was a pioneer in the judicial field in recognizing the inter-dependence of the mind and body. At page 680 of 111 Cal. at page 322 of 44 P., 32 L.R.A. 193 of that decision the court said: "The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves, or the entire nervous system, are thus affected, there is a physical injury thereby produced, and, if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect, through some action upon the mind." See also: Taylor v. Pole, 16 Cal.2d 668, 671, 107 P.2d 614; Dryden v. Continental Baking Co., 11 Cal.2d 33, 39, 77 P.2d 833; Chappell v. San Diego & A. R. Co., 201 Cal. 560, 567, 258 P. 73; Lindley v. Knowlton, 179 Cal. 298, 176 P. 440.

[3] It is equally settled that the tort feasor must take the person whom he injures as he finds him. If by reason of some pre-existing condition his victim is more susceptible to injury the tort-feasor is not thereby exonerated from liability. Jonte v. Key System, 89 Cal.App.2d 654, 660, 201 P.2d 562; Taylor v. Sims, 72 Cal.App.2d 60, 65, 164 P.2d 17; Matthews v. Atchison T. & S. F. R. Co., 54 Cal.App.2d 549, 599–560, 129 P.2d 435; Smith v. Schumacker, 30 Cal.App.2d 251, 263, 85 P.2d 967. This rule was specifically applied to a case of nervous susceptibility in Sloane v. Southern Cal. Ry. Co., supra, 111 Cal. at page 683, 44 P. at page 323, 32 L.R.A. 193, the court saying: "Whether the defendant or its agents knew of her susceptibility to nervous disturbance was immaterial. * * * It was not necessary that this injury should have been anticipated in order to entitle her to a recovery therefor."

[4, 5] It makes no difference whether the jury believed plaintiff's evidence or defendant's. Whether the plaintiff suffered a whip injury to a nerve of the neck as his physician testified or because of his pre-existing neurotic tendencies suffered only

a traumatic neurosis as testified by defendant's expert, his injury was in either case an actual one for which he is entitled to such reasonable award as will compensate him for whatever damages were proximately caused thereby as determined by a jury. The fact that he may have later exaggerated the extent of his injuries, as indicated by the testimony of an investigator who observed him working a full day on July 5, 1950 when plaintiff testified that he only returned to partial work on July 15, and who corroborated his testimony with moving pictures taken at the time, might justify the jury in awarding plaintiff lower damages. It did not justify the jury in awarding him no damages whatever in the face of testimony not substantially contradicted in any fashion that the plaintiff suffered some substantial injury through defendant's negligence.

Judgment reversed.

NOURSE, P. J., and KAUFMAN, J., concur.

123 Cal.App.2d 345

DANIELS v. PITMAN.

Civ. 19838.

District Court of Appeal, Second District,
Division 2, California.
Feb. 18, 1954.

Action to recover a sum representing a balance of defendant's indebtedness to plaintiff's assignor. From orders refusing to set aside a default judgment entered against defendant in the Superior Court of Los Angeles County, Meyer, J., the defendant appealed. The District Court of Appeal, McComb, J., held that the facts disclosed no excusable mistake, surprise or neglect so as to warrant the setting aside of the default judgment.

Affirmed.

1. Appeal and Error 🔑957(1)

On appeal from order refusing to set aside a default judgment, any statements in defendant's affidavits contradictory of plaintiff's affidavits must be disregarded, since when there is a substantial conflict in facts presented by affidavits, determination of the controverted facts by the trial court will not be disturbed on appeal. Code Civ.Proc. § 473.

2. Appeal and Error 🔑957(1)
Judgment 🔑139

A motion for relief under the statute respecting setting aside of default judgment is addressed to the sound discretion of the trial court and in absence of a clear showing of abuse thereof exercise of discretion will not be disturbed on appeal. Code Civ.Proc. § 473.

3. Judgment 🔑143(3)

In exercise of discretion under the statute respecting setting aside of default judgment, it should appear that something more than mere inadvertence or neglect without reasonable excuse or justification existed, and that the inadvertence or neglect is not the result of mere forgetfulness nor neglect but is based on other circumstances which would make the neglect excusable. Code Civ.Proc. § 473.

4. Judgment 🔑162(4)

Facts supported by affidavits in opposition to defendant's motions to set aside a default judgment disclosed no abuse of discretion by the trial court in refusing to set aside a default judgment where they did not show any excusable mistake, surprise or neglect. Code Civ.Proc. § 473.

Samuel A. Rosenthal and Norman Warren Alschuler, Los Angeles, for appellant.

Jacob Paull, Hollywood, for respondent.

McCOMB, Justice.

Defendant appeals from orders denying (1) his motion to set aside a default judgment pursuant to the provisions of section 473 of the Code of Civil Procedure, and (2) his motion to reconsider the previous order.

Facts: Plaintiff commenced an action to recover the sum of $4,000 representing a balance of defendant's indebtedness of $7,000 to plaintiff's assignor which was evidenced by a writing executed by defendant.

The case was originally set for trial July 27, 1951, but due to the fact that certain depositions had not been returned it was ordered off calendar.

April 1, 1952, the commissioner appointed to take the depositions wrote a letter to the attorney of record for defendant enclosing copies of the interrogatories and cross-interrogatories put to the witnesses, and advising him that the original interrogatories had been transmitted to the clerk of the court. Thereupon plaintiff made a motion to have the case restored to the trial calendar and an order was entered setting the trial for July 31, 1952.

Notice of motion to restore the case to the calendar was mailed to the attorney of record for defendant enclosed in an envelope containing plaintiff's attorney's return address. The same was never returned to plaintiff's attorney by the post office department. On April 17, 1952, plaintiff's attorney received a telephone call from a woman who represented that she was Mrs. Rollinson, the wife of defendant's attorney. She stated that her husband was due to come out of the hospital in about a week, and that it would take a little time for his recovery, and on that basis requested a continuance of the hearing of the motion to restore the case to the calendar. Plaintiff's attorney advised her that since the case would be set for trial for sometime in the future no purpose would be served in continuing the hearing; that after the trial date had been set, notice of trial would be mailed to the attorney for defendant and if for any reason his health would not permit his trying the case on that date, plaintiff's attorney would be willing to discuss with him a continuance of the trial.

On April 10, 1952, in addition to mailing to the attorney for defendant a copy of the notice of motion to restore the case to the calendar, there was mailed under separate cover a copy of a notice to produce. This document was never returned by the post office department to plaintiff's attorney.

April 18, 1952, a written notice of trial, indicating the case had been reset for trial on July 31, 1952, was mailed to the attorney for defendant at his office address enclosed in an envelope which bore the return address of plaintiff's attorney. This document was not returned to the attorney for plaintiff by the post office department, nor did plaintiff's attorney hear from defendant or his attorney between April 18, 1952 and the time that a default judgment was rendered against defendant on July 31, 1952.

It likewise appears that on or about March 12, 1952, defendant visited the attorney for plaintiff without any prior notice, representing that he was visiting such attorney with the knowledge and acquiescence of his own counsel. Defendant stated that the purpose of his visit was to ascertain the address of plaintiff's assignor, since he was desirous of discussing with the assignor a business deal similar to the one which resulted in his executing the written acknowledgment of indebtedness for $7,000, and that by such meeting he could in all probability work out a solution to the satisfaction of all persons concerned. The attorney for plaintiff referred defendant to the attorney for plaintiff's assignors from whom he might obtain the address he desired and stated to defendant that he doubted that any business transaction could be consummated with plaintiff's assignor in view of the pendency of the present action, and that if defendant desired to enter into any further negotiations he would first have to make a disposition of the pending action. He further advised defendant that in spite of the fact he was contemplating contacting plaintiff's assignor he would proceed with the pending action as soon as the depositions were received, and that, in all probability, based upon a motion which would then have to be made to restore the case to the calendar, the trial would probably take place sometime in June or July of 1952.

On August 8, 1952, a copy of the memorandum of costs and disbursements together with a copy of notice of entry of judgment were mailed to the attorney for defendant in an envelope which bore plaintiff's attorney's return address. This envelope was not returned by the post office department. Defendant admitted that he had learned of the judgment on or about August 20, 1952.

[1] Defendant's original motion was based upon two grounds: 1. Mistake, inadvertence, surprise and excusable neglect; and 2. Extrinsic fraud of plaintiff and plaintiff's attorney.

No facts were shown to establish any fraud. Therefore we need not consider the correctness of the court's ruling as to the second ground. We, of course, must disregard any statements in defendant's affidavits contradictory of those of plaintiff's affidavit, since, when there is substantial conflict in the facts presented by affidavits, the determination of the controverted facts by the trial court will not be disturbed on appeal. (Baratti v. Baratti, 109 Cal.App.2d 917, 922 [12], 242 P.2d 22; Reeves v. Reeves, 34 Cal.2d 355, 360 et seq., 209 P.2d 937.)

We are thus presented with this sole question:

Under the foregoing facts did the trial court abuse its discretion in denying defendent's motions to set aside the default judgment entered against him?

[2] *No.* Mr. Justice Traynor, in Coyne v. Kremples, 36 Cal.2d 257, 263 [8], 223 P.2d 244, 248, thus accurately states the rule: "A motion for relief under section 473 is addressed to the sound discretion of the trial court and in the absence of a clear showing of abuse thereof the exercise of that discretion will not be disturbed on appeal."

[3, 4] It is likewise settled that in the exercise of its discretion under section 473 of the Code of Civil Procedure, in setting aside a default judgment, it should appear that something more than mere inadvertence or neglect without reasonable excuse or justification existed, and that the inadvertence or neglect in question is not the result of mere forgetfulness or neglect but is based on other circumstances which would make the neglect excusable. In the instant case the above facts are supported by affidavits in opposition to defendant's motions and such facts do not show any *excusable* mistake, surprise or neglect. Therefore the trial court did not abuse its discretion in concluding that no proper showing of inadvertence or excusable neglect had been made.

The orders are and each is affirmed.

MOORE, P. J., and FOX, J., concur.

123 Cal.App.2d 264

UPDECK v. SAMUEL.

Civ. 15594.

District Court of Appeal, First District,
Division 2, California.
Feb. 17, 1954.

Proceedings by plaintiff to establish right to an interest in property of defendant under an alleged marriage by oral agreement. The Superior Court, City and County of San Francisco, I. L. Harris, J., decreed that plaintiff was the owner of one-half of defendant's real property subject to defendant's lien for $350. The defendant appealed. The District Court of Appeal, Nourse, P. J., held that court's finding, that a putative marriage existed between plaintiff and defendant, was not sustained by the evidence.

Reversed.

Dooling, J., dissented.

1. Marriage 🔑54

In action by plaintiff, a married woman, who was living with defendant, a married man, to establish an interest in property of defendant under an alleged marriage by oral agreement, court's finding, that a putative marriage existed between plaintiff and defendant, was not sustained by the evidence. Pen.Code, §§ 269a, 269b.

2. Marriage ⚷54

Plaintiff, who was legally married to another, and who had allegedly married defendant, a married man, by oral agreement, could not claim an interest in real estate owned by defendant. Civ.Code, §§ 1091, 1624, subd. 4; Pen.Code, §§ 269a, 269b.

3. Marriage ⚷11

Alleged marriage of plaintiff, who was legally married to another, to defendant, who was legally married to another, by oral agreement, was void ab initio. Pen. Code, §§ 269a, 269b.

◆

Edward D. Mabson, San Francisco, for appellant.

Alex L. Arguello, Marvin G. Giometti, San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued on a claim of title for real property and for damages. Her action is predicated upon an alleged marriage by oral agreement at an indefinite date without either license or ceremony. At the time of the alleged oral agreement both parties were married to other persons and both marriages were in full force and effect. The original complaint alleged that the parties hereto executed the oral agreement on September 16, 1941. This was amended to read January 30, 1942. This date was changed during the trial so that the trial court found that the agreement was executed in February or March of 1942. Then it was found that on April 25, 1942, the parties engaged in a marriage ceremony and that plaintiff entered into this so-called marriage in good faith but that the defendant acted fraudulently and with intent to deceive. In March, 1942, the defendant purchased two lots in the city of Tulare for the sum of $500 and in 1946 and 1947 purchased additional lots. Title to all of said property was taken in appellant's name only and the entire purchase price was paid by him.

The evidence relating to the purported marriage and the oral agreement is in serious conflict. It should be pointed out that the plaintiff was not wholly an innocent actor in these transactions. She had been married and divorced on two previous occasions, had six children, the marriage of five of whom the plaintiff attended and witnessed. Her testimony as to the purported marriage with defendant in the city of Tulare is almost unbelievable in view of those circumstances. She said that she was living in the defendant's home with his consent while he was employed by the federal government in the Sequoia National Park; that one day the defendant came to the home in a truck of the federal service driven by a federal employee. She stated that this employee performed a marriage ceremony without a license and without other witnesses, and that before he left he took a yellow paper out of his pocket which she assumed was the marriage license. This paper was then signed by the defendant and the truck driver returned it to his pocket. Could it have been anything but the common receipt for the delivery of his goods? She admitted, however, that she had not appeared at any state or city office for the purpose of procuring a marriage license. At the date of this purported ceremony the plaintiff was admittedly the lawful wife of a man living in Texas.

On the 30th of September, 1943, the plaintiff herein filed an action for divorce against this defendant in the county of Tulare in which she alleged they were married on April 25, 1942, and separated on November 28, 1942. Though the original complaint was offered in evidence showing her signature and verification thereof, she was led to deny it in toto as a witness in this case. (The importance of this item is that if the allegations of her other complaint are true, the purported marriage took place subsequent to the purchase of lots 4 and 5 in March, 1942, and the separation, which she alleged occurred November 28, 1942, occurred prior to the purchase of the lots on August 19, 1946 and August 7, 1947. The trial court might well have found that this separation breached the oral agreement and that these later purchases did not come within that agreement.)

In 1943 defendant gave plaintiff $700 in cash which, according to his testimony, was to be used in improvement of the home owned by defendant and in which plaintiff was then living with his consent. She first denied the receipt of this but when sufficient proof was made she testified she probably burned it up.

The facility with which the plaintiff has juggled the allegations in regard to the time of the purported marriage from September 16, 1941 to January 30, 1942 to April 25, 1942 and to "February or March, 1942" makes the case most confusing because if the allegations of the former complaint can be taken as true the first purchase of these lots was made before the purported marriage and all the others were made after the separation. The case is all the more confusing because on an order denying a new trial the judgment was modified by ordering that the sum of $700 be added as an additional value to the real property, and that the property less that sum would be divided one-half to each. Thereafter a modified judgment was filed in which it was decreed that the plaintiff was the owner of one-half of all the real property subject to a lien in favor of the defendant in the sum of $350. Why she was given one-half of the money she burned does not appear.

If this was a case of a putative marriage in which the parties were entitled to one-half of the property acquired during the time of the marriage it is hard to understand why the payment by defendant to plaintiff in the sum of $700 cash has anything to do with the interest in the real property or how a lien could be put upon the property for any portion of it.

[1] On a careful reading of the evidence it seems that it is insufficient to show that a putative marriage ever existed. It is clear that both the parties were then married, that they knew they were married and not divorced, that they knew that they could not enter into a marriage relation until the prior marriages were dissolved. It does appear however from the undisputed evidence that for some period the parties were living together in a state of adultery and that such relation was the one and only consideration for the alleged contract.

[2] There are two fully settled principles of law which govern the decision. (1) An agreement for the transfer of an interest or estate in real property must be in writing. Sections 1091 and 1624, subd. 4 of the Civil Code. The exceptions relating to agreements between husband and wife covering their community and joint tenancy property discussed in Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905 and similar cases are not applicable here because there was no valid existing marriage relation.

[3] (2) The illegal oral contract was void ab initio because it was founded on both an unmoral and an immoral consideration. The oral contract was based on the consideration that the parties live together as husband and wife. At the time both parties were legally married to other spouses. Hence the alleged agreement called for them to live in a state of adultery. But adultery is a criminal offense under our Penal Code, §§ 269a, 269b. Hence the parties were contracting between themselves to commit a crime. The settled rule of law is that such a contract is void ab initio.

In 6 Cal.Jur. p. 124, this rule is stated: "A court will not enforce an executory contract founded on the mutual turpitude of the parties, and if the contract has been executed, it will not aid either party to escape its consequences. A contract which has the direct effect of promoting sexual immorality is against public policy. Thus a promise to marry, made in consideration of an agreement, on the part of the woman, to continue an immoral and illegal relation toward the promisor is void."

Judgment reversed.

KAUFMAN, Justice (concurring).

The evidence in the record submitted by respondent to show a purported marriage is incredible and unworthy of belief and therefore insufficient to sustain a finding of a putative marriage. Under these circumstances we are not reweighing the evidence or resolving conflicts but determining that there is no credible or substantial evidence in the record to sustain the lower court's finding. People v. Headlee, 18 Cal.2d 266, 267, 115 P.2d 427.

Respondent would ask a court to believe that on the day of the purported marriage appellant and a man drove up to the house in a government truck; entered the house, and the man who was not introduced to her in any official capacity or as a minister, priest or judge and who did not exhibit a marriage license, performed a marriage ceremony. This was done, according to respondent, without a witness being present and without ever having applied for a license to marry. It is significant to note that respondent had previously been married twice before, had applied for marriage licenses and had the ceremonies performed in the presence of witnesses.

Other findings of the trial court are likewise not supported by substantial evidence, but in view of the fact that the evidence is insufficient to show that respondent entered into the purported marriage in good faith, it is unnecessary to discuss them.

DOOLING, Justice.

I dissent. While the plaintiff's testimony presents a bizarre case on its facts and the plaintiff was impeached in certain particulars the trial judge resolved the evidence in favor of the plaintiff and under the settled rule, which is such a commonplace of our appellate procedure as to require no citation of authority, the credibility of the witnesses and the weight of the evidence are left solely to the determination of the trial court and this court cannot reweigh the evidence on appeal. It is only by reweighing the evidence that my associates are able to say: "On a careful reading of the evidence it seems that it is insufficient to show that a putative marriage ever existed."

The plaintiff testified that she arranged with a lawyer in Texas to secure a divorce from her prior husband and that in January 1942 she received a letter from this lawyer assuring her that the divorce would be secured immediately, and believing that she was divorced she entered into what she was led by defendant to believe was a valid marriage with defendant a few months thereafter. The decree of divorce from her former husband was in fact not entered until 1944 but plaintiff did not learn of this until shortly before the trial of this action; and while defendant also had a wife she did not know this fact and believed that he and she had entered into a valid marriage. In the face of this testimony, which the trial court made the basis of its findings, it is only by reweighing the evidence, and deciding that what the trial court believed this court does not, that the court can say: "It is clear that both parties were then married, that they knew they were then married and not divorced, that they knew that they could not enter into a marriage relation until the prior marriages were dissolved."

Equally must this court reweigh the evidence to make its finding, contrary to the finding of the trial court, that the contract of the parties called for them to live in the state of adultery. The trial court found "that plaintiff entered into said marriage in good faith, honestly believing herself to be the true and legal wife of the defendant" and that "plaintiff in reliance on the oral contract to pool assets and earnings and in the belief that she was legally married to the defendant, lived with the defendant as the wife of the defendant, from April 25th, 1942 to the 5th day of January, 1950."

The plaintiff was an ignorant woman who could barely read and write and her bona fides and the deception practiced on her by defendant are corroborated by the fact that defendant wrote letters to her which he signed: "Loving Husband" and represented to others in her presence that she was his wife. Even the fact that she at one time filed a suit for divorce against him, which the majority opinion cites as casting doubt on her credibility as to the date of the putative marriage, might itself be considered some corroboration of her good faith. Those considerations, however, are not our concern on appeal but were for the trial judge to consider in exercising his function, which is clearly not ours, as trier of the facts.

Under the findings of the trial court, which are supported by substantial evidence, the innocent party to the putative marriage is entitled to the quasi-community property rights which are the basis of the judgment here under attack. Vallera v. Vallera, 21 Cal.2d 681, 683, 134 P.2d 761; Figoni v. Figoni, 211 Cal. 354, 295 P. 339; Schneider v. Schneider, 183 Cal. 335, 191 P. 533, 11 A.L.R. 1386; Coats v. Coats, 160 Cal. 671, 118 P. 441, 36 L.R.A.,N.S., 844.

* * *

123 Cal.App.2d 341

VOGLER v. INGRAO et al.

Civ. 19804.

District Court of Appeal, Second District,
Division 2, California.
Feb. 18, 1954.

Action on demand note executed by one of two sisters allegedly associated in a partnership venture. The Superior Court, Los Angeles County, Kurtz Kauffman, J., entered judgment for sister who had not joined in the execution of the note, and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that evidence warranted finding that partnership had been dissolved prior to execution and delivery of the note, and that any acts committed by maker were without the express or implied authority of sister who did not join in execution, and were not for the benefit of the partnership or for the benefit of the latter sister.

Judgment affirmed.

1. Appeal and Error 🔑1071(5)

A judgment will not be disturbed on appeal though some findings are without support in the evidence, if findings of the basic facts are supported by the substantial evidence, since erroneous findings, not necessary to sustain judgment, may be disregarded as immaterial.

2. Appeal and Error 🔑1010(1)

Findings of fact are conclusive on appeal if there is substantial evidence to support them.

3. Partnership 🔑296(3)

In action on demand note executed by one of two sisters allegedly engaged in a partnership venture, wherein it was contended that partnership had been dissolved at time of execution of the note and that sister not joining therein had not participated and was not liable, evidence warranted finding that no partnership existed at any time during month when note was executed or at any time subsequent thereto, but that acts committed by the one sister in execution of the note were done without express or implied authority of the other, and not for her benefit or the benefit of partnership.

4. Partnership 🔑259½, 285

Where there is no fixed term for its existence, a partnership may be dissolved by the expressed will of one of the partners, and when it is dissolved, the authority of one partner to bind his copartner in creation of a new indebtedness is revoked and the agency ends.

5. Partnership 🔑296(3)

A creditor who seeks to take advantage of statute declaring that, after dissolution, a partner can bind partnership by any transaction which would bind the partnership if dissolution had not taken place, provided other party to transaction had extended credit to partnership and had no knowledge or notice of dissolution, or though he had not extended credit, he had known of partnership prior to dissolution and had no notice of dissolution, has the burden of establishing prior knowledge of existence of the partnership, in absence of which a person who has not been a creditor of partnership prior to dissolution cannot recover. Corporations Code, § 15035.

◆

Nathan Newby, Jr., Los Angeles, for appellant.

Frank Desimone, Beverly Hills, for respondents.

MOORE, Presiding Justice.

Appellant recovered judgment against defendant Karsten on the demand note of the latter made in favor of one Josephine Falzone, but was denied recovery as to all others.[1]

Defendants Florence Karsten and Catherine Ingrao are sisters and for some time prior to December 1946 had, as a copartnership, operated the Venetian Dining Room and Gardens in Altadena. On January 25, 1947, Florence executed and delivered the note to Miss Falzone in the principal sum of $2,400 with interest and signed the name of the partnership by Florence L. Karsten, partner. The court found that no partnership of the sisters existed at any time during the month of January 1947 or at any time subsequent thereto; that any acts committed by Mrs. Karsten in procuring moneys during that period were done without the express or implied authority of Mrs. Ingrao and without her knowledge; that Mrs. Karsten borrowed the $2,400 for her own individual account and not for the benefit of the partnership or for the benefit of defendants Ingrao. Appellant included the husbands of the sisters as defendants. Florence defaulted and on the other defendants' plea of nonliability and the proof that they were not participants in the loan, judgment went in their favor but was entered against Florence Karsten only. A reversal of the judgment is demanded by plaintiff on the ground that the loan was made to the partnership and that Catherine as well as Florence had the benefits of the proceeds of the loan.

[1, 2] Appellant contends certain findings are not sustained by the evidence. While some findings may be without support, the judgment will not be disturbed on appeal if findings of the basic facts are supported by substantial evidence. Erroneous findings, not necessary to sustain the judgment, may be disregarded as being immaterial. Supreme Grand Lodge, etc., v. Smith, 7 Cal.2d 510, 513, 61 P.2d 449; American National Bank v. Donnellan, 170 Cal. 9, 15, 148 P. 188. Findings are conclusive on appeal if there is substantial evidence to support them. Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557; Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689.

[3, 4] The findings made are sufficient to support the judgment in favor of respondents. Sufficient, substantial evidence is contained in the record to sustain them. Where there is no fixed term for its existence, a partnership may be dissolved by the expressed will of one of the partners. Maryland Casualty Co. v. Little, 102 Cal.App. 205, 210, 282 P. 968. When it is dissolved, the authority of one partner to bind his copartner in the creation of an indebtedness is revoked and the agency ends. Ibid., 102 Cal.App. at page 211, 282 P. at page 971.[2]

Mrs. Ingrao testified that she gave Mrs. Karsten money to pay all outstanding bills and orally dissolved the partnership on December 22 or 23, 1946, and that the restaurant was closed and padlocked about two days after New Years Day, 1947, at which time the statement of dissolution was repeated. Mr. Ingrao testified to the same effect. Mr. Montana, an employee of the restaurant and a brother of Mrs. Karsten, testified that he padlocked the place of business at Mrs. Ingrao's direction about January 3, 1947, and that he was present on the same day when Mrs. Ingrao notified Mrs. Karsten of the closing and dissolution of the partnership. Mrs. Karsten's testimony that she borrowed the money in question on January 24, 1947 in order to pay creditors so that she could remove the padlock and reopen the restaurant was thus rendered no more than airy nothingness in the mill of the trial judge.

Much emphasis is placed on the effect of a letter from defendants Ingrao to defendants Karsten notifying the latter of the sale by the former of their interest in the partnership and also giving notice of dissolution of the partnership. This letter was written after the execution by Mrs. Karsten of the promissory note in question. As argued by appellant, this writing is entitled to great weight in determining the date of dissolution. However, it is not controlling and does not necessarily overcome the positive testimony of the Ingraos. It may have been considered a formal reiteration of the prior statements and actions of respondents made at the request of the purchaser of their interest.

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[1] Three other counts of the complaint are not involved in this appeal.

[2] "The authority of a partner to bind his copartner in the creation of an indebtedness finds its source in the doctrine of agency. When the partnership is dissolved, the authority to create a new obligation is revoked and the agency ends."

[5] Appellant contends that Mrs. Karsten had the power to obligate the partnership to a third person even though the partnership had been dissolved at the time the debt was incurred, citing Corporations Code, § 15035. The pertinent portion of that statute declares that after dissolution, a partner can bind the partnership by any transaction which would bind the partnership if dissolution had not taken place, provided (1) the other party to the transaction had extended credit to the partnership and had no knowledge or notice of dissolution, or, (2) though he had not so extended credit, he had known of the partnership prior to dissolution and had no knowledge or notice of dissolution and the fact of dissolution had not been advertised in a newspaper of general circulation in the place at which the partnership was regularly carried on.

From the record it is learned that the payee of the note was not a creditor of the partnership prior to dissolution and that no notice of dissolution was advertised. Appellant argues that the burden of proof rests on respondents to establish that the payee had notice of the dissolution at the time the loan was made, citing Torvend v. Patterson, 136 Cal.App. 120, 28 P.2d 413. This is correct. However, a necessary condition for the application of the section 15035, supra, is that the creditor know of the existence of the partnership prior to the dissolution. Certainly, the burden of proof in establishing this prior knowledge rests with appellant. There is nothing in the record in regard to what the payee knew or did not know concerning the existence or status of the partnership prior to or at the time of the creation of the debt other than the fact that the note is signed in partnership form. The payee did not testify at the trial. By reason of appellant's failure to establish her case in this respect, the statute referred to is of no avail.

The judgment is affirmed.

McCOMB and FOX, JJ., concur.

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123 Cal.App.2d 235

WASHINGTON

v.

CITY AND COUNTY OF SAN FRANCISCO.

Civ. 15655.

District Court of Appeal, First District, Division 1, California.

Feb. 17, 1954.

Hearing Denied April 14, 1954.

Action for injuries sustained by pedestrian when struck by automobile at a street intersection after a police car of the defendant city collided with another automobile. From an adverse judgment in the Superior Court for the City and County of San Francisco, Schonfeld, J., the defendant appealed. The District Court of Appeal, Finley, J. pro tem., held that the evidence warranted the giving of instructions objected to.

Judgment affirmed.

1. Appeal and Error 🔑930(1)

Where plaintiff recovered verdict below, in considering testimony with view to determining whether, as a matter of law, there was sufficient evidence to justify court in giving instructions complained of by defendant, testimony must be considered in the light most favorable to the plaintiff.

2. Appeal and Error ⚷1066

To find that the giving of any certain instruction was not warranted by the evidence, the appellate court must find that, as a matter of law, there is in the record not even slight or inconclusive evidence on the point covered by the instruction.

3. Automobiles ⚷227

The application of the last clear chance doctrine with respect to automobiles is not determined by speed or lack of speed alone but by the question of whether the elements of the doctrine are present and the test remains that of ordinary care under all the circumstances.

4. Negligence ⚷6

An act or failure to act below the statute or a standard is negligence per se or negligence as a matter of law.

5. Automobiles ⚷246(58)

In action for injuries sustained by pedestrian when police car collided with automobile at an intersection and resulting impact carried both vehicles onto the corner of the intersection where they struck and injured plaintiff, instructions were not erroneous on the ground that there was no evidence that the officer driving the police car had a last clear chance to avoid the collision. Vehicle Code, § 454.

6. Automobiles ⚷246(49)

In action for injuries sustained by pedestrian at street corner who was struck by automobiles after police car collided with another automobile, evidence warranted instructions outlining the city's responsibility in event the police car was not being driven in response to an emergency call.

7. Evidence ⚷586(3)

Negative testimony that witness in a position to hear, heard no siren of police car prior to collision and though looking observed no red light on the car is sufficient to support a finding.

8. Automobiles ⚷242(1)

The exemption provided by the statute respecting emergency vehicles was available to city when sued for injuries as an affirmative defense and the city had the burden of proving the necessary compliance with its provisions. Vehicle Code, § 454.

9. Trial ⚷252(2)

Evidence sufficient to warrant the giving of an instruction need not be sufficient to support a finding and it may be slight and inconclusive or opposed to the preponderance of evidence.

10. Automobiles ⚷246(49)

In action for injuries sustained by pedestrian when struck by automobiles at an intersection after police car collided with another automobile, evidence warranted instructions recognizing issues as to whether a siren on police car was in fact sounded as was reasonably necessary and whether a red light was in fact displayed. Vehicle Code, § 454.

◆

Dion R. Holm, City Atty. of City and County of San Francisco, Thomas M. O'Connor, Deputy City Atty., San Francisco, for appellant.

Keith, Creede & Sedgwick, San Francisco, for respondent.

FINLEY, Justice pro tem.

This is the second appeal in this case. The first was taken by plaintiff and resulted in this court setting aside a judgment for defendant notwithstanding the verdict for plaintiff and is reported in 111 Cal.App.2d 368, 244 P.2d 774. Defendant then moved for a new trial, which motion was denied, and judgment was entered upon the verdict for plaintiff. Defendant appeals from this judgment on the ground that certain instructions not warranted by the evidence were given to the jury.

Appellant's police car, an emergency vehicle, was proceeding north on Divisadero Street. At the intersection of Divisadero with Bush Street the police car collided with a Hudson automobile traveling easterly on Bush Street and driven by one Melvin Garner. The impact carried the vehicles onto the sidewalk at the northeast corner of the intersection where they struck and injured respondent.

The only point raised here concerns the propriety of giving five instructions which, as stated above, appellant claims were not warranted by the evidence.

The first two instructions complained of set forth in substance the provisions of section 454 of the Vehicle Code and the duty of the driver of an emergency vehicle when confronted with a situation similar to that with which the initially non-negligent person is confronted under the last clear chance doctrine. The next two instructions, in effect, charged the jury that the question of whether the police car was being driven in response to an emergency call was a question of fact for them. The fifth instruction states, in effect, that it was a question of fact for the jury whether the vehicle was displaying a red light and was sounding its siren at the time of the collision.

Appellant makes no claim that the instructions complained of are not correct statements of law, so we will not set them forth here. As to the first two instructions, its position is that there was no evidence that the officer driving the police car did anything which would constitute negligence were it not for the exemption accorded drivers of emergency vehicles under the provisions of section 454 of the Vehicle Code, and that there was no evidence that the officer had either the means or the opportunity to prevent the collision after seeing the Garner car. To put it another way, appellant contends that there was no evidence that the officer driving the police car had a last clear chance to avoid the collision.

[1, 2] In considering the testimony with a view to determining whether, as a matter of law, there was sufficient evidence to justify the court in giving the instructions complained of, this testimony must be considered in a light most favorable to respondent, for in order to find that the giving of any certain instruction was not warranted by the evidence, the court must find that, as a matter of law, there is in the record not even slight or inconclusive evidence on the point covered by the instruction. In 24 Cal.Jur., p. 832, the rule is stated as follows: "In order to warrant the giving of an instruction it is not necessary that the evidence upon an issue be clear and convincing, it being sufficient if there be slight or, at least, some evidence upon the issue. *Even though the evidence may not be sufficient to sustain the cause of action or defense to which an instruction applies, a reversal may not be had if the evidence on other defenses is sufficient to sustain the verdict.*" (Emphasis added.)

And in 53 Am.Jur. p. 457: "In determining whether there is evidence that will warrant an instruction, the court does not pass on the weight and sufficiency of the evidence. It is not error to submit an instruction covering a theory advanced by a party if there is any evidence on which to base it, although it may be slight and inconclusive, or opposed to the preponderance of the evidence." Numerous cases are cited in these volumes in support of the rule as stated. See, also, Brandes v. Rucker-Fuller Desk Co., 102 Cal.App. 221, 282 P. 1009; and Lowe v. Lee, 95 Cal.App.2d 685, 213 P.2d 767.

The testimony of the witnesses in this case places the speed of the police car at between 30 and 60 miles per hour just before reaching or at the intersection, and the speed of the Garner car at between 20 and 50 miles per hour. The evidence as to when the cars entered the intersection varies from testimony that they entered at or about the same time to testimony that the Garner car had entered the intersection while the police car was still about five to ten feet away.

Garner testified that he did not see the police car until about the instant of the collision. The officer who was driving the police car was killed, but the testimony of two of the three other officers who were passengers in the police car varied as to when each saw the Garner car. One said it was when the police car was from 10 to 15 feet south of the south crosswalk on Divisadero and when the Garner car was approximately the same distance on the west side of the crosswalk on Bush. Another said that when he first saw the Garner car it was about 10 feet from the property line on the west side of Divisadero Street, and at the same time the police car was adjacent to the property line on the south side of Bush Street. There was testimony that the police car was in second gear and that from a distance of 55 feet south of the southerly curb line of Bush Street there was an unobstructed view over the last 120 feet of the westerly approach to the intersection, which distance increased as the police car approached nearer to the intersection.

Viewing the testimony above outlined most favorably to respondent, as we must, we cannot say, as a matter of law, that the jury could not have legitimately believed that the police car approached the intersection in second gear at a speed of 30 miles per hour; that from a point 55 feet south of the southerly curb line of Bush Street the driver had an unobstructed view of the last 120 feet of the westerly approach to the intersection, and by the exercise of ordinary care could have and should have seen the Garner car traveling on Bush Street at anywhere between 30 to 50 miles an hour; that it could have been observed that Garner, the driver, did not see the police car and was making no effort to slow down or stop and was proceeding either that much faster than the police car or was that much nearer the intersection that it could reasonably have appeared probable that he would not stop, but would enter the intersection at about the same time as or ahead of the police car, and that unless some immediate action were taken there would be a collision.

[3, 4] In the recent case of Buck v. Hill, 121 Cal.App.2d 352, 263 P.2d 643, the elements necessary to bring the doctrine of last clear chance into operation are set forth and discussed in connection with application of that doctrine to vehicles approaching each other at high rates of speed. It is said there, 121 Cal.App.2d at page 360, 263 P.2d at page 648: "While it is true, as contended by defendants, that no California case has applied the doctrine to a situation where moving vehicles were approaching each other at the speeds in this case, that fact, however, should not bar its application here. Its application is not determined by speed or lack of speed alone, but by the question of whether the elements of the doctrine are present." And further quoting from that opinion, 121 Cal.App.2d at page 358, 263 P.2d at page 647: "As said in Bagwill v. Pacific Electric Ry. Co., 90 Cal.App. 114, 265 P. 517, 'Like the body of the law of negligence, to which the doctrine (last clear chance) is appended, the test remains as that of ordinary care under all of the circumstances.' 90 Cal.App. at page 121, 265 P. at page 519. 'We cannot say as a matter of law that he did not, by exercising ordinary care, have the last clear chance to avert the collision—something more than a split second possible chance.' Selinsky v. Olsen, supra, 38 Cal.2d 102, 106, 237 P.2d 645, 648. 'Whether the doctrine of last clear chance is applicable depends entirely upon the existence or non existence of the elements necessary to bring it into operation, and whether such elements exist or do not exist is ordinarily a question of fact to be determined by the fact finder.' Bailey v. Wilson, 16 Cal.App.2d 645, 647, 61 P.2d 68, 69. Again, like the body of the law of negligence, if the question is one upon which reasonable minds might differ, it is one of fact which must be left to the jury and not one of law for the court. See Collins v. California Street Cable R. R. Co., 91 Cal. App. 752, 755, 267 P. 731."

[5] We cannot say here that with the evidence above outlined before them the jury could not have found that the driver of the police car did have a last clear chance and that by the exercise of the care required under the provisions of section 454 of the Vehicle Code he could have avoided the collision.

[6, 7] It is true that the doctrine of last clear chance is applicable here only indirectly and by analogy. The jury found against Garner who was also a defendant in this case on the basis of his negligence. Appellant here would not be liable even though the police car struck and injured appellant if the driver of the police car at the time of the collision was complying with the requirements necessary to bring the police car within the exemption provided in section 454 of the Vehicle Code. But one of these requirements is that the driver of an emergency vehicle must, in addition to the other requirements, drive "with due regard for the safety of all persons using the highway," even though such a person might, by his own prior negligence, have placed himself in a position of peril on the highway.

Certainly the driver of an emergency vehicle would not be exercising the required "due care" if, having a last clear chance to prevent an accident, he failed to take advantage of it. Failure on his part to do so would constitute negligence and liability to a third party proximately injured thereby would result. "An act or failure to act below the statutory standard is negligence *per se*, or negligence as a matter of law. And if the evidence establishes that the plaintiff's or defendant's violation of the statute or ordinance proximately caused the injury and no excuse or justification for violation is shown by the evidence, responsibility may be fixed upon the violator without other proof or failure to exercise due care." Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581 at page 588, 177 P.2d 279 at page 283; Cavagnaro v. City of Napa, 86 Cal.App.2d 517, 195 P.2d 25; Rogers v. City of Los Angeles, 6 Cal.App.2d 294, 44 P.2d 465; Mastro v. City of San Diego, 17 Cal.App.2d 331, 62 P.2d 407.

[8] We turn now to the question of whether there was any sufficient evidence to warrant giving the instructions outlining appellant's responsibility in the event the police car was not being driven in response to an emergency call. Appellant contends that there was no evidence that it was not responding to such a call. Respondent calls attention, however, to testimony of the officers that at the time the call was received the police car was heading toward the area where the collision took place to discharge officers who were passengers. Officer Jordan testified that the police car was at approximately Height and Ashbury Streets which was "a couple of miles" from the scene of the accident when the call came, yet the official police log indicates that the only call to the police car involved was transmitted at 4:11 p. m., the Park Station Log indicated that the call was received at 4:10 p. m., Officer Fegan reported the accident happening at 4:10 p. m., and Garner's automobile clock broke at 4:10 p. m. There is enough of a conflict here that the jury, in the event they disbelieved some of the testimony, could have concluded that the police car was on its way to discharge passengers rather than on an emergency call, and that the sending of the call and the happening of the collision occurred almost simultaneously.

Appellant contends that there was no sufficient evidence to warrant giving the instruction recognizing issues as to whether a siren was in fact sounded as was "reasonably necessary" and whether a red light was in fact displayed. Yet all of the occupants of the Garner car testified that they heard no siren prior to the collision and the hearing of each was described as either "excellent" or "definitely good." Mrs. Garner testified that, although she was looking to her right continuously as they approached the intersection and up to the time of the accident, she observed no red light. Garner testified that, when 30 feet west of the intersection, he looked to his right but observed no red light. To similar effect the testimony of a Mrs. Abrams.

[9] Such negative testimony has been held to be sufficient to support a finding. Rogers v. City of Los Angeles, supra, 6 Cal.App.2d 294, 44 P.2d 465; Isaacs v. City and County of S. F., 73 Cal.App.2d 621, 167 P.2d 221; Mastro v. City of San Diego, supra, 17 Cal.App.2d 331, 62 P.2d 407.

[10] It will be remembered that the exemption provided by section 454 of the Vehicle Code was available to appellant as an affirmative defense, and upon appellant rested the burden of proving the necessary compliance with its provisions. It will also be remembered that it is not necessary that the evidence sufficient to warrant the giving of an instruction be sufficient to support a finding. "* * * it may be slight and inconclusive, or opposed to the preponderance of the evidence." See quote above from 53 Am.Jur. p. 457.

We therefore hold that the evidence is sufficient in each case to justify the giving of the instructions complained of. This being so, it will not be necessary to discuss the effect of the proposal by appellant of similar instructions.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

123 Cal.App.2d 313

GILMORE v. HOFFMAN et al.

Civ. 4640.

District Court of Appeal, Fourth District, California.

Feb. 17, 1954.

Hearing Denied April 14, 1954.

In action by tenant against lessors' assignees for crop damage caused by assignees' failure to use their best efforts to see that there was sufficient water to irrigate the property for cotton raising, which duty was imposed upon lessors by lease and assumed by assignees. The Superior Court, Tulare County, W. G. Machetanz, J., entered judgment for plaintiff, and all parties appealed. The District Court of Appeal, Griffin, J., held, inter alia, that the evidence sustained trial court's finding that assignees' delay in attempting to repair defective well rather than constructing new well constituted negligence and a breach of the lease agreement.

Affirmed.

1. Appeal and Error 🔑994(3)

It is within province of trial court to determine whether weight and credit shall be given to testimony of any witness unless testimony creating conflict is so inherently improbable of belief as in effect to constitute no evidence at all.

2. Evidence 🔑589

In action by tenant against persons who had assumed lessors' duty under lease to use best efforts to see that there was sufficient water to irrigate demised property which was used for cotton planting, receipts showing delivery of material necessary for drilling of new well and checks showing payments for drilling of well and testimony of assignees' witnesses as to date on which well was drilled did not create such conflict as to render tenant's testimony that well was not completed until later date unreasonable and inherently improbable.

3. Landlord and Tenant 🔑124(1)

Where lease required lessors to do such things as might be necessary to increase supply of water that could be produced by the existing well and pumping plant to an amount as nearly equal to that being produced at time of lease as was reasonably possible, assignees who assumed lessors' obligations, could not satisfy their contractual duty by merely making two or three unsuccessful attempts to correct failure of well to produce amount of water agreed upon, but were obligated to increase supply of water to that which ordinarily had been produced by the well, even if that necessitated construction of new well.

4. Landlord and Tenant 🔑124(1)

In action by tenant against lessors' assignees for breach of contractual duty to see that there was sufficient water to irrigate the demised property, evidence sustained trial court's finding that assignees' delay in attempting to repair defective well rather than constructing new well constituted negligence and a breach of the lease agreement.

5. Contracts 🔑227

A provision in contract pertaining to written notice may be waived, either expressly or by conduct, by party for whose benefit it is inserted.

6. Landlord and Tenant 🔑124(1)

Although lease required tenant to give lessors written notice of defect in pump used to create water supply for irrigation purposes, where lessors' assignees, who had assumed lessors' obligation, had been given oral notice and had thereafter inspected the condition and made some effort to correct it, assignees' actual knowledge was equivalent to notice required by lease agreement, and such written notice was waived.

7. Landlord and Tenant 🔑124(1)

In action by tenant against lessors' assignees who had assumed lessors' duty to use their best efforts to see that there was sufficient water to irrigate the demised property for cotton raising, evidence sustained trial court's determination that assignees' failure to fulfil such obligation had resulted in crop loss valued at $3,038.87.

8. Landlord and Tenant 🔑326(1)

Share of cotton crop due cotton company as rental was one of the accounts receivable of the company at time of its dissolution and was included in assignment of accounts receivable.

Burford & Hubler, Porterville, for plaintiff, cross-defendant, respondent and cross-appellant.

West, Vizzard, Howden & Baker, Bakersfield, for defendants, cross-complainants, appellants and cross-respondents.

John R. Berryhill, Tulare, for defendant, cross-complainant and respondent L. A. Crews.

GRIFFIN, Justice.

Plaintiff, cross-defendant, respondent and cross-appellant (hereinafter referred to as plaintiff) in 1948, under the terms of a written share-rent lease, leased two 80-acre parcels of land from P. C. Weaver and wife for the purpose of farming cotton and re-leased this acreage again on March 10, 1949. After the execution of the last lease the Weavers sold the 160 acres to defendants, cross-complainants, appellants and cross-respondents R. E. Hoffman, Sr., and wife, and R. E. Hoffman, Jr., and wife, and Enid T. Crews, and defendant, cross-complainant, and respondent on cross-complaint, and cross-respondent on cross-complaint L. A. Crews, individually and as copartners doing business as Hoffman Cotton Company (hereinafter referred to as defendants).

By the terms of the written lease assignment dated April 1, 1949, they did "promise and agree" to comply with all the terms, covenants and conditions imposed upon the Weavers as lessors.

A pumping plant was in operation on each 80-acre parcel. The written lease provided, among other things, that:

> " * * * lessee agrees to farm to cotton all of the tillable land located on the herein described property and to deliver to the lessors, as rent, one-fifth (1/5) of all cotton and cotton seed produced thereon."

The main contention arising in this case involves the paragraph reciting that:

> "It is understood and agreed by and between the parties hereto that the well and pumping plant located upon said premises now produce sufficient water for the irrigation thereof. The lessors agree that in the event the water level underlying said premises shall lower to such a depth as to materially decrease the supply of water that can be produced by the well and pumping plant, or the said pumping plant shall fail to properly operate and pump, without any fault on the part of the lessees, his agents or servants, that the lessors will, within a reasonable time after being notified of the condition and after receiving written request from the lessee that the situation be remedied, deepen the well or lower the pump therein, or to do such other things as may be necessary to increase the supply of water that can be produced by the said well and pumping plant to an amount as nearly equal to that now being produced as is reasonably possible; nothing herein contained to be construed as making the lessors guarantors of water at all times, but only to use their best efforts to see that there is sufficient water to irrigate said property."

It appears that the pumping plant furnishing water for irrigation of the east 80 acres failed through no fault of the plaintiff on June 20, 1949, and at that time plaintiff had growing upon that acreage a thriving crop of cotton and, according to the evidence, under normal conditions, with water to irrigate, it would have produced not less than an average of 1¼ bales of cotton per acre. It appears that the defendants were notified and had knowledge of the failure of said well and pumping plant; that they came to the property, made examination, and were fully advised of the need existing and instructed plaintiff not to worry, that they would take care of providing for the repair of it. The testimony shows that the defendants were experienced cotton people, knew and were advised that it required ample water for the production of cotton crops; that plaintiff's crops were then in condition to require irrigation and if water was not applied the result would be a loss of the crops to plaintiff.

It appears that as a result of the failure of the well and pumping plant plaintiff's crops growing on the east 80 acres failed in part and his loss therefrom was estimated to be 75½ bales of cotton, resulting in a net loss to plaintiff of $8,682.50, being 75½ bales at $115 per bale (or $160 per bale less $45 cost).

Plaintiff's crops, according to plaintiff's testimony, failed to receive any irrigation on the east 80 acre tract from June 20, 1949, to August 8, 1949, being a period of one month and 18 days. The evidence indicated that the loss of the crops sustained by plaintiff was occasioned by reason of the breakdown of the well and pumping plant and failure of the defendants to make available for plaintiff's use on the premises water for irrigation of said crops during said 48-day period.

Plaintiff takes the legal position that under the lease, if the well or pumping plant failed or there should be any substantial diminution of the water supply, defendants were obligated to do such other things as might be necessary to increase the supply of water, and their failure to do so showed a lack of diligence on their part resulting in the claimed damage. The court found generally in accordance with the facts stated.

It is defendants' contention that although the evidence does show that they encountered difficulty with the pump and well and plaintiff was not able to obtain the supply of water from it for a period of time up to July 27th, they did, after receiving notice of the condition, exercise reasonable diligence in an endeavor to place it in operation, but through no fault of their own they were unable to do so and accordingly they complied with the terms of the lease which did not require them as guarantors to furnish water at all times but only to use their best efforts to see that there was sufficient water to irrigate said property, and that the evidence conclusively shows this and accordingly the finding of the trial court is not supported by the evidence.

Defendant Hoffman, Sr., testified that the cause of the breakdown was due to obstruction in the well, and that he immediately employed the Pixley Hardware Company to pull the bowls out of the well; that it tried to remove the obstruction but informed him it could not be done; that thereafter he secured the B & B Drilling Company to attempt the repairs, and after working on it for two days, June 28 and 29, 1949, they were unable to rectify it; that one Elvis asked him if he could attempt to remove it but he found that he could not; that after two days of trial he authorized him to drill a new well; and that during the middle of July the drilling of a new well was commenced and completed by July 27th.

Plaintiff testified that it was not commenced until July 27th; that the casing was delivered on that date; and it was not completed until August 8th. By stipulation of counsel it was agreed that there was a record of a steel company indicating that some casing was delivered at the site on July 15th and the balance on July 19th. The records of the electric company showed that there was a power hookup installed for the new pump and well on July 27th, and Elvis was paid for the drilling on that date.

The contention is that the evidence conclusively shows that defendants exercised reasonable diligence in repairing the old well; that the agreement did not require the drilling of a new well, but if it did, they were not lacking in any diligence in procuring it; that the finding of the court that defendants were negligent and had breached the lease agreement is not supported by the evidence.

Plaintiff contends that the full import of the agreement was that defendants would use "their best efforts to see that there was sufficient water to irrigate said property"; that since they mutually agreed there was sufficient water to irrigate the land when the lease was executed, and wherein plaintiff was required by its terms to farm all tillable land to cotton, defendants must have known that plaintiff's ability to comply with the agreement required an ample supply of water, and since that was the only source of water, accordingly they were obligated to do everything necessary or reasonably possible to furnish a supply of water equal to that then being produced; that the evidence conclusively shows that they failed to supply any water to the 80 acres involved between June 20 and August 8, 1949, and accordingly ordinary diligence was not exercised and a partial crop failure resulted.

It is conceded that the main crop failure was due to lack of supply of water. An examination of the reporter's transcript shows that the plaintiff Gilmore testified he planted his cotton crop in the early part of April, 1949, and in June he fertilized it; that defendants changed from gas pumps to electric pumps; that his crop needed irrigation on June 20th, and after running the electric pump on the east 80 acres for a period of time, a shaft that turns the bowls broke; that he immediately, on June 21st, told the defendant Crews of this condition, and Crews sent plaintiff to defendant Hoffman, Sr., and he reported that fact to Hoffman; that Hoffman said he would have one Simeral fix it; that Simeral came out and tried to repair it and could not; that he told plaintiff the bowls had broken off and fallen into the well; that later, on June 28th, the B & B Drilling Company came out and the bowls came out of the well with the pump and apparently did not break off as indicated by Simeral; that the workmen said they would return the next morning; that plaintiff's cotton crop at that time was very much in need of water; that on the 29th Hoffman came out and examined conditions and said the well had collapsed and that he was not going to drill a new well and he would not fix the old one because he wanted to put down a 900-foot well when he drilled a new one; that he told Hoffman the crop would not mature without water and Hoffman said he could not put a new well down at that time; that later on he again went to Hoffman and asked him to try to do something about it; that Hoffman studied a little bit and said a man named York might be able to repair it and told plaintiff to go and see him; that plaintiff sent York to see Hoffman and York came out about July first and tried to put a pump in the well without success; that plaintiff looked down the well with a glass and saw that the hole was free and open to the water; that no other workman came out after that so, on July 8th, he sent defendants a written notice of the defective condition, with a request to make the necessary repairs; that about July 25th or 27th, defendants started drilling a new well and it took eight days to bore it, and on August 6th, some sand was pumped out and water was not obtainable until August 8th; that in the meantime his crop was "burned up"; and that Hoffman stated it looked "burned up" when he examined it at the time he commenced drilling the new well. He further testified that in August, 1949, defendants lowered the well on the west 80 acres about 20 feet, and put new bowls on the pump due to defective pumping conditions after the change over to electric pumps. Plaintiff was positive from his records that no casing was delivered to the well until July 26th, and that the well was not started until July 25th, and that no water was available to him until August 8th. This later date receives some corroboration in the testimony of another witness who testified he visited the property two days after July 26th, and the drilling rig was still operating.

[1, 2] It therefore appears that there is a conflict in the evidence between that related by the plaintiff and that produced by the defendants in relation to the time when the casing was delivered and when the well was completed and water was produced. It is defendants' contention that the testimony of the plaintiff, although positive in form, was completely destroyed by the production of the receipts, the checks, and the testimony of defendants' witnesses, and that therefore plaintiff's testimony was of no weight and should be disregarded in this respect, citing such cases as Elliott v. Market Street Ry. Co., 4 Cal.App.2d 292, 40 P.2d 547, and Burns v. Faget Engineering Co., 53 Cal. App. 762, 200 P. 818. We see no merit to this contention. It is within the province of the trial court to determine what weight and credit shall be given to the testimony of any witness unless the testimony creating the conflict is so inherently improbable of belief as in effect to constitute no evidence at all. Romero v. Eustace, 101 Cal.App.2d 253, 225 P.2d 235; People v. Miller, 114 Cal.App. 293, 299 P. 742. The testimony creating the conflict in this respect cannot be said to be unreasonable and inherently improbable.

[3] The claim that the defendants were not under obligation to drill a new well under any conditions of the agreement and that their willingness to do so was purely voluntary is not sustainable. By the agreement plaintiff agreed to farm the land. It was agreed that plaintiff then had a sufficient supply of water to irrigate it and that

if the water supply from said wells failed defendants would, within a reasonable time after notice, deepen the well or lower the pump therein or "do such other things as may be necessary to increase the supply of water that can be produced by the said well and pumping plant to an amount as nearly equal to that now being produced as is reasonably possible". It is clear that the intent of the agreement was to keep plaintiff supplied with water for the purpose indicated. Defendants could not satisfy the terms of the agreement by merely making two or three unsuccessful attempts to correct the failure of the wells to produce the amount of water agreed upon and then abandon further attempts to produce water or to further remedy the situation. While defendants did not guarantee to make water available to plaintiff "at all times" the inference is that they intended to guarantee water to him at least some of the time, allowing a reasonable time in case of a breakdown that they may be afforded an opportunity to "do such other things as may be necessary" to increase the supply of water to that which ordinarily had been produced by that well. We conclude that there is no merit to this contention.

[4] The real question is whether defendants used their best efforts to see that there was sufficient water to irrigate the property in accordance with their agreement. As it appears now, their best efforts would have been to drill a new well when it was first discovered, about June 21st, that such action was necessary. The delay and unsuccessful efforts in doing other exploratory work and in trying to obtain satisfactory results from further attempted repairs concededly was not chargeable to plaintiff. Whether defendants took the proper course, obtained proper counsel and advice, and acted wisely and timely and used their best efforts under the circumstances to correct the condition was a factual question for the trial court to determine. Its finding on this question, under the evidence, cannot be disturbed on appeal. 4 Cal.Jur.2d 481, sec. 602; Henika v. Lange, 55 Cal.App. 336, 339, 203 P. 798; McCready v. Bullis, 59 Cal.App. 286, 210 P.2d 638; Woolford v. Electric Appliances, Inc., 24 Cal.App.2d 385, 75 P.2d 112.

Some contention is made by defendants that no breach of the agreement was chargeable to defendants because, by its terms plaintiff was required to notify defendants "in writing" pertaining to the condition of the pump, and demand that the situation be remedied; and that oral notice was insufficient, citing such cases as Monson v. Fischer, 118 Cal.App. 503, 519, 5 P.2d 628.

[5, 6] Defendants concede the evidence shows that they were orally notified of the condition and that they had actual knowledge and notice of it and that a request was made to remedy the situation; that they thereafter inspected the condition and did make some effort to correct it. It is plaintiff's testimony that when defendants refused to act further and drill another well for the production of water, he did, on July 6th, send written notice of the condition, and stated that he had previously reported the trouble to them and requested them to remedy the condition. The court so found. Under the facts related defendants would be estopped to claim any rights by failure of plaintiff to serve defendants with written notice of the conditions in the first instance. Their actual knowledge was equivalent to notice, particularly where, as here, they acted upon the oral notice and throughly understood the situation, were not relying upon any such written notice, and apparently waived it. A provision in a contract pertaining to written notice may be waived, either expressly or by conduct, by the party for whose benefit it is inserted. Daly v. Ruddell, 137 Cal. 671, 70 P. 784.

The next complaint involves the amount of damages awarded to the plaintiff and to the cross-complainant L. A. Crews. By plaintiff's complaint, he seeks judgment against defendants for their breach of the agreement, and alleges that the difference between the number of bales which would ordinarily have been produced on said land and the number actually produced was 139½ bales, worth the gross sum of $22,320; that after deducting the cost of picking and delivering, etc., he was damaged in the sum of $12,046.

Defendants, doing business as Hoffman Cotton Company, answered and denied generally the allegations of plaintiff's complaint, and by way of a cross-complaint against plaintiff, sought the recovery of one-fifth of all cotton and cottonseed produced by plaintiff on both 80-acre tracts as rental. They alleged that plaintiff sold the 1949 crop from both 80-acre parcels for $8,208.16, being the amount realized from the production of 61 bales of cotton grown on said land by plaintiff that year; and further alleged that one-fifth of the crop amounted to $1,641.63, and that said sum was an offset against any claimed damage allowed plaintiff; that if a judgment was given plaintiff for $22,320, or any portion of it, defendant should be allowed an offset of 5 per cent on that amount as rental, plus the $1,641.63, as alleged.

Defendant and cross-complainant L. A. Crews, by separate cross-complaint, alleged that the defendant Hoffman Cotton Company, in a partnership settlement, assigned to him all accounts receivable pertaining to their joint venture and partnership and accordingly he asked the court to determine that he was entitled to the $1,641.63 claimed by the defendant company for crop rental due from plaintiff to the company. He attached to his cross-complaint a copy of the alleged dissolution agreement and assignment.

At the conclusion of the trial the court found generally in respect to the damage that plaintiff planted 150 acres of cotton on the two parcels, and that on June 20, 1949, the crop was growing and was in a healthy condition; that on that date, on the easterly portion, at least 70 acres had been planted to cotton; that the pump broke down and the well failed to produce water; that the crops growing thereon sustained a loss in production consisting of 75½ bales; that 35 per cent of said loss was attributable to defendants' breach of the terms of the lease and their negligence in failing to repair the well and pump for the period from June 20 to August 8, 1949; that the reasonable net market value of the portion of the cotton crop lost by plaintiff was $3,038.87; that defendants would be entitled to one-fifth rental therefrom, totaling $607.77, resulting in a net loss to plaintiff of $2,431.10; that plaintiff received $8,208.16 for cotton marketed from the entire leased premises, and defendants were entitled to one-fifth thereof, as rental, totaling $1,641.63; that since defendants' rights to said rents were assigned by the Hoffman Cotton Company to L. A. Crews prior to the filing of the complaint herein, Crews was entitled to receive said sum of $1,641.63 from plaintiff as an offset against the judgment rendered against him. Judgment was given for plaintiff against defendants for $2,431.10.

Plaintiff Gilmore appealed, claiming that the court should have awarded him the entire loss of $8,682.50 claimed to have been sustained by him, less the one-fifth rental. Defendant Hoffman Cotton Company appealed and claims that not only was there no breach of the agreement, but that the judgment is not supported by the evidence; that it was error to give judgment to Crews on his cross-complaint because the crop rental should be used as an offset against the judgment in favor of plaintiff and against all defendants; that the court erred in admitting and excluding certain testimony and that the damage found is not based upon any substantial evidence.

The evidence pertaining to crop damage may be thus summarized. Plaintiff testified he compared the 1949 returns with the returns from the crop he obtained in 1948, from the same acreage, without fertilization, and from this comparison he estimated the crop return he should have received in 1949, with fertilization, at a bale and a quarter per acre. He then stated that the only crop return on the east 80 in 1949, due to burn from lack of water after fertilization, was the picking of 12 bales of bolls, and that they were ginned, but no standard grade cotton matured on that parcel; and that the price of the bolls was much lower than regularly developed cotton.

Other witnesses testified that they were familiar with the property and had observed the condition of the cotton crop on June 20, 1949; that both 80-acre parcels had a fair stand of cotton, and if cared for in the normal manner should have produced at least a bale of cotton per acre. Other witnesses testified that it might produce 1¼ bales per acre. One witness testified he handled and held the mortgage on the crop actually obtained and that the two 80-acre parcels produced 61 bales of cotton, weighing 29,351 pounds, but that the number of bales of bolls was not separately indicated in this return but the gross return of the 61 bales of cotton was $8,206.16; that the production from the two 80-acre parcels in 1948 was 111 bales. He testified that about July 25, 1949, after the water supply failed on the east 80, there was a difference between the crops on the two 80-acre parcels as to its size and the west 80 was more prolific, i. e., it was normal and the east 80 was subnormal. He then stated that the average cost of producing and delivering a bale of cotton in that district was about $50 per acre, and the ginning cost would run about $10 per bale; that picking would estimate $45 per bale; that when he observed the east 80 about July 28th, a well-drilling outfit was operating on it; that later, when the water was being pumped from it again, he observed the cotton thereon averaged about 12 inches in height and that on the west 80 it was about 30 inches. A qualified expert testified that if the crop went without water from June 20th to July 10th there would have been about a 5 per cent damage; from July 10th to July 15th an additional 10 per cent damage; from July 15th to July 20th, an additional 25 per cent damage; from July 20th to July 31st, a 40 per cent additional damage; and from July 31st to August 8th, an additional 10 per cent. He then testified generally to the habits in reference to the growth of cotton and the resultant damage from lack of water, particularly where a fertilizer had been applied.

[7] Plaintiff's claim that there was a complete destruction of his crop on the east 80-acre parcel due entirely to defendants' negligence is not borne out by the record. The court found that as to the east 80-acre tract, there was a total loss of 75½ bales of cotton, as compared to the previous year, and that only 35 per cent of that loss was attributable to defendants' negligence. It also found that there was a crop loss on the adjoining 80-acre tract where there was sufficient water supplied by defendants, but found that such loss was not attributable to defendants' negligence. The agreement does not provide that defendants should guarantee water "at all times", but provides for temporary breakdowns and that defendants might not be liable for crop damage during such reasonable periods, even though some damage might result. To sustain plaintiff's contention it would be necessary to construe the agreement to mean that it provided an absolute guarantee of water "at all times". It does not so provide. We cannot say, as a matter of law, that plaintiff was entitled to the full amount of claimed damage, particularly where the evidence justifies the conclusion that all of the damage claimed was not due to defendants' negligence. The percentage of crop damage for lack of water, for the dates indicated by the expert witness, add support to this conclusion. No prejudicial error resulted in admitting this testimony, as well as the testimony of plaintiff, the owner, as to estimated crop damage, nor in denying admission of certain other testimony about which defendants complain. The evidence fully supports the award of damages allowed to plaintiff.

[8] The judgment allowing Crews the sum of $1,641.63 on his cross-complaint, as an offset on the judgment rendered against him, rather than an offset against the judgment obtained against defendant Hoffman Cotton Company, including Emma T. Crews, is supported by the evidence under the theory that the one-fifth crop rental due from plaintiff to the partnership was one of the accounts receivable of the partnership or joint venture at the time of its dissolution on April 20, 1951. It provided for its dissolution and, among other things, that the Hoffmans do hereby "transfer and assign to * * * Crews * * * all of the accounts receivable of said joint venture * * *." However, in this connection, a separate assignment was made by the Hoffmans on May 18, 1951, assigning "those accounts of the Hoffman Cotton Company * * * referred to in their agreement". These accounts receivable are set forth in an attached list as being accounts shown on the books of the company. This list does not mention the account of N. M. Gilmore.

However, we conclude that assignment in the agreement was sufficient to cover the account here in question.

No prejudicial error appears and the evidence supports the findings and judgment rendered.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

123 Cal.App.2d 283

GUNN et al.
v.
STATE BOARD OF EQUALIZATION et al. (two cases).

Civ. 15750.

District Court of Appeal, First District, Division 2, California.
Feb. 17, 1954.
Hearing Denied April 14, 1954.

Two mandamus proceedings were instituted to compel the State Board of Equalization to revoke off-sale licenses to sell wine and beer. The Superior Court, County of Santa Clara, John D. Foley, J., entered judgments adverse to licensees, and they and the board appealed. The District Court of Appeal, O'Donnell, J., pro tem., held that distance under section of Penal Code making it a misdemeanor to sell intoxicants within one and one-half miles of university grounds or campus, is to be measured by air line rather than by shortest road or roads connecting points in question.

Judgments affirmed.

1. Intoxicating Liquors 🔑59(2)

Where Legislature amended section of Penal Code setting limits for sale of intoxicants near certain public institutions by adding subdivision providing that distances provided in this "act" shall be measured not by air line but by following shortest road or roads connecting points in question, word "act" was not synonymous with "code" and did not require that distance set forth in that section of Penal Code making it a misdemeanor to sell intoxicants within one and one-half miles of university grounds or campus, be measured by shortest road or roads rather than by air line. Pen.Code, §§ 172, 172a.

See publication Words and Phrases, for other judicial constructions and definitions of "Act".

2. Intoxicating Liquors 🔑59(2)

Distance under section of Penal Code making it a misdemeanor to sell intoxicants within one and one-half miles of university grounds or campus, is to be measured by air line rather than by shortest road or roads connecting points in question. Pen.Code, § 172a.

3. Statutes 🔑219

Where there is no ambiguity in statute, and interpretation of statute by administrative body is clearly erroneous, administrative interpretation does not give legal sanction to long continued incorrect construction.

4. Statutes 🔑219

Administrative interpretation cannot alter the clear meaning of a statute.

5. Statutes 🔑219

Since section of Penal Code making it a misdemeanor to sell intoxicants within one and one-half miles of university grounds or campus clearly requires that distance be measured by air line rather than by shortest road or roads, contrary interpretation by State Board of Equalization did not give legal sanction to such incorrect interpretation. Pen.Code, § 172a.

6. Statutes 🔑220

Fact that Legislature twice amended statute after rendition of opinion of Supreme Court construing statute, without changing statute to show disapproval of Supreme Court's opinion, manifested Legislature's contentment with Supreme Court's opinion.

7. Courts ⇐92

Where two independent reasons are given by court for decision, neither reason is to be considered mere "dictum."

See publication Words and Phrases, for other judicial constructions and definitions of "Dictum".

8. Courts ⇐95(2)

Where California Supreme Court construed California statute contrary to construction of similar Pennsylvania statute by county courts in Pennsylvania, decisions of Pennsylvania county courts had no weight in California.

9. Statutes ⇐77(4)

Section of Penal Code making it a misdemeanor to sell intoxicants within one and one-half miles of university grounds or campus, though construed as requiring that distance should be measured by air line rather than by shortest road or roads as in another section of the Penal Code, is not unconstitutional, on ground that it constitutes special legislation. Pen.Code, §§ 172, 172a.

◆

Edmund G. Brown, Atty. Gen., William M. Bennett, Dep. Atty. Gen., for appellant Board of Equalization.

Di Maria, Di Maria & Daschbach, Philip A. Di Maria, Palo Alto, for appellants Marie Ehrich and Herman Ehrich.

Hardy, Carley & Thompson, Leon A. Carley, Palo Alto, for appellant Adam A. Schmierer.

Edwin E. Grant, San Francisco, for petitioners-respondent.

O'DONNELL, Justice pro tem.

These two cases are presented on an agreed statement on appeal, Rule 6(a) of Rules on Appeal, which statement reads in part as follows:

"1. In 1948 the State Board of Equalization issued to Adam A. Schmierer an off-sale license to sell wine and beer (unrestricted as to alcoholic content) at the grocery store operated by Schmierer and located at 2775 Middlefield Road in the City of Palo Alto, County of Santa Clara, State of California. Previous to that time a similar license had been in effect for the prior operator of said store.

"2. Also in 1948 the State Board of Equalization issued to Marie Ehrich and Herman Ehrich an off-sale license to sell wine and beer (unrestricted as to alcoholic content) at the grocery store operated by them and located at 2849 Middlefield Road in said City of Palo Alto.

"3. On the 19th day of September, 1951, petitioners (with the exception of John W. Bodley) filed an accusation with the State Board of Equalization alleging that each of said licensees was violating Section 172a of the Penal Code in that they were selling beverages containing more than 3.2% of alcoholic content by weight within one and one-half miles of the campus of Stanford University.

"4. It has been stipulated herein that the premises of each of said licensees are within one and one-half miles of the Stanford University Campus if such distance is measured in a straight line and that neither of said premises is within one and one-half miles of said campus if such distance is measured by following the shortest road or roads connecting the points in question and that Section 172a of the Penal Code applies to the area contiguous to the campus of Stanford University.

"5. After hearings before a hearing officer and before the State Board of Equalization itself, the Board dismissed the accusations on the ground that the measurement of the distance involved should be by the shortest road or roads connecting the points in question.

"6. On March 4, 1952, the petitioners filed two separate petitions in the Superior Court of Santa Clara County for writs of mandate compelling the State Board of Equalization to revoke the said licenses respectively of Mr. Schmierer and of Mr. and Mrs. Ehrich. The petitions were submitted on the record of the proceedings had before the Board, and on December 24, 1952, judgment was entered on each of said petitions in the said Superior Court that a peremptory writ of mandate issue. Each said judgment was based upon the conclusion of the Court that for the purposes of Section 172a of the Penal Code measurement of the distance between the Stanford campus and the licensed premises of Mr. Schmierer and Mr. and Mrs. Ehrich should be in a straight line."

The Board of Equalization, the Ehrichs and Schmierer have appealed from these judgments, and the parties have stipulated that the two appeals may be heard together.

The parties to the appeals are also agreed that the only question presented for decision is this: Is the distance set forth in Section 172a of the Penal Code to be measured by straight line, or by the shortest road or roads connecting the points in question?

Penal Code, section 172a provides: "Every person who, upon or within one and one-half miles of the university grounds or campus, upon which are located the principal administrative offices of any university having an enrollment of more than one thousand students, more than five hundred of whom reside or lodge upon such university grounds or campus, sells, gives away or exposes for sale, any intoxicating liquor, is guilty of a misdemeanor * * *." The remaining provisions of the section are not pertinent here. The section is completely silent on the method of measurement of the distance of one and one-half miles. However, in 1934 in Board of Trustees of Leland Stanford University v. State Board of Equalization, 1 Cal.2d 784, 37 P.2d 84, 96 A.L.R. 775, the Supreme Court held that the distance designated in Section 172a must be measured by straight line.

In 1937 the Legislature amended Section 172 of the Penal Code (which section sets limits for the sale of intoxicants near certain public institutions) by adding thereto subdivision 4 which reads: "Distances provided in this *act* shall be measured not by air line but by following the shortest road or roads connecting the points in question." (Italics ours.) Appellants contend that the italicized word "act" refers not to Section 172 alone but to the entire Penal Code. They cite three decisions, Wright v. Norwich & N. Y. Transp. Co., 30 Fed.Cas. No. 18,087, p. 685; Steck v. Prentice, 43 Colo. 17, 95 P. 552; and, Flowers v. Rotary Printing Co., 65 Ohio App. 543, 31 N.E.2d 251, in support of this contention. Those cases are not helpful. There is not the slightest intimation in any of them, that the terms "code" and "act" are synonymous.

In further advancing this contention appellants direct our attention to Penal Code Section 1, reading: "This act shall be known as The Penal Code of California * * *", and to Section 24 which states, "This act * * * may be designated simply as The Penal Code * * *." They conclude from that that the terms "act" and "code" are synonymous. Clearly, however, the expression "this act" in Sections 1 and 24 refers to the Act of 1872, establishing the Penal Code. "Act" is defined as "A written law, formally ordained or passed by the legislative power of a state; a statute."; while "code" is defined as "A collection or compendium of laws." Black's Law Dictionary.

[1, 2] Had any doubt ever existed as to the meaning of the word "act" in Section 172, that doubt was completely dispelled by the enactment in 1951 of Penal Code, Section 172b, prohibiting the sale of intoxicants in the vicinity of the University of California at Los Angeles, subdivision 3 of which provides: "Distances provided in this *section* (italics added) shall be measured not by air line but by following the shortest road or roads connecting the points in question." This same language also appears in subdivision 3 of Penal Code Section 172d (which section prohibits the sale of intoxicants in the vicinity of the University of California at Riverside) added in 1953. Obviously, were "act" and "code" synonymous terms, as appellants contend, there would have been no need of subdivision 3 of Section 172b or subdivision 3 of Section 172d. The conclusion is therefore irresistible that the term "act", as it is employed in subdivision 4 of Section 172 refers not to the entire Penal Code but rather to the legislative act of 1937 adding that subdivision to Section 172.

Appellants next argue that because Sections 172, 172a, 172b, 172d, and 172.5 of the Penal Code all deal with the prohibition of the sale of intoxicants in the vicinity of public and educational institutions, they are therefore in *pari materia* and should be given a uniform construction: more specifically, that the same method of measurement should be made applicable to all. However, it is at once apparent from reading these sections that the Legislature was concerned not with uniformity, but with individual circumstances. For example, Section 172 alone designates seven distinct perimeters of interdiction for as many different institutions.

[3–6] While not mentioned in the agreed statement on appeal, counsel on both sides concede that in 1951 the State Board of Equalization, in a case involving the University of Southern California, construed Section 172a of the Penal Code as calling for a measurement by road. Appellants then invoke the rule of administrative construction which is thus stated in Coca-Cola Co. v. State Board of Equalization, 25 Cal.2d 918, 921, 156 P.2d 1, 2: "Although not necessarily controlling, as where made without the authority of or repugnant to the provisions of a statute, the contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized." But, as pointed out in Cullinan v. McColgan, 80 Cal.App.2d 976, 979, 183 P.2d 115, 117: " * * * in order to justify construction by either an administrative agency or a court, it must first appear that construction is necessary." And, in California Drive-In Restaurant Ass'n v. Clark, 22 Cal.2d 287, 294, 140 P.2d 657, 661, 147 A.L.R. 1028, it is said: "But where there is no ambiguity and the interpretation is clearly erroneous, such administrative interpretation does not give legal sanction to a long continued incorrect construction. The administrative interpretation cannot alter the clear meaning of a statute. (Citing authorities.)" As we have observed above, the term "act" in subdivision 4 of Section 172 clearly refers to the legislative act of 1937 adding that subdivision. And, in as much as the Stanford case, supra, has established a straight line measurement for section 172a, there is no room for administrative construction. "But if its (a statute's) meaning be not doubtful, and the regulations are in conflict with that meaning, they are simply void." Hodge v. McCall, 185 Cal. 330, 334, 197 P. 86, 88. Moreover, the fact that the Legislature has amended Section 172a twice since the decision in the Stanford case (in 1947 and 1949), but in respects not bearing on the method of measurement, manifests that body's contentment with the method established by that decision. See Artukovich v. Astendorf, 21 Cal.2d 329, 334–335, 131 P.2d 831.

[7] Some comment should be made on appellant's contention that the statement of the court in the Stanford case, supra, to the effect that the distance in Section 172a should be measured by straight line, is mere dictum. In that case the Board of Equalization had granted a liquor license to the California Pharmacy. The Pharmacy was located 0.7 miles from the boundary of the University campus in the usual course of travel (but less in a straight line), and 2.25 miles from the principal administrative offices of the university, along the usual course of travel, but only 1.345 miles from those offices, measured in a straight line. The court said 1 Cal.2d at page 786, 37 P.2d at page 85: "We are of the view that the distance is to be measured from the campus limits, *and by a direct and straight line*." (Italics ours.) The court therefore held that the license granted to the Pharmacy was void. Thus it is clear that the court based its decision on two grounds: the point from which the measurement was to be made; and, the method of measurement. "It is well settled that, where two independent reasons are given for a decision, neither one is to be considered mere dictum, since there is no more reason for calling one ground the real basis of the decision than the other. The ruling on both grounds is the judgment of the court, and each is of equal validity." Bank of Italy Nat. Trust & Sav. Ass'n v. Bentley, 217 Cal. 644, 650, 20 P.2d 940, 942; See also, Gilgert v. Stockton Port District, 7 Cal.2d 384, 389, 60 P.2d 847.

[8] Appellants refer to four decisions of the Pennsylvania county courts approving a rule adopted by the Pennsylvania Liquor Board which established the shortest road method for the measurement of the

area fixed by the Pennsylvania Liquor Control Act for the prohibition of liquor sales. Those cases are: In re Barrett's License, 61 Pa. Dist. & Co. R. 631; In re Betoff's License, 36 Pa. Dist. & Co. R. 32; In re Elmen's License, 51 Pa. Dist. & Co. R. 477; and Wolf's License, 58 Pa. Dist. & Co. R. 178. In view of the decision in the Stanford case, supra, those decisions have no weight here.

[9] Finally, appellants contend that Section 172a constitutes special legislation and is therefore unconstitutional. This very contention was advanced and rejected in In re Burke, 160 Cal. 300, 116 P. 755, which held Section 172a to be not violative of either the California Constitution or the United States Constitution.

The judgments are affirmed.

We concur:

NOURSE, P. J., and DOOLING, JJ., concur.

Hearing denied; SPENCE, J., not participating.

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123 Cal.App.2d 336

ALBAECK
v.
SANTA BARBARA COUNTY.

Civ. 19789.

District Court of Appeal, Second District, Division 2, California.

Feb. 18, 1954.

Rehearing Denied March 8, 1954.

Hearing Denied April 14, 1954.

Action against county for injuries suffered by child while playing in county dump. From adverse judgment of Superior Court, Santa Barbara County, Ernest D. Wagner, J., child appealed. The District Court of Appeal, Moore, P. J., held that to maintain an action against a county for losses resulting by reason of dangerous or defective condition of public property, a claim for damages must be filed within ninety days and claim filed eight and one-half months after injury was too late.

Judgment affirmed.

1. Counties 🔑222

In action against county brought upon rejection of claim filed eight and one-half months after child was injured while playing in a county dump, allegation that "Claim for Damages was filed under and in accordance with the provisions of Section of the State of California", was a doubtful allegation and must be taken most strongly against the pleader and constituted declaration that he filed claim in accordance with statute dealing with tort liability of local agencies. Government Code, § 53052.

2. Counties 🔑142, 208

Since counties are agencies of the state, their functions are exclusively governmental and they are protected by the doctrine of sovereign immunity.

3. Counties 🔑211

Where statutes authorizing actions against counties or other state agencies do not include procedural provisions, resort must be had to provisions of general law for procedure. Government Code, § 29700 et seq.

4. Counties 🔑213

To maintain an action against a county for losses resulting by reason of dangerous or defective conditions of public property, claims must be filed within 90 days after accident in compliance with statute providing procedure for claims based on tort liability of local agencies. Government Code, §§ 53050 et seq., 29700 et seq.

5. Counties 🔑213

Where child was injured while playing in county dump, an alleged attractive nuisance, but claim for damages was not filed within 90 days, action could not be maintained against the county for resulting damages. Government Code, § 53050 et seq.

Richard L. Oliver, Los Angeles, for appellant.

Griffith & Thornburgh, C. Douglas Smith, Robert L. Thornburgh, Santa Barbara, for respondent.

MOORE, Presiding Justice.

Appeal from judgment after demurrer to the complaint had been sustained and no amended pleading filed.

The complaint alleges that defendant maintained the "Carpinteria Dump" on a public, ocean beach where the residents of the county were allowed to dump their garbage and rubbish on payment of a fee and where children frequently played and which was made especically attractive to children by the large number of sea gulls which congregate there by reason of the garbage dumped thereon; the attraction to the children caused by the sea gulls was known to defendant or should have been in the exercise of ordinary care; the burning of large quantities of combustible materials on the dump was so negligently conducted that live coals were covered with sand, dirt and ashes creating a concealed danger to persons who might walk on the dump, and causing a visual appearance of a public open beach, with no visible line of demarcation between the dump and the ocean beach; no walls, fences or other barriers, no signs or warning devices were maintained to warn children not to enter or cross the dump; the maintenance of such dump under the conditions described constituted a public and attractive nuisance.

That on September 8, 1951, plaintiff was eleven years of age; while playing with other children on the public ocean beach and trying to catch sea gulls then present in such numbers as would and did attract him, appellant walked upon said dump in pursuit of the sea gulls; his body suddenly sank through the sand, dirt and ashes and came in contact with the live coals then beneath the surface, causing serious and permanent injuries to plaintiff to his damage in the sum of $50,000. That on May 26, 1952 (eight and a half months after the accident) plaintiff filed his claim with the board of supervisors for damages "in accordance with the provisions of Section of the of the State of California." Such claim was rejected on July 8, 1952. This action was filed September 8, 1952.

No essential allegation to a valid cause of action appears to have been omitted from the pleading except a declaration of the filing of the claim with the clerk of the board of supervisors within 90 days after the claimant had "been injured * * * as a result of the dangerous or defective condition of public property" requirement of Government Code, § 53052, whereas sections 29702 et seq. of the same code allow the claimant one year "after the last item accrued."

The difficulty encountered by the court below was the necessity of determining which statute provides the procedure for the filing of claims for torts against counties. Such problem results from the similarity of the contents of sections 53050 to 53056 to the provisions of sections 29702 and 29705 of the same code. Whereas the former trace their origin to the "Public Liability Act" of 1923, subsequently amended, Stats.1931, p. 2475, and incorporated in 1949 as sections 53050 to 53056, the latter trace their origin to section 4075 of the Political Code. It was adopted in 1872 and allowed actions on contract to be filed against a county provided the claim for the debt be filed with the clerk of the board of supervisors within one year. With every legislative transfusion, it retained the proviso that the claimant might present his claim to the county auditor, or clerk of the board of supervisors within one year. But neither the Public Liability Act which was enacted to permit tort actions against local agencies, nor any of its successive statutes allowed longer than 90 days for a claim to be presented. Also, in 1949 when it was enacted as sections 53050 to 53053, Government Code, it provided that a tort action against a local agency was maintainable only when the claim for damages was presented to the clerk of the board of supervisors within 90 days after the accident.

[1] Appellant argues that both sets of code sections are valid but that the general claims statute of 1931, Act 5149, Deering's General Laws, now §§ 53050–53056, for all local agencies, allowing 90 days to file

a claim, does not control the special statute, § 29700 et seq., for counties, allowing one year. The first answer to that argument is that in his pleading he alleged that his "Claim for Damages was filed under and in accordance with the provisions of Section of the of the State of California." Under the ancient rule of pleading that a doubtful allegation must be taken most strongly against the pleader, appellant must be deemed to have declared he filed his claim in accordance with section 53052[1] of the Government Code. In such event, he filed too late. He could not have alleged it was filed within 90 days after the accident; that would have been a factual untruth.

But we are not without specific guidance. In Thompson v. County of Los Angeles, 140 Cal.App. 73, 35 P.2d 185, the action was predicated on the defective condition of a county highway, but the claim was not presented within 90 days. The court held, contrary to that plaintiff's contention, that the particular provisions of an act, when applicable, are paramount to the general provisions of the codes. In other words, sections 53050 et seq. (a codification of Act 5149) are subsequent to sections 29070 and 29071 which "do not specifically relate to the filing of claims for damages arising out of personal injuries caused by defective highways" whereas sections 53050 et seq. are "concerned particularly with such matters." Being subsequent to the enactment of sections 29070–29071, the procedure they prescribe must be followed in presenting a claim for damages arising from the tort of a county. Id.; Kahrs v. County of Los Angeles, 28 Cal.App.2d 46, 49, 82 P.2d 29; Copper v. County of Butte, 17 Cal.App.2d 43, 45, 61 P.2d 516. Since appellant's action arose out of a defective condition of public property, he did not allege a valid cause of action by virtue of his failure to declare he had filed his claim for damages within 90 days after the accident.

Sections 29700 et seq. Not Repealed

[2, 3] Appellant contends that if to hold this action falls under sections 53050 et seq., sections 29700 et seq. would effectually be nullified with reference to claims for a county's tortious acts. Not so. Sections 29700 et seq. provide a procedure for claims against counties arising under either contract or tort. The Public Liability Act, Gov.Code, § 53050 et seq., deals only with tort liability of all local agencies, arising from negligence in the maintenance of dangerous or defective condition of public property. Dillard v. County of Kern, 23 Cal.2d 271, 144 P.2d 365, 150 A.L.R. 1048. Inasmuch as counties are agencies of the state, their functions are exclusively governmental. As such counties, they are protected by the doctrine of sovereign immunity. Dillwood v. Riecks, 42 Cal.App. 602, 607, 184 P. 35. By reason thereof when the legislature has enacted a statute authorizing actions against counties or other state agencies, such statutes have included procedural provisions, as in the case of the Public Liability Act. If a statute omits a claim-filing procedure as in the case of section 400 of the Vehicle Code, then the resort must be had to provisions of general law, section 29700 et seq., for procedure. For illustration: as section 400, supra, contains no provision for filing tort claims, the procedure under sections 29700 et seq. must apply. Artukovich v. Astendorf, 21 Cal.2d 329, 330, 131 P.2d 831; Dillard v. County of Kern, supra; Raynor v. City of Arcata, 11 Cal.2d 113, 122, 77 P.2d 1054; see 38 Cal.Law Review 259.

[4, 5] Compliance with the claims provisions of sections 53050 et seq. is the sine qua non to the maintenance of an action against a county for losses resulting by reason of dangerous or defective condition of public property. Young v. County

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[1] "When it is claimed that a person has been injured or property damaged as a result of the dangerous or defective condition of public property, a verified written claim for damages shall be filed with the clerk or secretary of the legislative body of the local agency within ninety days after the accident occurred."

of Ventura, 39 Cal.App.2d 732, 738, 104 P.2d 102. A delay of only one day to file his claim against the county defeated the plaintiff's action in Gale v. County of Santa Barbara, 118 Cal.App.2d 451, 452, 257 P.2d 1000.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

In re Adoption of PIOR.*

BENNETT et ux.

v.

FRESNO COUNTY DEPARTMENT OF PUBLIC WELFARE.

Civ. 4666.

District Court of Appeal, Fourth District, California.

Feb. 19, 1954.

Rehearing Denied March 19, 1954.

Hearing Granted April 14, 1954.

Proceedings for adoption of minor child. From an adverse determination of the Superior Court of Fresno County, Arthur C. Shepard, J., the petitioners appealed. The District Court of Appeal, Griffin, J., held that petition for adoption may not be granted without consent of licensed agent of State Department of Social Welfare to which child has been relinquished, in absence of arbitrary or unreasonable refusal of the agency to give its consent.

Judgment affirmed.

1. Adoption 🔑13

In proceedings on petition for adoption of minor child, wherein it appeared that natural father of child had refused to execute a consent to adoption by the petitioners, but that he had executed and delivered a relinquishment of custody of minor child to an adoption agency, evidence was insufficient to warrant a finding that the delivery to the agency had been conditional and subject to withdrawal by father in opposition to adoption by petitioners. Civ.Code, §§ 224m, 226.

2. Adoption 🔑9

County Department of Public Welfare to which natural father of child had relinquished custody could not, in opposition to petition for adoption, take advantage of its failure to act in forwarding a certified copy of the relinquishment to the State Department of Social Welfare, when the relinquishment had been duly executed, delivered and filed with agency licensed by the department, which had assumed authority to act and had refused its consent to such adoption. Civ.Code, §§ 224m, 226.

3. Adoption 🔑13

A petition for adoption cannot be granted where a child has been relinquished to the State Department of Social Welfare or its licensed agent without the consent of the agency, in the absence of arbitrary or unreasonable refusal of the agency to give its consent.

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Ralph Moradian, Fresno, for appellants.

Robert M. Wash, County Counsel; John E. Loomis, Assistant County Counsel, Fresno, for respondent.

GRIFFIN, Justice.

Petitioners, Ralph Bennett and Mary Bennett, his wife, petitioned the court, on September 5, 1951, to adopt Donna Lynn Pior, then aged four years. They alleged that the child's mother, Faye Pior, sister of petitioner Mary Bennett, was killed in an accident in April, 1951; that at that time Donald Pior, father of the child, was separated and divorced from his wife and living in New Mexico; and that he gave his consent to the adoption by petitioners. It appears that thereafter the matter was referred to the Fresno County Department of Public Welfare, a co-adoption agency, for the purpose of investigating and reporting, under the provisions of section 225m of the Civil Code, as it then existed. That agency then reported to the court that the minor's father refused to consent to such adoption by petitioners, and that the agency recommended denial of the petition.

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* Subsequent opinion 274 P.2d 637.

The investigation showed that the minor, due to an injury suffered by the mother, was placed temporarily in petitioners' home when the child was about 18 months of age; that it remained there about five months and later was removed by the mother, and was again placed in petitioners' home about three years prior to the rendering of the report; that the mother lived in petitioners' home for a period of time; that the child saw her father when she was eight months old, but was not acquainted with him to any great extent; that following the mother's death the father wired petitioners consenting to their temporary custody until further arrangements could be made; that the father paid petitioners $25 per month for the minor's care, and that he paid a like sum to the mother following their separation and until her death.

The investigator reported that the minor's father was of Protestant faith, had completed a course of study at the University of New Mexico, and was then employed as a certified public accountant. The report showed the family background of petitioners and that they had three boys; that one son was then serving a prison term in San Quentin for armed robbery; that he was arrested at the age of 14 for truancy and petty theft; and that he had been a problem for the law-enforcing officers in Fresno for several years. The trial judge here, who had him under observation during his youth, stated in a report: "This boy * * has not responded to kindness, reason, suggestion, or severity. He has shown meanness to those who would do him good, instability of temperament, and failure to respond to advice, command, or reason * * *. We recommend * * * close psychiatric observation * * * something serious may be developing * * * he may become a maniac sex slayer if his present thought trends continue."

A probation officer's report shows another boy was involved with the law (including grand theft, petty theft and sodomy); and that a "dire lack of supervision of this boy's activities on the part of his parents * * * was indicated".

A somewhat similar report was made in reference to the background of the third son. The report indicated that both petitioners were employed at times and that their financial background and ability to provide for their children was in doubt, and that the references given by petitioners gave guarded recommendations of them. However, at the hearing, considerable evidence was taken on this subject and many witnesses (19) testified in favor of petitioners' stability and high qualifications to be the adoptive parents of the child. The investigator's report described the minor's father as a conscientious and deliberate thinking person, and at the time of his interview in February, 1952, he described his marriage to the minor's mother as a "mistake" and stated he did not wish to make another mistake in reference to his child's future welfare, and requested the agency to make a thorough investigation of petitioners' own children and into their financial status; that after receiving the report above mentioned, he decided he did not wish the minor adopted by petitioners and that he signed a "refusal to consent to the adoption"; that he stated he was coming to California and remove the child from petitioners' home, which he subsequently did do.

The agency then reported that it recognized the strong emotional tie existing between the minor and the petitioners but believed the positive factors were outweighed by the negative factors, and accordingly determined that petitioners' home was not suitable and recommended the denial of the petition.

It appearing to the court that petitioners had not obtained a duly authenticated consent to adoption by the parent, as provided by section 226 of the Civil Code, it was about to deny the petition under the authority of Matter of Cozza, 163 Cal. 514, 522, 126 P. 161, when counsel for petitioners moved the court, and the court allowed him, to amend the petition to conform to the proof, reciting that the father had executed a relinquishment of the custody of the minor child to the adoption agency under the provisions of section 224m of the Civil Code, and accordingly requested the court to grant the adoption to petitioners, notwithstanding the negative report of the adoption agency.

The facts prompting this request are the claims of petitioners that the father of the minor child was wrongfully influenced by the report of the investigator to change his mind in permitting them to adopt his minor child; that accordingly he did sign a relinquishment for adoption to the licensed adoption agency, as provided by section 224m of the Civil Code, and accordingly the court was authorized to assume jurisdiction of the matter and should have granted the petition. No convincing evidence was produced so indicating.

The respondent Fresno County Department of Public Welfare claims that the father of the minor child voluntarily refused adoption consent to petitioners, but did sign and execute a relinquishment as indicated; that this relinquishment was held by it in its files, but there never was in fact "filed with the State Department of Social Welfare, a certified copy thereof", as provided by section 224m, supra, and accordingly the relinquishment "had no effect whatsoever".

The court signed findings reciting "that no legally binding consent to said adoption has been given either by the parent of said minor child or the Department of Social Welfare of the State of California or the Department of Public Welfare of the County of Fresno", and accordingly the respondent was not authorized to consent to said adoption, and stated that the court was without jurisdiction to consider the remaining allegations of the petition. It then denied the petition.

It is petitioners' contention on this appeal that they cannot be deprived of their day in court by a failure on the part of the administrative officer to carry out the duties which were imposed upon him by law in filing a certified copy of the relinquishment with the State Department of Social Welfare, and accordingly equity presumes that as done which ought to have been done, and the mere technical failure on respondent's part to file such a copy would not affect the validity of the relinquishment.

The evidence in respect to the signing and the claimed conditional delivery of the relinquishment is confusing and indefinite. It appears from the testimony that the adoption agency sent a request to the New Mexico agency to investigate the attitude of the father in respect to the petition for adoption filed by petitioners; that a consultation was had with him and after reading a report on the matter he refused to sign such a consent; that he did, however, sign a relinquishment of the custody of the child to the respondent for placement in an adoption home but a certified copy thereof was not filed with the State Department of Social Welfare because Mr. Pior was "aware of the status of the relinquishment" and "aware that he still has custody and would give and make every effort to prevent the consummation of this adoption by the Bennetts". The court then said: "That phase of the matter may go out * * * if he wanted to prevent it, he should be here personally: We cannot accept his—we cannot accept his rejection of the adoption, from anyone, except himself * * *. As far as the court is concerned, no written consent provided by law has been filed with the court * * *. That poses the proposition of whether or not the Court could, if it wanted to, grant adoption * * *. As far as my feeling at the present time is concerned, I can't do it, but I am willing to listen to a discussion of it. Mr. Loomis: The record does show there has been a relinquishment filed with the welfare department. The Court: General relinquishment to the department. Yes. It is not clear whether the court intended to find that the relinquishment was conditionally delivered to respondent and remained subject to withdrawal by the father; whether it found it was ineffective because a certified copy was not filed with the State Department of Social Welfare; or whether, by reason of respondent's refusal to give consent, the court found it had no jurisdiction to act.

[1, 2] In the absence of other testimony or that of the father that the relinquishment was conditionally delivered, we do not believe that the evidence would support a finding of conditional delivery. Under the circumstances, we agree with appellants that respondent may not now take advantage of its failure to act in forwarding a certified copy of the relinquishment to the State Department of Social Welfare when the relinquishment had been duly executed, delivered and filed with the duly authorized official of the organization, licensed by the State Department of Social Welfare to find homes for children, as provided by section 224m of the Civil Code, and where the agency had assumed authority to act and had refused its consent to such adoption. Whether the father could take advantage of the claimed conditional delivery of the relinquishment is not the question here presented.

[3] There is then posed the question directly presented in In re Adoption of Kitchens, 116 Cal.App.2d 254, 253 P.2d 690, and decided by this court, to the effect that the Superior Court may not grant a petition for adoption where a child has been relinquished to the State Department of Social Welfare or its licensed agent without the consent of the agency, in the absence of arbitrary or unreasonable refusal of the agency to give its consent. Appellants cite in support of their claim that the cited case should be overruled, some of the authorities therein discussed, as well as In re Adoption of D.S., 107 Cal.App.2d 211, 236 P.2d 821.

By appellants' pleadings they make no attempt to allege any arbitrary or unreasonable refusal of the agency to give its consent. No useful purpose would be served in further discussing and distinguishing the authorities relied upon.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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123 Cal.App.2d 291

PALMER et al. v. PHILLIPS et al.

Civ. 19956.

District Court of Appeal, Second District, Division 2, California.

Feb. 17, 1954.

Suit for quasi-specific performance of an alleged oral agreement to transfer property to plaintiffs by will in consideration of services rendered during decedent's lifetime. The Superior Court, Los Angeles County, Frank G. Swain, J., entered judgment of dismissal for failure to state cause of action, and plaintiffs appealed. The District Court of Appeal, Fox, J., held that the complaint was insufficient to show that services performed by plaintiffs were of such unique or extraordinary character as would make them noncompensible in money, or that plaintiffs subjected themselves to such a detrimental change of position as would work an unconscionable hardship to leave them to their legal remedy of quantum meruit, and hence alleged insufficient facts to obviate bar of statute of frauds, and that where complaint also failed to allege that plaintiffs presented claim for value of their services against decedent's estate, complaint was also insufficient to state cause of action for quantum meruit.

Judgment affirmed.

1. Frauds, Statute of ⟹75

An oral agreement for devise of property by will is invalid under statute of frauds. Civ.Code § 1624(6).

2. Frauds, Statute of ⟹149
Specific Performance ⟹114(1)

In order to state cause of action for quasi-specific performance of oral agreement for devise of property by will, plaintiffs were required to plead not only such facts as would prima facie entitle them to specific performance of the agreement, but also such other facts as would be sufficient to lift the oral contract out of bar of statute of frauds, and latter element would be satisfied by a pleading of facts which would bring into play against defendants the principle of estoppel to assert statute of frauds. Civ.Code § 1624(6).

3. Frauds, Statute of ⚷144

In action for quasi-specific performance of oral agreement for devise of property by will, defendants would not be estopped from relying upon statute of frauds unless plaintiffs would suffer unconscionable injury or defendants would be unjustly enriched if oral contract were not enforced. Civ.Code § 1624(6).

4. Frauds, Statute of ⚷138(4)

Ordinarily, in order to prevent unjust enrichment, the law provides a remedy whereby reasonable value of personal services rendered to decedent in reliance upon oral agreement for devise of property by will may be recovered in an action against estate of deceased promisor based upon theory of quantum meruit.

5. Specific Performance ⚷45

Mere rendition of personal services to deceased promisor in reliance upon oral agreement for devise of property by will is not sufficient to relieve agreement from operation of statute of frauds in an action for quasi-specific performance, unless services are of such peculiar, extraordinary or exceptional character that it is impossible to estimate their value by any pecuniary standard or to adequately compenstate for them in money. Civ.Code § 1624(6).

6. Specific Performance ⚷114(2)

In action for quasi-specific performance of alleged oral agreement for devise of property by will, complaint alleging that, in reliance on such agreement, plaintiffs performed for decedent miscellaneous services, some purely impersonal and others of an intimate and confidential nature, requiring a degree of self-discommoding, was insufficient to show that the services performed were of such unique or extraordinary character as would make them noncompensible in money, or that plaintiffs subjected themselves to such a detrimental change of position as would work an unconscionable hardship to leave them to their legal remedy of quantum meruit, and hence complaint alleged insufficient facts to obviate bar of statute of frauds. Civ.Code § 1624(6).

7. Descent and Distribution ⚷92

In suit against heirs for quasi-specific performance of oral contract to transfer property by will in consideration of services rendered decedent during his lifetime, and to impress a trust, complaint which failed to allege that plaintiffs presented a claim for value of their services against decedent's estate, was insufficient to state cause of action for quantum meruit. Civ.Code § 1624(6).

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Edwin C. Boehler, Los Angeles, and A. T. Folsom, Los Angeles, for appellants.

No appearance for respondents.

FOX, Justice.

Plaintiffs appeal from a judgment of dismissal for failure of the amended complaint to state a cause of action.

Plaintiffs initiated a suit in equity against the heirs of Mary Virginia Jones, in which they sought quasi-specific performance of an alleged oral agreement by Mary Virginia Jones to make a will leaving to plaintiffs all property she owned at the time of her death, and to impress a trust upon the property left by Mrs. Jones, who died intestate, for the use and benefit of plaintiffs. The public administrator, originally made a party defendant, was dismissed upon the ground of improper joinder. All of the other defendants, who were alleged, upon information and belief, to be the sole heirs at law residing outside of California, at places unknown to plaintiffs, were served by publication. No appearance having been made by any of the defendants, their defaults were duly entered. Upon the hearing on the matter the court, having considered the allegations of the complaint, concluded that it was insufficient to state a cause of action, and entered a judgment dismissing the suit. Subsequently, in order to rectify a clerical error, a corrected judgment was entered *nunc pro tunc* as of March 6, 1953, the date of the original judgment.

The sole issue presented is whether the amended complaint sufficiently states a cause of action against the defendants.

So far as is here material, the amended complaint recites that Harry Jones and his wife Mary, both residents of Los Angeles County, died intestate in said county. Harry's death occurred on or about November 23, 1950; Mary passed away on about March 29, 1952. Mary's estate, consisting of real property worth approximately $7,000 and personal property of the value of $2,712, is being administered by the public administrator. It is alleged that neither Harry nor Mary had any living ancestors or descendants at the time they died. Mary's only known relations are two sisters allegedly living outside California, whose exact addresses are unknown to plaintiffs. Harry had no brothers or sisters. (Mary's sisters are named as defendants; other possible heirs-at-law of Mary and Harry are joined as defendants under fictitious name designations.)

The complaint alleges that in about April, 1946, plaintiffs Charles H. Palmer, Sr., and his wife Myrtle entered into an oral agreement with Harry and Mary Jones, pursuant to a proposal made by the Joneses, to the effect that if the said plaintiffs would, during the remainder of the lives of Harry and Mary, oversee and care for their business matters, advise them, keep their property in repair and in rentable condition, provide transportation, companionship and personal care as needed, render services in case of illness, look after their general welfare and give them such attention as dutiful children give their parents, "then upon the death of both the said Harry Jones and his said wife they would leave a will under the terms of which all of the property owned by the survivor at death would be given and distributed to plaintiffs." It is alleged that after Harry's death Mary reaffirmed the agreement, pursuant to which, during the entire period from the time of the original agreement until Mary's death, plaintiffs performed the services and obligations therein bargained for. The complaint states that Harry was ill a long time prior to his death, and required constant care, while Mary could not read, could write only her name, and for some months prior to her death was very forgetful, making it necessary for plaintiffs to look after her daily.

The complaint contains a catalogue of the services, among others, which plaintiffs allege they performed in fulfillment of their part of the agreement. We quote them as follows: "Advise and assist the said Mary Virginia Jones and her said husband in business matters; (2) Keep rental cabins rented; (3) Collect rents; and keep books and records; (4) Keep lawns mowed and yards in good condition; (5) Make necessary repairs on rental units, and Jones residence; (6) Pay taxes and insurance premiums; (7) Give advice and counsel in personal matters; (8) Furnish transportation by auto to the said parties, and especially to a greater extent after the death of Harry Jones; taking widow to work in evening; (9) Assist with shopping for merchandise needed by the said Mary Virginia Jones, watching to see that she was not cheated; (10) Nurse and care for and prepare meals for said Mary Virginia Jones when ill and do her laundry; (11) Furnish continual companionship, afternoons, evenings, Saturdays and Sundays, for Mrs. Jones (as she complained of lonesomeness, especially after the death of her husband); (12) Go on various errands; (13) Take the said Mary Virginia Jones on automobile trips; (14) They made themselves available at all times to care for, wait upon, help and advise said Harry Jones and wife; and especially said widow Mary Virginia Jones after the death of her said husband, both as to business and personal matters; and to furnish her with companionship and enjoyment."

Plaintiffs next allege that in reliance upon the agreement, they "changed their own mode of life and denied themselves outside pleasures and enjoyment in order to continually concern themselves with the welfare of the decedents. * * *" But despite their faithful compliance with the terms of the oral agreement, they allege that neither Harry nor Mary ever executed any will or instrument under which they would receive any portion of the property owned by the survivor at the time of death. Claiming to be entitled to receive from Mary's estate all the residue of her property after payment of claims and expenses of administration, plaintiffs pray for quasi-specific performance of the oral agreement to leave the Jones property to them upon the death of the survivor and seek to establish that Mary's heirs hold title to the estate property distributable to them in trust for the plaintiffs.

[1-3] The complaint in the instant case directly and affirmatively alleges that the contract between the parties for the devise of property by will was never reduced to writing, but rests solely in parol. An oral agreement of this nature is "invalid" under the statute of frauds. Civ. Code, § 1624(6); Code Civ.Proc. § 1973 (6). Under such circumstances, in order to state a cause of action for quasi-specific performance, plaintiffs were required to plead not only such facts as would *prima facie* entitle them to specific performance of the agreement, but also such other facts as would be sufficient to lift the oral contract out of the clearly appearing bar of the statute. Loper v. Flynn, 72 Cal. App.2d 619, 622, 165 P.2d 256. This latter element is satisfied where a plaintiff pleads facts which bring into play against defendants the principle of estoppel to assert the statute of frauds. Monarco v. Lo Greco, 35 Cal.2d 621, 623-624, 220 P.2d 737. "There can be no estoppel unless plaintiff will suffer unconscionable injury or defendant will be unjustly enriched if the oral contract is not enforced [citation]." Ruinello v. Murray, 36 Cal.2d 687, 689, 227 P.2d 251, 253. Whether the elements of estoppel are present depend on the particular factual context. Jirschik v. Farmers & Merchants Nat. Bank, 107 Cal.App.2d 405, 406, 237 P.2d 49.

[4-6] Plaintiffs contend, however, that they have alleged sufficient facts to obviate the bar of the statute. This contention is without substance. The allegations of the complaint disclose that in reliance on the alleged oral contract, plaintiffs performed miscellaneous services, some purely impersonal and others of an intimate and confidential nature, requiring a degree of self-discommoding in order to accommodate themselves to the specialized needs of the decedents. Ordinarily, in order to prevent unjust enrichment, the law provides a remedy wherein the reasonable value of such personal services may be recovered in an action against the estate of the deceased promisor based upon the theory of *quantum meruit.* Long v. Rumsey, 12 Cal.2d 334, 84 P.2d 146; Leoni v. Delany, 83 Cal.App.2d 303, 188 P.2d 765, 189 P.2d 517. However, the mere rendition of personal services is not sufficient to relieve a contract from the operation of the statute in an action for quasi-specific performance unless they are of "such a peculiar, extraordinary or exceptional character that it is impossible to estimate their value by any pecuniary standard or to adequately compensate for them in money [citations]." Fowler v. Hansen, 48 Cal.App.2d 518, 522, 120 P.2d 161, 164. An examination of the allegations previously set out clearly manifests that the services performed are not of such unique or extraordinary character as would make them noncompensible in money; nor have plaintiffs subjected themselves to such a detrimental change of position as would work an unconscionable hardship to leave them to their legal remedy of *quantum meruit.* Chahon v. Schneider, 117 Cal. App.2d 334, 256 P.2d 54; Jirschik v. Farmers & Merchants Nat. Bank, supra; Murdock v. Swanson, 85 Cal.App.2d 380, 193 P.2d 81.

In the Chahon case, the plaintiff took one Berge into her own home, and in reliance on an oral promise to leave his estate to her, provided extensive nursing care, did all of his washing, ironing, mending, sewing and other household tasks; cooked special food for him; gave him back massages and helped him to walk while he was convalescing; did all his personal errands outside the house and took him on week-end trips. When plaintiff's husband died, plaintiff desired to sell her home, give up her job and enjoy a more complete social life than was possible while caring for Berge. Thereupon

Berge induced her not to sell the house, but to continue her care of him, by reaffirming his oral promise to will her his estate. She acceded, and cared for him until his death, though his demands increased, though he attempted to dominate her business and social activities and discouraged her friends from calling at the house. Throughout this time Berge paid her $40 monthly, and at his death left her only $1,000 by will instead of the promised estate. Plaintiff brought an action for quasi-specific performance. Judgment for defendant on sustaining a demurrer to the complaint was affirmed, and petition for a hearing was denied by the Supreme Court.

In the Jirschik case, plaintiff, 70 years of age, rendered housekeeping and nursing services to a person who promised to will her $15,000. She alleged she could have gotten work at a higher rate of pay which would have carried social security benefits, but was induced by the oral promise to stay on and work continuously, foregoing vacations and days off. A demurrer to a complaint seeking specific enforcement of the promise was sustained and affirmed on appeal, and a petition for a hearing denied by the Supreme Court.

In the Murdock case [85 Cal.App.2d 380, 193 P.2d 82], plaintiff brought an "'Action to Impress a Trust, Specific Performance and on a Claim'" based on an oral contract to make a will in consideration of care for the decedent, the rendition of personal services, the furnishing of goods, assistance in caring for property and care for decedent in plaintiff's home if necessary. In addition to enumerating the various personal services and goods provided, plaintiff alleged it became necessary to spend so much time with decedent that she found it impossible to continue to operate her own beauty shop, which she was obliged to sell at great loss with respect to good will and future profit. Plaintiff also alleged that her performance of the agreement entailed the neglect of many of her marital, social and household duties and caused her to remain away from home and her husband for many hours at a time. In affirming a judgment of dismissal after demurrers were sustained, the court stated, 85 Cal.App.2d at page 384, 193 P.2d at page 83: "It is well settled that equity will not intervene in such cases involving payment for personal services since the remedy at law is adequate [citation]." The court further observed: "No such change of position here appears as to make it impossible for plaintiff to obtain compensation for anything she did other than through equitable relief * * *." 85 Cal.App.2d at page 385, 193 P.2d at page 84. A petition for a hearing was denied by the Supreme Court.

We believe the cases last cited, in which the complaints alleged elements of stronger appeal to a court of equity than appear in the complaint now before us, are here controlling. There was here no uprooting from an established home, no transplantation in a new area, no abandonment of one's own business, no sacrifice of better opportunities, no taking of decedent into plaintiffs' own home; in short, a showing far less persuasive than in other cases where the relief sought was denied. Plaintiffs' generalized assertion that they changed their own mode of life and denied themselves outside pleasures does not sustain their cause of action in the light of the prevailing authorities. In Tompkins v. Hoge, 114 Cal.App.2d 257, 250 P.2d 174, an action for declaratory relief, plaintiff gave up her position in New York as a school teacher at a salary of $2,500 per year and the right to retire at a pension of $50 per month upon reaching the age of 70, in reliance on defendant's promise to devise all her property to plaintiff if the latter would come to defendant's home to care for her and her husband for the remainder of their lives. In discussing this aspect of the case in support of its position that equity denies relief when the services are compensible in *quantum meruit*, the court stated: "The detriment suffered by plaintiff in resigning her position, with respect both to loss of salary and pension rights, would have been proper elements of damage in an action to recover for the value of plaintiff's services. The fact that plaintiff gave up association with her friends and relatives in New York was comparable to the neglect of marital, social and household duties and absence from her home and husband, alleged by the plaintiff in the Murdock case. There was no finding that by reason of the facts found plaintiff suffered detriment in coming into the home of defendant that could not be compensated for in money. We think such a finding would have had no basis in the evidence. Anyone who goes into the home of another, there to reside permanently, gives up associations and ways of life for others that may turn out to be less desirable. Inability to be restored to the former status is not a good ground for equitable relief unless to deny it would operate as a fraud upon the party seeking relief. This is not such a case and was not considered by the trial court to be one. Such detriment as plaintiff suffered was compensable in damages and her claim therefor was one to be prosecuted at law and not in equity [citation]." Tompkins v. Hoge, supra, 114 Cal.App.2d at pages 265, 266, 250 P.2d at page 179. A petition for a hearing by the Supreme Court was denied.

We have examined the cases to which plaintiffs have directed our attention. All of them differ so essentially on their facts from the present case as to be of no assistance. Some of them involve situations in which the plaintiff deeded over real property or surrendered valuable rights in real property in reliance on decedent's oral agreement to make a particular will; in others, the plaintiff gave up his own home and completely disrupted his own life to enter the decedent's home in a status analogous to that of a foster child. Other cases such as Walker v. Calloway, 99 Cal.App.2d 675, 222 P.2d 455; Fowler v. Hansen, 48 Cal.App.2d 518, 120 P.2d 161, and Notten v. Mensing, 3 Cal.2d 469, 45 P.2d 198, are carefully distinguished in Chahon v. Schneider, 117 Cal.App.2d 334, 344, 256 P.2d 54, in which there appears a comprehensive examination of the authorities. It would be the work of supererogation to reiterate the pertinent discussion in which the court, in holding the oral contract unenforceable because of the adequacy of the legal remedy and the absence of unconscionable injury, followed the principles set forth in Ruinello v. Murray, 36 Cal.2d 687, 227 P.2d 251; Morrison v. Land, 169 Cal. 580, 147 P. 259; Zellner v. Wassman, 184 Cal. 80, 193 P. 84; Tompkins v. Hoge, supra; Jirschik v. Farmers & Merchants Nat. Bank, supra; Murdock v. Swanson, supra, and De Mattos v. McGovern, 25 Cal.App.2d 429, 77 P.2d 522. We may adopt the following language from the Chahon case, which applies with equal force to the instant matter: "It does not appear to us that plaintiff made such a change of position or that the services she rendered were so peculiar that she could not be compensated in terms of money. Recognition of the invalidity of the contract and consequent denial of enforcement of its provisions, would neither unconscionably injure the plaintiff nor unjustly enrich the decedent, his estate, or his legatee, were plaintiff to pursue her legal remedy of recovering from the estate the reasonable value of her services * * * [117 Cal.App.2d at page 339, 256 P.2d at page 57]."

[7] As has been observed, plaintiffs might have pursued their legal remedy based on the theory of *quantum meruit*, provided they had first filed a claim against the estate of the deceased promisor. The complaint in the instant case, having failed to allege that plaintiffs presented a claim for the value of their services against the deceased, is also insufficient to state a cause of action for *quantum meruit*. Chahon v. Schneider, supra, 117 Cal.App.2d at page 346, 256 P.2d at page 61; Morrison v. Land Co., supra, 169 Cal. at page 585, 147 P. at page 261; De Mattos v. McGovern, supra, 25 Cal.App.2d at page 433, 77 P.2d at page 524.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

123 Cal.App.2d 300

LAWRENCE BLOCK CO., Inc.

v.

PALSTON.

Civ. 19194.

District Court of Appeal, Second District, Division 3, California.

Feb. 17, 1954.

Hearing Denied April 14, 1954.

Action to recover real estate broker's commission. The Superior Court, Los Angeles County, Leo Freund, J., entered judgment for the broker, and defendant appealed. The District Court of Appeal, Vallée, J., held, inter alia, that since broker's right to recover was predicated upon language in offer to purchase, and acceptance of offer was made subject to acquisition by defendant of first deed of trust, which was not obtained, there was no binding contract of sale, and broker was not entitled to recover.

Reversed.

1. Brokers 🔑84(2)

To entitle broker to commission for sale of realty, it must be established that in pursuance of his contract and within time specified therein, he found purchaser ready, able, and willing to buy on terms and conditions specified in contract of employment, or, if exact terms are not specified in his contract, upon terms satisfactory and acceptable to his employer.

2. Brokers 🔑49(1), 60, 64(1)

Where only agreement to pay broker commission is contained in contract between his principal and the customer, broker's right to compensation is dependent upon performance of that contract, and if customer refuses to perform, or if contract is canceled or rescinded, broker cannot recover.

3. Brokers 🔑52

Before broker is entitled to compensation, negotiations which he is authorized to make must be concluded or conducted to state where, as to all material or essential terms of sale, there is a meeting of the minds or an agreement between principal and customer produced by him, and if principal and customer are unable to come to terms, broker cannot recover.

4. Contracts 🔑39

Although terms of contract need not be stated in minutest details, it is requisite to enforceability that it must evidence meeting of minds upon essential features of agreement, and that scope of duty and limits of acceptable performance be at least sufficiently defined to provide rational basis for assessment of damages.

5. Contracts 🔑10(1)

Where parties assume to make contract in which one's promise is the consideration for the promise by the other, the promises must be mutual, and to be obligatory on either party, the contract must be mutual and reciprocal in its obligations.

6. Contracts 🔑1

One who promises to do a thing only if it pleases him is not bound to perform that thing.

7. Contracts 🔑10(1)

Where contract imposes no definite obligation on one party to perform, it lacks mutuality of obligation.

8. Contracts 🔑1

Where performance of purported contract is optional with one of the parties, no enforceable obligation exists.

9. Contracts 🔑1

Promise to perform a thing if it pleases promisor is illusory and does not result in binding agreement even if unconditionally accepted.

10. Contracts 🔑1

Where performance due under purported contract involves matter dependent upon judgment of one of the parties, the standard as to the satisfaction of a reasonable person does not apply and the contract is not binding.

11. Vendor and Purchaser 🔑18

Where by terms of agreement owner of property binds himself to sell on specified terms, and leaves it discretionary with other party to contract whether he will or will not buy, it constitutes simply an optional contract.

12. Vendor and Purchaser 🔑17

Where offer to purchase was subject to Office of Price Administration rent statements to be approved by purchaser and subject to purchaser's inspection and approval of all apartments in building which was subject of offer, offeror had unrestricted discretion to decide whether to be bound, even if offeree unconditionally accepted the offer, in view of fact that no standard or basis for the "approvals" was established, and therefore, the offer was merely illusory and the parties were not bound upon offeree's acceptance.

13. Brokers 🔑49(2)

Where performance of purchase contract was optional with purchaser, broker was not entitled to commission in absence of performance under the contract.

14. Brokers 🔑49(2)

To entitle broker to commission, acceptance of buyer's offer to purchase must be unconditional.

15. Contracts 🔑23

An offer imposes no obligation until it is accepted according to its terms, and a qualified acceptance of offer constitutes rejection of original offer.

16. Contracts 🔑23

An acceptance must be absolute and unqualified, and a qualified acceptance is a new proposal. Civ.Code, § 1585.

17. Contracts 🔑23

An acceptance, to result in formation of binding contract, must meet exactly and precisely the terms proposed in the offer, and if something different is made a condition of alleged acceptance, there is no meeting of minds and no contract arises, unless original offeror accepts the counteroffer. Civ.Code, § 1585.

18. Contracts 🔑159

The meaning usually attributed to such words as "subject to" in a contract is that a promise that is so limited is a conditional promise, and one that is different from that for which the offeror bargained.

See publication Words and Phrases, for other judicial constructions and definitions of "Subject To".

19. Contracts 🔑143

A contract shall be so construed as to give force and effect, not only to every clause, but to every word in it, so that no clause or word may become redundant. Code Civ.Proc. §§ 1858, 1862; Civ.Code, §§ 1641, 1651.

20. Contracts 🔑163

Where contract is partly written and partly printed, the written parts control the printed parts. Civ.Code, § 1651; Code Civ.Proc. § 1862.

21. Vendor and Purchaser 🔑17

Where offeree in accepting signed printed offer to purchase realty inserted in the offer the phrase "subject to seller securing a first deed of trust," acceptance was subject to or conditional upon offeree's securing trust deed loan, and constituted a counteroffer, and, in absence of acceptance of counteroffer, there was no binding contract for the sale of the property. Civ.Code, §§ 1651, 1653, 3535; Code Civ.Proc. § 1862.

22. Contracts 🔑170(1)

A construction given a contract by acts and conduct of parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by the court. Civ.Code, § 3535.

23. Vendor and Purchaser 🔑17

Where offeree accepted offer to purchase building subject to offeree's obtaining first deed of trust, and offeree attempted to obtain such deed of trust after signing agreement, rather than before, and it was agreed that transaction was ended when first deed of trust could not be secured, and parties failed to open escrow, and offeree attempted to obtain new offer from offeror, and offeror did make new offer, parties by their conduct evidenced agreement that offeree had not unconditionally accepted the first offer.

Tobias G. Klinger, Los Angeles, for appellant.

Marvin Osburn, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant from an adverse judgment in an action to recover a broker's commission.

In October, 1950, defendant was the owner of a parcel of realty improved with an apartment building in Los Angeles. The property was encumbered with a first deed of trust in the then approximate amount of $49,000. According to the terms of the note secured by the deed of trust, it could not be paid in full until April 1, 1952, without the consent of the beneficiary, Mrs. Mae E. Blenkiron. Defendant decided to sell the property and listed it exclusively with Harold E. Phelps and Associates, a firm of real estate brokers. The property was listed for sale at $150,000.

In January, 1951, during the time the exclusive listing with Phelps was in effect, a salesman from the Phelps office, Walter H. Nichols, brought a salesman from plaintiff's office, H. B. Sawtell, to see defendant. Sawtell was introduced as an associate of Nichols. Plaintiff had no independent listing of the property, but was working in cooperation with the Phelps office in an effort to find a buyer. Sawtell submitted a written offer of $137,500, made by Aaron Neidorf to defendant. She refused the offer and asked that a larger offer be obtained.

On January 27, 1951, Sawtell, in the company of Nichols, brought another written offer from Neidorf to defendant in the amount of $142,500. It was typed on a printed form prepared by plaintiff. When presented to defendant, the offer had been signed by Neidorf. The instrument was also signed by plaintiff, as agent of defendant, acknowledging receipt of $1,000. paid by Neidorf on account of the purchase price. The instrument provided, in part, that the unpaid purchase price ($141,500.) would be paid as follows:

"$ . . .	
33,541.64	Cash on demand of escrow
60,000.00	First Deed of Trust payable $474.60 per month including 5% int. to be secured by Seller and assumed by Buyer."

The offer was discussed by Sawtell, Nichols, and defendant for approximately an hour before defendant signed the document. During that time, the language in the offer "to be secured by Seller" was stricken out in ink, and the phrase "and subject to Seller securing a" was inserted in ink immediately after the statement of cash to be paid on demand of escrow. Defendant initialed the changes made. Thus, as modified, the provision relative to the payment of the purchase price reads as follows:

"[$] 1,000.00	Check as shown above as deposit
7,958.36	First Trust Deed covering premises at 2207 Harcourt St. L.A. to be assigned to seller named herein.
33,541.64	Cash on demand of escrow.
	And Subject To Seller Securing A
60,000.00	First Deed of Trust payable $474.60 per month including 5% int. ~~to be secured by Seller~~ and assumed by Buyer.
40,000.00	Second Deed of Trust in favor of the Seller payable $316.40 or more per month including 5% interest.
$142,500.00"	

The agreement also provided that the purchase price included "furniture and furnishings now on the premises as evidenced by an inventory to be furnished by the Seller and approved by the Buyer." Following the paragraph setting forth the terms of the purchase price and under the heading "Subject To:" there were the typewritten statements: "O.P.A. Rent statements to be approved by Buyer"; "Subject to buyer's inspection and approval of all apartments." Defendant affixed her signature to the offer, as seller, beneath a number of printed lines comprising a part of the form reading:

> "We accept and confirm agent's authority to accept said payment on account of the purchase price and agree

> to sell said property to above buyer on the terms and conditions above stated. For services heretofore rendered we also agree to pay Lawrence Block Co., Inc. *(5%) Five* per cent of above specified sales price and a reasonable sum as attorney fees if suit be commenced to collect the same. If above sale is not completed upon fault of buyer and not seller and payments have been made on account of the purchase price then agent's commission shall be one-half of payments made on account of the purchase price including deposits made with agent, to seller and in escrow, but not exceeding said *(5%) Five* per cent. Agent is authorized to retain deposits made with agent in payment on account of said commission. If sale is not completed upon fault of seller, with or without deposits made, the agent's commission shall be as first above provided."

The parties did not proceed to escrow.

Defendant testified that "right away," the same day, she telephoned Mrs. Blenkiron's secretary and requested that Mrs. Blenkiron increase the deed of trust to $60,000. The secretary talked it over with Mrs. Blenkiron. They told defendant that at that time they couldn't raise the "mortgage" to that amount. Defendant so informed the brokers. In a conversation at defendant's home the next day, January 28, 1951, Sawtell and Nichols informed her, and agreed, that the deal was off if she "couldn't raise the $60,000."—that there was "no deal," "absolutely no deal." This evidence is uncontradicted.

Several days later, defendant received through H. E. Phelps and Associates an offer for the property from another party. In the meantime, Sawtell talked to Neidorf, and on February 1, 1951, he presented another written offer by Neidorf to defendant which she did not accept because she had already accepted the later offer made through Phelps.

Plaintiff, thereafter, filed this action against Mrs. Palston based upon the agreement of January 27, 1951, claiming a commission of $7,125. (5% of $142,500.) Plaintiff claims that its commission was earned when it obtained the agreement dated January 27th. Defendant alleged in her answer that the sale to Aaron Neidorf was made contingent upon her obtaining a $60,000. first deed of trust, payable $474.60 per month, including 5% interest, which was to be assumed by the buyer.

The court did not permit defendant to testify to any part of the discussion preceding her signing of the offer and the making of the changes therein, ruling that any discussion prior to the making of this contract was merged in the written agreement.

The court found: defendant employed plaintiff as a real estate broker to obtain, and plaintiff did obtain, an agreement dated January 27, 1951; the agreement was executed by Neidorf as buyer and defendant as seller; the promise in the agreement made by defendant to pay plaintiff the commission was not subject to the condition that the sale of the property be completed; the promise to pay plaintiff the commission was not subject to the provision "subject to Seller securing a $60,000 first trust deed"; the promise was made unconditionally; and defendant, in the agreement of January 27, 1951, confirmed that she had employed and authorized plaintiff as a real estate broker to perform the service of obtaining said agreement signed by the buyer; and plaintiff did obtain the agreement. Judgment was for plaintiff. Defendant appeals.

Defendant contends the findings are not supported by the evidence. She says: 1. The agreement of January 27, 1951, including the payment of any commission, was contingent upon and subject to the condition of obtaining a $60,000. trust deed—which through no fault of hers did not occur—and further, that the payment of any commission by her was dependent upon completion of the sale. 2. Even under plaintiff's theory that it is entitled to commission for services rendered in procuring the agreement of January 27, it is necessary that the agreement be valid and binding; and evidence of a valid, binding agreement is lacking. 3. The court misapplied the parol evidence rule and erroneously excluded material testimony.

[1] To entitle a broker to a commission for a sale of real property it must be established that in pursuance of his contract and within the time specified therein, he found a purchaser ready, able, and willing to buy on the terms and conditions specified in the contract of employment, or, if the exact terms are not specified in his contract, upon terms satisfactory and acceptable to his employer. 9 Cal.Jur.2d 240, § 79.

Plaintiff agrees that it is entitled to recover only if it found a buyer ready, able, and willing to buy on terms acceptable to defendant. It argues, however, that Neidorf was ready, able, and willing to buy on the terms of his written offer and that defendant accepted such terms by signing the agreement of January 27, 1951; consequently, she cannot question the readiness, willingness, and ability of the procured purchaser to perform according to the terms of his offer. In support of its proposition, plaintiff relies on such cases as Deeble v. Stearns, 82 Cal.App.2d 296, 186 P.2d 173; Cole v. Low, 81 Cal.App. 633, 254 P. 676; Carrington v. Smithers, 26 Cal.App. 460, 147 P. 225; Jauman v. McCusick, 166 Cal. 517, 137 P. 254. Those cases hold that a broker employed to sell real property has earned his commission when he has produced a purchaser who has been accepted by his principal as his purchaser by entering into a contract with him, and that the failure of either party to perform the contract is not material to the right of the broker to receive compensation from his principal. The rule laid down in those cases is based entirely on the principle that the broker, having performed what he was employed to do, is entitled to be paid without regard to the ultimate fate of the contract between his principal and the purchaser produced by him. Those cases have no application to a situation where the claim of the broker is based on a provision of a contract of sale between his principal and the person produced by him to which he himself is not a party. In such a case, his rights are those only conveyed by such contract. Brion v. Cahill, 34 Cal.App. 258, 260–261, 165 P. 704.

[2] Where the only agreement to pay a broker a commission is contained in the contract between his principal and the customer, the broker's right to compensation is dependent upon performance of that contract. If the customer refuses to perform, or if the contract is canceled or rescinded, the broker cannot recover. In such cases the broker, not having the protection of the ordinary broker's contract for compensation for service to be performed, must stand or fall on the contract actually entered into; and if he has seen fit to allow payment of his compensation to be dependent upon the performance of a contract made between parties other than himself, he cannot complain if, through the nonperformance of that contract, his own contingent rights be lost. Jennings v. Jordan, 31 Cal.App. 335, 160 P. 576; Devereux v. Sirkus, 105 Cal.App.2d 340, 233 P.2d 644; Dowds v. Armstrong, 17 Cal.App.2d 485, 62 P.2d 411, 63 P.2d 1114; K. Lundeen Corp. v. Barlow, 120 Cal.App. 391, 7 P.2d 1102; Houghton v. Kuehnrich, 46 Cal.App. 469, 189 P. 457; See Stewart v. Bowie, 43 Cal.App. 751, 754, 185 P. 868; Brion v. Cahill, 34 Cal.App. 258, 165 P. 704. Cf. Rose v. Gardner, 130 Cal.App. 302, 19 P.2d 1009. As was said in Jennings v. Jordan, supra, 31 Cal.App. at page 337, 160 P. at page 577: "The plaintiff's right to recover, then, must depend entirely upon the terms of the contract entered into between Fletcher and Jordan, to which Epinger [broker] was not a party. Up to that point, so far as the evidence discloses, there was no obligation upon them to pay him anything. The object of the contract actually entered into was to provide for an exchange of the properties of the parties thereto, each agreeing to convey title free of incumbrances, and the provision therein for the payment of a commission to Epinger must be construed in its relation to the whole contract. Quite apart from the evidence of Jordan, one of the parties to it, that as to him it was not his intention that any commission should be paid unless the exchange of lands was actually effect-

ed, such would be the natural and logical construction of the instrument. Unless and until the exchange was consummated the parties would receive no benefit from Eppinger's efforts; and, as we have seen, there was no obligation existing to pay Eppinger anything except that arising from the written agreement under consideration. The provision relating to such payment is not separable from the remainder of the contract; and certainly as to Jordan, when the other party to it found himself unable to comply with its terms and consented to its cancellation (Jordan already having a right to rescind it) the whole contract fell, the provision relating to Eppinger's compensation with the rest. If the broker should suffer any hardship from such construction it is one inherent in the form of the contract entered into, and which was the only means he chose for his protection."

[3] Before a broker is entitled to compensation, the negotiations which he is authorized to make must be concluded or conducted to the state where, as to all the material or essential terms of the sale, there is a meeting of the minds or an agreement between the principal and the customer produced by him; but if the principal and the customer are unable to come to terms, the broker cannot recover. Love v. Gulyas, 87 Cal.App.2d 608, 618, 197 P.2d 405; Silva v. Goldman, 117 Cal.App. 423, 426, 4 P.2d 191; 9 Cal.Jur.2d 256, § 87; 12 C.J.S., Brokers, § 84, page 184.

Plaintiff was entitled to a commission only if defendant and Neidorf came to a meeting of the minds as to the terms of sale and if the contract did not fail of consummation through the fault of defendant. Stanton v. Carnahan, 15 Cal.App. 527, 115 P. 339.

[4–9] Although the terms of a contract need not be stated in the minutest details, it is requisite to enforceability that it must evidence a meeting of the minds upon the essential features of the agreement, and that the scope of the duty and limits of acceptable performance be at least sufficiently defined to provide a rational basis for the assessment of damages. Ellis v. Klaff, 96 Cal.App.2d 471, 478, 216 P.2d 15; 12 Am.Jur. 554, § 64. Where the parties assume to make a contract in which one's promise is the consideration for the promise by the other, the promises must be mutual. To be obligatory on either party, the contract must be mutual and reciprocal in its obligations. One who promises to do a thing only if it pleases him, is not bound to perform. Central Oil Co. v. Southern Refining Co., 154 Cal. 165, 97 P. 177; 12 Cal.Jur.2d 317, § 114. Where a contract imposes no definite obligation on one party to perform, it lacks mutuality of obligation. It is elementary that where performance is optional with one of the parties no enforceable obligation exists. Patty v. Berryman, 95 Cal.App.2d 159, 167, 212 P.2d 937; Shortell v. Evans-Ferguson Corp., 98 Cal.App. 650, 660–661, 277 P. 519; Charles Brown & Sons v. White Lunch Co., 92 Cal.App. 457, 461, 268 P. 490; Seymour v. Shaeffer, 82 Cal.App.2d 823, 825, 187 P.2d 95; Williston on Contracts (Rev.Ed.), Vol. 1, pp. 123–128, 349. This type of promise is illusory and does not result in a binding agreement even if unconditionally accepted.

[10] The terms of the agreement gave Neidorf two opportunities to decline to purchase the property. The Neidorf offer of January 27, 1951, expressly provided that it was "subject to" two special conditions: 1) "O.P.A. Rent statements to be approved by Buyer," and 2) "Subject to buyer's inspection and approval of all apartments." These conditions had the effect of reserving to the offeror the unrestricted discretion to decide whether to be bound or not, even in the event of an unconditional acceptance by the offeree. No standard or basis for these "approvals" is established. No hint is given as to what criteria, if any, are to determine whether the O.P.A. rent statements and all the apartments will be approved by the buyer. What are the rent statements to contain or show for the offeror's approval to be forthcoming? What are the apartments to have and consist of in order to be "approved"? Are they to satisfy him as to size, furnishings, décor? Who is to judge whether he is satisfied with the statements

and apartments? Only the buyer himself. It is entirely a subjective matter. Ellis v. Klaff, 96 Cal.App.2d 471, 478, 216 P.2d 15. No one could compel Neidorf to be satisfied for he reserved these approvals to himself without limitation or restriction. The standard "as to the satisfaction of a reasonable person" does not apply where the performance involves a matter dependent on judgment. Melton v. Story, 113 Cal.App. 609, 613, 298 P. 1032; 12 Cal. Jur.2d 440, § 219.

[11–13] By simply refusing to approve the O.P.A. statements or the apartments, Neidorf could withdraw from the agreement. Actually, the Neidorf "offer" was not an offer to enter into an agreement, but an offer to enter into an agreement if he later wished to do so. This illusory promise is the only offer that was submitted by plaintiff to defendant. When by the terms of an agreement the owner of property binds himself to sell on specified terms, and leaves it discretionary with the other party to the contract whether he will or will not buy, it constitutes simply an optional contract. Johnson v. Clark, 174 Cal. 582, 586, 163 P. 1004. This was all that the contract amounted to in this case.

Plaintiff cites Lipton v. Johansen, 105 Cal.App.2d 363, 233 P.2d 648, and Keelan v. Belmont Co., 73 Cal.App.2d 6, 165 P.2d 930, as holding that a buyer's promise to purchase subject to approving O.P.A. rent statements and inspecting the apartments is not illusory. In those cases the buyer approved the rent statements, inventories, and apartments. Neidorf did not.

[14–17] To entitle a broker to a commission, the acceptance of the buyer's offer to purchase must be unconditional. Edwards v. Billow, 31 Cal.2d 350, 358–359, 188 P.2d 748; Andrews v. Waldo, 205 Cal. 764, 272 P. 1052; see also, Love v. Gulyas, 87 Cal. App.2d 608, 613, 197 P.2d 405. It is fundamental that an offer imposes no obligation until it is accepted according to its terms. A qualified acceptance of an offer constitutes a rejection of the original offer and puts an end to it. Niles v. Hancock, 140 Cal. 157, 161, 73 P. 840. An acceptance must be absolute and unqualified. A qualified acceptance is a new proposal. Civ. Code, § 1585; Hunkins-Willis Lime & Cement Co. v. Los Angeles Warehouse Co., 155 Cal. 41, 99 P. 369; Patterson v. Clifford F. Reid, Inc., 132 Cal.App. 454, 456, 23 P.2d 35. An acceptance, to result in the formation of a binding contract, must meet exactly and precisely the terms proposed in the offer; and if something different is made a condition of the alleged acceptance there is no meeting of the minds and no contract arises, unless the original offeror accepts the counteroffer. Howard v. Chow, 27 Cal.App.2d 755, 757, 81 P.2d 994; Robbins v. Pacific Eastern Corp., 8 Cal.2d 241, 65 P.2d 42; Ajax Holding Co. v. Heinsbergen, 64 Cal.App.2d 665, 149 P.2d 189.

[18] When the Neidorf offer was submitted to defendant on January 27, 1951, it had been signed by the offeror. After that, defendant wrote in ink the words "and subject to Sellor securing a" following the statement as to the amount of cash to be paid on demand of escrow. The meaning usually attributed to such words as "subject to" is that a promise that is so limited is a conditional promise, one that is different from that for which the offeror bargained. Corbin on Contracts, Vol. 1, p. 186, § 61; Humes v. Walker, 116 Cal.App. 599, 601, 3 P.2d 33.

[19–21] A contract is to be interpreted "so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Civ.Code, § 1641; Code Civ.Proc. § 1858. "A contract shall be so construed as to give force and effect, not only to every clause, but to every word in it, so that no clause or word may become redundant". Cole v. Low, 81 Cal.App. 633, 637, 254 P. 676, 678. Where a contract is partly written and partly printed, the written parts control the printed parts. Civ. Code, § 1651; Code Civ.Proc. § 1862. See, Body-Steffner Co. v. Flotill Products, 63 Cal.App.2d 555, 561, 147 P.2d 84. The intention disclosed by the written part prevails over the printed part. Burns v. Peters, 5 Cal.2d 619, 623, 55 P.2d 1182. In the case at bar, the only handwritten provision is the conditional "subject to" language placed there during the meeting on January 27,

1951. It was incorporated just prior to defendant's affixing her signature. The modifying language qualifies and dominates the entire agreement. To the extent that it is inconsistent with, or repugnant to, any printed clauses elsewhere in the contract, the latter are to be disregarded. Civ.Code, §§ 1651, 1653; Code Civ.Proc. § 1862; 12 Cal.Jur.2d 362, § 148. The inserted words, read in conjunction with the next line relative to the $60,000 first deed of trust, make defendant's acceptance subject to or conditional on her securing a trust deed loan for $60,000. Edwards v. Billow, 31 Cal.2d 350, 188 P.2d 748; M. V. B. MacAdam Co., Inc., v. Bryant, 86 Cal.App. 74, 77, 260 P. 298; Hamlin v. Barnhart, 26 Cal.App. 632, 633, 147 P. 1188.

[22] A construction given a contract by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will when reasonable be adopted and enforced by the court. Woodbine v. Van Horn, 29 Cal.2d 95, 104, 173 P.2d 17. The practical construction of a contract made by the parties thereto is the best evidence of what they intended. Tennant v. Wilde, 98 Cal.App. 437, 453–454, 277 P. 137; see, Civ.Code, § 3535; Barham v. Barham, 33 Cal.2d 416, 423, 202 P.2d 289; California Canning Peach Growers v. Williams, 11 Cal.2d 221, 229, 78 P.2d 1154; Lemm v. Stillwater Land & Cattle Co., 217 Cal. 474, 481, 19 P.2d 785; Douglas v. Bergere, 94 Cal.App.2d 267, 270, 210 P.2d 727.

[23] The conduct of the parties here, at the time of the making of the agreement and immediately thereafter, is consistent only with the construction that defendant did not unconditionally accept Neidorf's offer to purchase. The understanding of all the parties as to the conditional nature of the acceptance is demonstrated by: 1. The effort by defendant to obtain a $60,000 first deed of trust after signing the agreement rather than before. 2. The agreement that there was "no deal" when the $60,000 first deed of trust could not be secured. 3. The failure to open an escrow. 4. The subsequent efforts of plaintiff to obtain a new offer from Neidorf. 5. The obtaining of a new offer by plaintiff, and its submission several days later to defendant. All of these facts, established by uncontroverted evidence, manifest the understanding of the parties that the acceptance was subject to the $60,000 deed of trust condition. Obviously, the insertion of the "subject to" language was because the first deed of trust which then encumbererd the property was substantially less than $60,000 and its increase to that amount was entirely within the control of a third person not a party to the agreement.

The change made in the original offer by defendant was a material one. From a positive obligation imposed upon her to secure a $60,000 deed of trust, the agreement was changed to make her promise to sell conditional upon her securing such a deed of trust. There is no testimony in the record to show that Neidorf ever approved or ratified the qualifying change which had been made in his offer. The result of his failure to accept the counteroffer was that there was no binding contract between him and defendant. Edwards v. Billow, 31 Cal.2d 350, 188 P.2d 748; Howard v. Chow, 27 Cal.App.2d 755, 81 P.2d 994; 12 Cal.Jur. 2d 217, § 25.

The only evidence offered by the parties relative to defendant's efforts to obtain Mrs. Blenkiron's consent to increase the deed of trust to $60,000 was that given by defendant. Her testimony was not contradicted by plaintiff. Plaintiff stipulated that Mrs. Blenkiron had said she would not raise the amount.

In view of our conclusion it is unnecessary to consider defendant's point with respect to the ruling rejecting evidence proffered by her.

Plaintiff's commission was dependent on a binding contract between Neidorf and defendant. It chose to protect its commission by a contract between other parties. Since they failed to enter into a binding contract, it is not entitled to recover.

Reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

123 Cal.App.2d 523

STONE v. RYALS.

No. 15712.

District Court of Appeal, First District, Division 1, California.
Feb. 26, 1954.

Action between former partners of dissolved partnership for contribution. The Superior Court, City and County of San Francisco, Theresa Meikle, J., entered judgment for defendant, and plaintiffs appealed. The District Court of Appeal, Bray, J., held that record established that plaintiffs had assumed all obligations under contract which was outstanding at time of dissolution.

Judgment affirmed.

1. Partnership ⚷296(3)

In action between former partners of dissolved partnership for contribution, evidence was sufficient to sustain trial court's finding that agreement of rescission entered into between plaintiffs and third person had been made without defendant's knowledge and that plaintiffs did not have authority to enter into such agreement upon behalf of dissolved partnership or defendant.

2. Partnership ⚷296(3)

In action between former partners of dissolved partnership for contribution, record established that plaintiffs had solely assumed all obligations under contract which was outstanding at time of dissolution.

Thelen, Marrin, Johnson & Bridges, San Francisco, for appellants.

A. Brooks Berlin, Alvin A. Lobree, San Francisco, for respondent.

BRAY, Justice.

In an action for contribution between former partners of a dissolved partnership, plaintiffs appeal from the judgment in favor of defendant.

Questions Presented.

1. Primarily,—whether on dissolution plaintiffs assumed the obligations of a certain contract. 2. Correctness of the findings.

(A companion case instituted by defendant to reform the agreement of dissolution was consolidated and tried with this case. The court found against defendant in that case. No appeal was taken.)

Facts.

For some time prior to September 30, 1948, the parties were partners doing business under the name of Stone-Ryals Electric and Manufacturing Co. Their business was making welding equipment, making and installing crane and hoisting equipment, and doing electrical wiring and other electrical contracting work. On January 28, 1946, a written contract was entered into between the partnership and Victor Equipment Company for the manufacture of certain welding equipment, to be resold by the latter to Mission Appliance Corporation. Among the specifications in the contract were requirements that the equipment meet certain tests. The purchase price was $20,350, payable on acceptance by Mission. The final delivery of equipment was March 19, 1947. The equipment was of a special nature and the tests could not be made at the factory. It was understood by all that additional work might have to be done on the equipment after delivery to make it meet specifications. An exchange of letters took place between the partnership, Mission and Victor, in which it was agreed that the partnership guaranteed the performance of the equipment, and if it did not give satisfactory performance as specified, it would be taken back and the purchase price refunded. The final payment was made in December. No tests had yet been made. The first tests were made March 15, 1948, which, by coincidence, was about the date when the partners commenced negotiating between themselves for a dissolution of the partnership. A dissolution agreement was executed dated December 9th, effective as of September 30, 1948. The equipment did not meet specifications and after considerable work on it by the partnership prior to dissolution and by plaintiffs after dissolution, Victor demanded the return of the purchase price. Without defendant's knowledge or consent, plaintiffs about December 8th returned the purchase price, partly in cash and partly by a promissory note of plaintiffs and received from Victor a release in favor of both plaintiffs and defendant, and the now dissolved partnership.

Plaintiffs contend that the partnership guaranty to Victor was an absolute one and therefore was a definite obligation of the partnership at the time of the dissolution, entitling plaintiffs to contribution. Defendant contends that on dissolution plaintiffs took over the welding end of the business while defendant took over the electrical end; that each party was to bear the losses for jobs in process in the respective divisions; that the obligation to refund was not an absolute obligation but dependent upon whether the equipment could be made to perform according to specifications; and that the risk of doing this was assumed by plaintiffs. The court found in accordance with defendant's contention. While the evidence as to plaintiffs' assumption of this risk is conflicting, there is substantial evidence to support the trial court's determination.

Defendant testified that it was understood that the equipment might have to be worked on after delivery; that changes were contemplated by the partners after the first tests were made; that future tests were to be made; that tests were made and discussions had with Mission as to rectifying the work; and that Mission's attitude did not become threatening until April of 1949. He further testified that in August and September, 1948, he was unaware of any difficulties with the equipment, that plaintiff Stone had assured him it was operating satisfactorily, and that when he and plaintiffs were discussing the dissolution plaintiff Stone expressly stated that plaintiffs would be responsible for making it work and that defendant would not be held responsible for the Victor job. The attorney who represented plaintiffs in the dissolution testified that plaintiff Stone told defendant that the equipment was not then working properly, but that he could make it work properly, that then defendant stated he did not want to be responsible for any part of what it would cost to make it work, and was assured that he would not be. The attorney representing defendant in the dissolution testified in effect that it was definitely understood that plaintiffs would take over the welding, hoist and crane business, and defendant the electrical business, and that each party would assume all obligations of the jobs in process taken by him, and the other party would be released from any obligation therefor. While plaintiffs testified to the contrary, claiming that the assuming of obligations by them under the Victor contract was limited to the cost of work thereafter to be done and did not include the guaranty, the testimony of both defendant and his attorney is positive to the effect that while the guaranty was not specifically mentioned, defendant was explicit in making it clear that the dissolution was final and that neither party would be subjected to any obligations arising from the jobs in process taken by the other party.

Both parties agree that it was understood that each party would bear the obligations of the jobs in progress assigned to him respectively. Plaintiffs testified that the Victor job was complete at the time of dissolution, that all that remained was to await the outcome of the tests, which outcome would determine whether the purchase price of the equipment would have to be returned. Defendant testified that the Victor job was not complete, that further work had to be done and hence it was still in progress. The court believed his testimony. Actually, the determination of this question depended mainly upon the court's determination of the credibility of the parties.

Findings.

1. In finding III the court found that the assets transferred to plaintiffs on dissolution included all jobs in process connected with the welding, hoist and crane division "and all profits to be derived therefrom." Plaintiffs criticize the last phrase, stating that the dissolution agreement made no reference to profits. This is a captious criti-

cism, inasmuch as both parties agree that the moneys to be received from jobs then in progress were to go to the party taking over such jobs. There is not the slightest intimation in this finding, as plaintiffs contend there is, that defendant did not receive his share of the profits from the Victor job, the full purchase price of which had long prior been paid to the partnership. Likewise the failure to find that defendant received the electrical business is immaterial. That fact was conceded. There was no issue on it.

2. Finding V.

This found that notice of defects constituting failure to meet minimum specifications were not given to the partnership on occasions commencing about March 15, 1948. This is literally true according to defendant's testimony. While Victor and plaintiff Stone, during the period prior to dissolution, discussed the work necessary to be done, the situation did not justify a finding that notice of failure to meet the specifications was given. The failure to find that ultimately the equipment failed to meet the specifications is immaterial, as the court found that plaintiffs assumed the risk of making it so, and had released defendant from liability therefor.

3. Finding VI found that the parties treated the Victor contract as incomplete at dissolution and that plaintiffs solely assumed the work to be done on the equipment. While, as plaintiffs contend, this is directly contrary to plaintiff Stone's testimony, it is supported by the evidence of defendant and his attorney.

[1] 4. Finding VII refers to an agreement of rescission entered into in 1949 between Victor and plaintiffs. It states that defendant was not a party to it nor had knowledge of it, and that plaintiffs had no authority to enter into it on behalf of the dissolved partnership or defendant. The evidence fully supports this finding. The dissolution contract expressly provided that the partnership should continue only "for the limited purpose" of completing a contract known as the Mare Island contract (not involved here).

5. Finding X is to the effect that there had never been a full and complete accounting between the partners. Apparently the theory of this finding is that the parties had agreed on a distribution of the assets without actually having an accounting. It is difficult to determine what this finding means. However, whether the parties did have a full accounting, as plaintiffs contend, or did not, as defendant contends, is immaterial. It in no wise affected the understanding as to the Victor contract.

6. Finding XI is to the effect that on November 10, 1949, when Victor rescinded (more than a year after the dissolution), there was no fixed obligation on the part of the partnership to refund the purchase price to Victor. This is true as this was now the obligation of plaintiffs and not of the dissolved partnership. The finding further states that plaintiffs' acts in entering into the rescission contract and returning the purchase price were voluntary acts of plaintiffs. Whether Victor could have compelled plaintiffs under the partnership contract which they had assumed to refund the purchase price is immaterial as to defendant. Whether plaintiffs repaid the money under compulsion or voluntarily, defendant was under no obligation to plaintiffs to contribute. This finding appears to be inconsistent with finding V which referred to the guaranty originally given Victor by the partnership, taken over by the plaintiffs. However, such inconsistency is immaterial.

7. Finding XIII is based upon the statement in the dissolution agreement to the effect that the continuance of the partnership is limited to the Mare Island contract.

8. Finding XIV refers to the recovery made by plaintiffs in salvaging the equipment returned by Victor. Under the court's previous findings the recovery could not be for the partnership but for plaintiffs. If the amount is erroneous, that is immaterial as defendant has no interest in it.

[2] While the dissolution agreement contained no provision with regard to liability under the Victor contract (this fact supports defendant's testimony and the court's finding that it was treated as work

in progress) the court's findings, taken as a whole, are to the effect that plaintiffs solely assumed all the work yet to be done under the contract and all the obligations thereof.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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123 Cal.App.2d 538

MACKENZIE v. VOELKER et al.

Civ. 15700.

District Court of Appeal, First District,
Division 2, California.
Feb. 26, 1954.

Complaint in two counts for rescission of agreement under which plaintiff had conveyed her one-fourth interest in realty to defendants and for a money judgment for agreed consideration for such conveyance. The Superior Court, City and County of San Francisco, Theresa Meikle, J., rendered a money judgment for plaintiff, and defendants appealed. The District Court of Appeal, Nourse, P. J., held that tender of deed reconveying to plaintiff a one-fourth interest in the realty, subject however to mortgage for an amount equivalent to one-half of agreed value of the realty, placed thereon by defendants for their own benefit, was not an offer to return to plaintiff the same value with which she had parted and hence did not preclude subsequent dismissal of her cause of action for rescission and recovery of agreed consideration.

Judgment affirmed.

1. Dismissal and Nonsuit 🔑18

Where complaint in separate counts asked for rescission of agreement under which plaintiff had conveyed her one-fourth interest in realty to a cotenant and his wife and for a money judgment for the agreed consideration and answer demanded no affirmative relief, plaintiff had the right under Code of Civil Procedure to dismiss with prejudice cause of action for rescission prior to trial by filing a notice of dismissal with county clerk. Code Civ.Proc. § 581, subd. 5.

2. Pleading 🔑53(2)

Where complaint seeking rescission of agreement under which plaintiff had conveyed her one-fourth interest in realty to defendants and a money judgment for the agreed consideration for such conveyance was considered as asking for two alternative remedies, such pleading did not commit plaintiff to either an affirmance or disaffirmance of agreement.

3. Pleading 🔑369(1)

Asking in pleadings for inconsistent remedies is proper practice, and when all the evidence is in, it is then for the court to say to which remedy plaintiff is entitled.

4. Contracts 🔑271

A notice of rescission is not irrevocable until everything with which plaintiff parted has been restored to him.

5. Vendor and Purchaser 🔑116

Where grantees of cotenants' interests in realty, in response to written notice of rescission by former owner of one-fourth interest in realty and demand for reconveyance, tendered deed reconveying to such former owner a one-fourth interest in the realty, subject however to mortgage for one-half of agreed value of the realty placed thereon by grantees for their own benefit, such tender did not constitute an offer to return to former cotenant the same value with which she had parted and hence did not preclude subsequent dismissal of her cause of action for rescission and recovery of money judgment for agreed consideration. Code Civ.Proc. § 581, subd. 5.

* * *

Louis T. Kruger, San Francisco, for appellants.

Lloyd Macomber, San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an appeal from a judgment in favor of plaintiff and respondent Anna

Mackenzie, in the sum of $3,250 and interest from May 6, 1950, and against defendants William and Ella Voelker, brother and sister-in-law of plaintiff.

Anna Voelker, mother of Anna Voelker Mackenzie, respondent, William Voelker, appellant, Bernard Voelker, and Marie Voelker Scheger who died on March 20, 1950, had executed a deed of gift of the family home in Daly City, California, on December 2, 1938, to her four children, giving each an undivided one-fourth interest.

Following the death of their mother, the four children held a number of conferences respecting the purchase of the home by the oldest brother, William. On May 6, 1950, Bernard Voelker, Marie Scheger and Anna Mackenzie together executed their deed conveying in joint tenancy their respective interests in the property to their brother William and Ella Voelker, his wife. They had orally agreed upon a valuation of $13,000 for the property and William was to pay $3,250 to each for his or her share. Anna Mackenzie testified that her brother Bernard was paid in full, and her sister Marie had been paid $3,000. William agreed to secure a loan on the property from the bank in order to pay off the amount promised his brother and sisters.

Following the execution of the deed several meetings of the family were held. There was a great conflict in the testimony as to what was said at these conferences. William Voelker claimed that he found records showing that Mrs. Mackenzie and her husband owed a sum of $2,700 to the deceased mother, and he insisted on an accounting from the Mackenzies showing how much of this sum had not been repaid the mother, before he would pay his sister her share of $3,250. Mrs. Mackenzie and her husband insisted that this money had not been a loan, but a gift to them. Mrs. Mackenzie said her mother wanted her to use it to buy a home.

It was stipulated that William Voelker had an incumbrance of $6,500 put on the property prior to June 14, 1950, and after he received the deed from the other members of the family.

On June 14, 1950, Anna Mackenzie filed a complaint in two counts based on the alleged fraud of defendants William and his wife. The first count asks for rescission; the second for a money judgment for $3,250. The first count alleges that plaintiff served upon defendants a written notice of rescission together with a demand that they execute a deed reconveying said real property to plaintiff. The answer denies generally the allegations of the two counts, and pleads affirmatively the reconveyance of the property to plaintiff on November 13, 1950, by good and sufficient deed of a one-fourth interest in the property involved herein. The second affirmative defense pleads that plaintiff agreed to deduct from the sum to be paid to her the total sum of all loans advanced to her and her husband by the deceased mother.

The deed from William Voelker to Anna Mackenzie was mailed to counsel for plaintiff, was received by him and then mailed back to defendants' counsel. Counsel for plaintiff notified the attorney for defendants that plaintiff refused to accept the deed, and defendants' counsel thereupon gave notice that he accepted it for custodial purposes only. On December 8, 1950, an order was made by the superior court pursuant to defendants' motion, that the deed be deposited with the clerk of court pending trial and final disposition of the action.

On March 7, 1951, plaintiff filed a dismissal with prejudice of the rescission count of the complaint pursuant to sec. 581(5), Code of Civil Procedure.

At the trial the court refused to go into the matter of the $2,700 which defendants claimed was owing from plaintiff to the deceased mother, having learned that defendant William had qualified as administrator of the mother's estate and had filed an action in the municipal court against Anna Mackenzie for that sum. In awarding the judgment for $3,250, the court ordered a stay of execution until ten days after the determination of the municipal court case.

The court made findings of fact reciting that the case had gone to trial on the second count of the complaint only, the first count having been abandoned and dismissed previously by a written dismissal and instructions to the clerk of court on March 7, 1951. Appellants do not attack the findings on the second count as unsupported by the evidence, but contend that respondent cannot urge that count at all, having previously given notice of rescission, and request for rescission having been accepted by defendants.

Appellants in their opening brief argue only the point that a rescission was accomplished by the tender of the deed of a one-fourth interest in the property, that the contract was thereby extinguished, leaving nothing on which to base a claim for damages.

[1] Under sec. 581(5) plaintiff had the right to dismiss this cause of action prior to trial by filing a notice of dismissal with the county clerk. And no affirmative relief appears to have been demanded by the answer. See Riley v. Superior Court of California, 111 Cal.App.2d 365, 366, 244 P.2d 474; Nickola v. Superior Court, in and for Sutter County, 111 Cal.App.2d 620, 622, 245 P.2d 20.

[2–4] The trial court found that the first cause of action had been duly dismissed, and therefore no findings were made on the issue of rescission. This finding was in accord with the rule that if the complaint is considered as asking for two alternative remedies, plaintiff could not be held to have been committed to an affirmance or disaffirmance of the contract by so pleading. It was held in Tanforan v. Tanforan, 173 Cal. 270, 273, 159 P. 709, that it is proper practice to ask for inconsistent remedies, and when all the evidence is in, it is then for the court to say to which remedy plaintiff is entitled. In accord is Karapetian v. Carolan, 83 Cal.App.2d 344, 188 P.2d 809, 1 A.L.R.2d 1075, where it was held that a notice of rescission is not irrevocable until everything has been restored to plaintiff with which he parted.

[5] The evidence herein, that appellant placed a mortgage on the realty up to half its value shortly after securing title, is certainly evidence that the deed tendering plaintiff a one-quarter interest therein is not an offer to restore to her the same value with which she parted, because the offer was to restore to her a property value of one-half only of that which she was entitled to receive.

The case as a whole is simple and needs no elaboration. The defendant agreed to pay plaintiff $3,250 for her one-quarter share of the realty. He took her deed to her share, placed a mortgage on the whole for his own benefit and retains possession without paying plaintiff anything. During the trial the court asked the witness (defendant): "Well, then she is entitled to $3,250.00? A. Yes."

Judgment affirmed.

DOOLING, J., concurs.

123 Cal.App.2d 533

UNGER v. ISAACS et al.

Civ. 15780.

District Court of Appeal, First District,
Division 1, California.
Feb. 26, 1954.

Action for real estate broker's commission. The Superior Court, in and for County of San Mateo, Murray Draper, J., entered judgment from which broker appealed. The District Court of Appeal, McMurray, J. pro tem., held that evidence sustained implied finding that parties had abandoned contract contained in deposit receipt which entitled broker to commission.

Affirmed.

1. Brokers 🔑88(1)

Where broker undertook to substitute property exchange agreement for contract contained in deposit receipt, which entitled broker to percentage commission upon sale, it became question of fact whether his acts showed rescission or abandonment of contract.

2. Brokers ⚷86(1)

In action for real estate broker's commission, evidence supported implied finding that there was an abandonment of the contract in the deposit receipt which entitled broker to commission.

3. Contracts ⚷256

For purpose of rescission, it is not necessary for parties to meet and state that contract has been rescinded, but if intent to abandon can be ascertained from acts and conduct of parties, the contract will be deemed rescinded.

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Dennis L. Woodman, Redwood City, for appellant.

Foley, Branson & Limpert, San Mateo, for respondents.

McMURRAY, Justice pro tem.

Plaintiff appeals from a judgment for respondents, husband and wife, in a suit for real estate broker's commission. In the action plaintiff was awarded judgment for $975 against Mrs. Dorothy N. Murphy, a co-defendant with respondents. Mrs. Murphy is not a party to this appeal.

On July 27, 1951, respondents signed a "Deposit Receipt" presented to them by appellant. This receipt was for $100 and recited that respondents agreed to sell certain property to Mrs. Murphy for $11,900 cash, and a balance of $14,000 to be secured by a deed of trust, and also that respondents agreed to pay a five per cent commission thereon to appellant. At this time all the parties knew that Mrs. Murphy intended to make the cash payment with proceeds from an anticipated sale of her residence property in San Mateo.

A week or two thereafter Mrs. Murphy told appellant the anticipated sale had fallen through. Appellant suggested that they see respondents and negotiate an exchange. Such a meeting was held, and Mr. Isaacs said that he would think it over and let them know. Upon returning to appellant's office appellant obtained from Mrs. Murphy an exclusive "Authorization to Sell" her San Mateo property, and the next day had her sign an "Agreement of Exchange." When appellant presented this agreement to Mr. Isaacs he refused to sign it.

Some time later respondents and Mrs. Murphy effected an exchange of their properties on radically different terms than those set forth in the deposit receipt, or the original exchange proposal.

[1] Appellant brought this action for his commission under the deposit receipt, contending that upon its signing he immediately became entitled to his commission. If appellant had done nothing more after the signing of the deposit receipt he would no doubt have been entitled to his commission, Ralston v. Demirjian, 86 Cal.App.2d 124, 194 P.2d 41; Deeble v. Stearns, 82 Cal.App.2d 296, 186 P.2d 173, but when he undertook a course of action to substitute an exchange agreement for the contract contained in the deposit receipt it became a question of fact whether or not his acts and conduct showed a rescission or abandonment of that contract. Stamler v. Kissinger, 115 Cal.App.2d 171, 251 P.2d 709. The court was justified in finding that this was not a case of substituted consideration, but was a completely different and inconsistent agreement.

[2, 3] There is testimony by Mr. Isaacs that, after the anticipated sale of Mrs. Murphy's property had failed, appellant referred to the deposit receipt and told him: "That this deal was off and that there was nothing more to do to this." This testimony, if believed and considered with the other evidence before the trial court, was ample to support the implied finding that there was an abandonment of the contract in the deposit receipt. The applicable rule of law is stated in Tucker v. Schumacher, 90 Cal.App.2d 71, at page 75, 202 P.2d 327, at page 329: "It was not necessary to meet and state either in writing or orally that the contract was rescinded. Cincotta v. Catania, 95 Cal.App. 99, 272 P. 330. If the intent to abandon can be ascertained from the acts and conduct of the parties the same result will be attained."

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

123 Cal.App.2d 371

KENNERSON v. SALIH BROS. et al.

Civ. 15636.

District Court of Appeal, First District, Division 1, California.

Feb. 19, 1954.

Action was brought to recover on agreement whereby plaintiff was to render services in finding purchasers of stock in corporations. The Superior Court of the County of Santa Clara, Leonard R. Avilla, J., entered judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that services performed by plaintiff, who had no license to act as a broker or agent dealing in corporate securities, were services of a broker or agent under the Corporate Securities Law, and that plaintiff could not recover for such services because of failure to have a license.

Judgment affirmed.

1. Evidence ⚷450(6)

Written contract confirming verbal agreement between plaintiff and defendants that in consideration of "services," which plaintiff rendered in "promotion" of certain corporations, defendants agreed to pay for and deliver to plaintiff 770 shares in one corporation and 231 shares in another corporation, was not clear and explicit, and therefore extrinsic evidence was admissible in action to recover value of stock.

2. Evidence ⚷419(11)

Recital of consideration in letter confirming verbal agreement that in consideration of services, which plaintiff rendered in promotion of corporations, defendants agreed to pay for and deliver to plaintiff certain number of shares in the corporations, was not conclusively presumed to be true in action to recover value of such shares. Code Civ.Proc. § 1962, subds. 2, 7.

3. Evidence ⚷437

Extrinsic evidence is admissible to establish illegality. Code Civ.Proc. § 1856.

4. Evidence ⚷437

In action to recover value of stock which defendants had agreed to deliver to plaintiff in consideration for services rendered by plaintiff in promotion of corporations, wherein letter embodying verbal agreement between parties was introduced in evidence, extrinsic evidence was admissible to establish that plaintiff performed service as a broker or agent in corporate securities wtihout a license as required by the Corporate Securities Law. Code Civ. Proc. § 1856; Corporations Code, §§ 25000–26104, 25005, 25006, 25009, 25700.

5. Licenses ⚷39.14

Services performed by one, who had no license to act as broker or agent dealing in corporate securities, in finding purchasers of stock of par value of $70,000 in two corporations, were the services of a broker or agent under the Corporate Securities Law, and he could not recover for such services because of failure to have a license, though he was a director and officer in one of the corporations, and though, under contract, compensation was payable by stockholders instead of corporations. Corporations Code, §§ 25000–26104, 25005, 25006, 25009, 25600.

◆

John H. Machado, A. Andreuccetti, San Jose, for appellant.

Arvin O. Robb, San Jose, for respondent.

FRED B. WOOD, Justice.

Plaintiff brought this action against Salih Brothers, a partnership, and Fred M. Salih and Lee Salih individually and as partners, upon an alleged agreement whereby plaintiff agreed to render services in the promotion of two corporations (Beverly Investment Co., Inc., and Burbank Amusement Co., Inc.) and defendants agreed to deliver to plaintiff 770 shares of the investment company and 231 shares of the amusement company, of the value of $10,010. Plaintiff, alleging that he performed but that defendants failed to perform (save for the payment of $130 on account of said shares), sought recovery of the balance, $9,880.

Defendants denied these allegations and set up the additional defense that the alleged services, if performed at all, were performed by plaintiff as a broker or agent in corporate securities without a license to act as such.

The trial court found that the parties entered into an agreement under which plaintiff became obligated to sell $130,000 par value of the stock of the two corporations, which were to receive the total consideration ($130,000) without deduction of any kind for commissions or promotion; in consideration thereof defendants agreed to deliver to plaintiff 1001 shares of the stock of said corporations, fully paid, at the par value of $10 per share; plaintiff at no time owned or possessed a license from the state Commissioner of Corporations authorizing him in any capacity as an agent or broker to take subscriptions for shares of the capital stock of either of the corporations; at no time did plaintiff have the right under the Corporations Code to act as a person entitled to take or receive subscriptions for capital stock of a corporation and receive compensation therefor; plaintiff failed to perform his contract, in that he did not sell $130,000 par value of the stock and did not obtain from purchasers a sum in excess of $70,000.

Judgment, accordingly, was for the defendants. Plaintiff has appealed.

The several findings of fact are supported by substantial evidence.[1] The principal question is whether or not extrinsic evidence of certain of the facts found was admissible, in view of a letter of July 29, 1949, from defendants to plaintiff, bearing their signature as sender and his signature of acceptance.

That letter, insofar as pertinent to this issue, read as follows: "Mr. Burton Kennerson, San Jose, California. Dear Mr. Kennerson: This will confirm our verbal agreement, that in consideration of services which you rendered in the promotion of Beverly Investment Co., Inc., and Burbank Amusement Co., Inc., we hereby agree to pay for and deliver to you in your own name free and clear of all incumbrances, the 770 shares you are presently subscribing to in said Beverly Investment Co., Inc., and likewise the 231 shares you are presently subscribing to in Burbank Amusement Co., Inc., said subscriptions being in the total sum of $10,010.00 * * *."

Plaintiff claims it was a violation of the parol evidence rule to admit extrinsic evidence concerning the "services which you [plaintiff] rendered in the promotion * *" of the corporations mentioned. He says this letter, signed by the parties, is a writing which integrated and expressed the agreed terms, conditions and covenants of the contract and superseded the antecedent oral negotiations, discussions and understandings of the parties. However that may be, there are several answers to the contention that the extrinsic evidence in question was inadmissible.

[1] What did the parties mean by the expression "services which you rendered in the promotion" of the two corporations? That language is not clear and explicit. The words "services" and "promotion," in that context, have no definite and certain meaning. The parties differ as to the meaning. A court cannot resolve the conflict without the aid of extrinsic evidence. This situation is like that which obtained in Wachs v. Wachs, 11 Cal.2d 322, 325–326, 79 P.2d 1085, where the like use of extrinsic evidence was sanctioned. See also Woodbine v. Van Horn, 29 Cal.2d 95, 104, 173 P.2d 17; Universal Sales Corp. v. Cal. etc. Mfg. Co., 20 Cal.2d 751, 760–761, 128 P.2d 665; Union Oil Co. v. Union Sugar Co., 31 Cal.2d 300, 305–306, 188 P.2d 470; Barham v. Barham, 33 Cal.2d 416, 422–423, 202 P.2d

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[1] Much of the supporting evidence appears in these portions of the Reporter's Transcript and in these Exhibits: The terms of the agreement and the character of services to be rendered (Rep.Tr. 4, 15, 194, 228, 245–246, 248, 254); the character of the services which were rendered (Rep.Tr. 247, 250, 256–259; Ex.L., p. 2, lines 24–28; Rep.Tr. 76, 77, 80, 87, 89–96, 104; Ex.F. and Ex.G.); the lack of a license (Rep.Tr. 122–124, 131–132); plaintiff's services were not fully performed (Rep.Tr. 255, 277); plaintiff had stated that he had sold all of the stock and it was in reliance upon that representation that the agreement (Ex. 1) of July 29, 1949, was drafted (Rep.Tr. 262, 279–280).

289; MacIntyre v. Angel, 109 Cal.App.2d 425, 426–431, 240 P.2d 1047.

[2] Added significance attaches to this ambiguity in view of the fact that the "services" in question constituted the "consideration" for defendants' promise to convey to plaintiff 1001 of their shares of the stock of the two corporations. The recital of a consideration, in a written agreement such as that here involved, is *not conclusively* presumed to be true. Section 1962 of the Code of Civil Procedure in this respect declares: "The following presumptions and no others, are deemed conclusive * * * 2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; *but this rule does not apply to the recital of a consideration*; * * * 7. Any other presumption which by statute is expressly made conclusive." (Emphasis added.) We know of no statute that negatives the exception declared in subdvision 2 of section 1962. This exception means what it says. See Shiver v. Liberty Building-Loan Ass'n, 16 Cal.2d 296, 299, 106 P.2d 4; Mackay v. Whitaker, 116 Cal.App.2d 504, 511–512, 253 P.2d 1021; Podesta v. Mehrten, 57 Cal.App. 2d 66, 70–74, 134 P.2d 38.

[3, 4] Extrinsic evidence is also admissible "to establish illegality". Code of Civ.Proc. § 1856; See Lebal Co. of America v. Mastrup, 51 Cal.App.2d 232, 233, 124 P.2d 348. The asserted illegality was plaintiff's solicitation and sale of an original issue of shares of stock of the corporations, plaintiff not having a license so to act.

[5] The applicable statute is the Corporate Securities Law, Corporations Code, §§ 25000–26104. It defines "agent" and "broker" in sections 25005 and 25006; provides for their regulation and licensing, sections 25700–25713; defines "sale" in section 25009; and declares that "No person or company shall act as an agent or broker until it has first applied for and secured from the commissioner a certificate, then in effect, authorizing it so to do." § 25700. Plaintiff's engagement to sell stock of an original issue of these corporations and his activities in finding purchasers to the extent of $70,000 worth, par value, would seem to be the work of an agent or broker as defined in this statute. "Sale" includes, for example, an offer to sell, an attempt to sell, the taking of a subscription, and the solicitation of a sale. § 25009.

The licensing requirements of the statute seem clearly applicable, as recently interpreted in Owen v. Off, 36 Cal.2d 751, 753–757, 227 P.2d 457, and Rhode v. Bartholomew, 94 Cal.App.2d 272, 276–282, 210 P.2d 768.[2] The only difference in fact between the Owen and the Rhode cases and our case is that in those cases the person acting as broker or agent undertook to sell stock owned by his principal, whereas here it was stock of an original issue of two corporations in which the principal held a large interest, apparently a controlling interest, as stockholder. That does not appear to be a significant or differentiating feature. Plaintiff was to receive substantial compensation if he carried out his part of the bargain. Also, the stock for which he took subscriptions could be issued only by the respective corporations, not by plaintiff's stockholder-principal. Each corporation, upon accepting a subscription taken or solicited by him, accepted the benefit of the contract between these parties and in a sense made him its agent by ratification. The statute proscribes acting "as an agent or broker" without a license. Corporations Code, § 25700. "Agent" includes every person "employed * * * by a company, broker, or any other person," who "either as an employee or otherwise, for a compensation," sells, offers for sale, negotiates for the sale of, or takes subscriptions for, "any security." § 25005. The language employed in the definition of "broker" is not significantly dissimilar, he being a person other than an agent who engages in such activities. § 25006. The statute does not say, expressly or by necessary implication, that the compensation which the agent receives must be payable by the owner or the issuer of the securities sold.

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[2] Plaintiff relies heavily upon Dougherty v. Cross, 65 Cal.App.2d 687, 151 P.2d 654. That case and other cases were distinguished in Owen v. Off, supra, 36 Cal. 2d 751, 227 P.2d 457. Also, the exceptions applicable after the consummation of a joint adventure or the termination of a partnership (see Norwood v. Judd, 93 Cal.App.2d 276, 209 P.2d 24, cited by plaintiff), do not appear applicable here.

The fact that plaintiff's compensation was payable by the defendant stockholders, instead of by the corporations, did not remove the contract or plaintiff's services under the contract from the impact of the statute.

Plaintiff suggests that as a director and officer of one of the corporations (Burbank Amusement Co., Inc.) he had the right to sell the stock without a license as broker or agent, citing a dictum in San Leandro Canning Co., Inc., v. Perillo, 1931, 211 Cal. 482, 489, 295 P. 1026. The dictum, at most, speaks of a duty and a right of a director to sell stock of his corporation without compensation. Plaintiff herein was working for compensation. Also, he was a director and officer of but one of the corporations whose stock he undertook to sell.

The services which plaintiff did render (all without the required license) were performed, in part, prior to the writing of the letter of July 29, 1949. It is a fair inference, therefore, that plaintiff's *unlicensed* sales activities were within the purview of the contract, an integral part of it; i. e., they were not something separate and apart from or collateral to the contract.

It is not a question solely whether the contract contemplated that plaintiff would render these services without the required license. The fact that plaintiff did render those services without such a license is a bar to recovery upon the contract. See Owen v. Off, supra, 36 Cal.2d 751, 753, 227 P.2d 457; Franklin v. Nat. C. Goldstone Agency, 33 Cal.2d 628, 631–633, 204 P.2d 37; People v. Descant, 51 Cal.App.2d 343, 124 P.2d 864; Sheble v. Turner, 46 Cal.App.2d 762, 117 P.2d 23.

We conclude, therefore, that the evidence supports both the finding of failure of plaintiff to render the agreed consideration for defendant's promise and the finding that the services which he did render were performed without the license required by law therefor.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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123 Cal.App.2d 542

PEOPLE v. McGHEE.

Cr. 2964.

District Court of Appeal, First District,
Division 2, California.

Feb. 26, 1954.

Hearing Denied March 25, 1954.

Defendant was convicted of pimping. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., entered judgment, and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Dooling, J., held that, where only evidence of guilt came from complaining witness and only direct denial thereof came from defendant, and sordid charge had strong tendency to arouse passion and prejudice in jurors' minds, and possibility of spite and revenge was suggested by defendant's testimony that he had ejected complaining witness and her pseudo-husband from his hotel, failure to give requested cautionary instruction that such charge was easily made and difficult to disprove even if defendant were innocent and, therefore, complaining witness' testimony should be examined with caution constituted prejudicial error.

Judgment and order reversed, and cause remanded for new trial.

1. Criminal Law ⇨768(1)

Reasons for requiring, in sex-offenses cases, particularly where testimony of complaining witness is uncorroborated, cautionary instruction that charge involved is easily made and difficult to disprove even if defendant is innocent and, therefore, complaining witness' testimony should be examined with caution are that ordinarily complaining witness and defendant are only available direct witnesses, that such cases generally arouse passion and prejudice in minds of decent people, including jurors, and that charge can easily be made to satisfy spite, vengeance, vindictiveness and other base motives.

2. Criminal Law ⚷768(1), 1173(2)

In prosecution for pimping, wherein only evidence of guilt came from complaining witness and only direct denial thereof came from defendant, and sordid charge had strong tendency to arouse passion and prejudice in jurors' minds, and possibility of spite and revenge was suggested by defendant's testimony that he had ejected complaining witness and her pseudo-husband from his hotel, failure to give requested cautionary instruction that such charge was easily made and difficult to disprove even if defendant were innocent and, therefore, complaining witness' testimony should be examined with caution constituted prejudicial error.

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James Martin MacInnis, Nicholas Alaga, Harry P. Glassman, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., of State of Cal., David K. Lener, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

The appellant ws convicted of the crime of pimping. He appeals from the judgment and the order denying his motion for new trial. The only substantial evidence introduced against appellant came from the complaining witness. Appellant, a Negro, operated a hotel in San Francisco. The complaining witness, Claire Strange, a white woman, went to live in this hotel some time in December, 1952, with one Bailey, a Negro. They represented themselves as husband and wife. They left the hotel in January, 1953.

Miss Strange testified that while in the hotel she was called to the lobby on 15 or 20 occasions by a buzzer in her room and informed by appellant that there was a customer in one of the ground floor rooms. On each occasion she found in the room indicated a man with whom she engaged in an act of prostitution. She gave appellant in each instance the money that she received from the customer and in each instance he later gave back to her one-half of it. No part of this summarized testimony was corroborated.

Appellant denied that any transaction of the sort testified to by the complaining witness had occurred. He also testified that he had ejected Miss Strange and Bailey from his hotel in January, 1953, because he learned that they were using narcotics. A police officer, called by the prosecution, testified that he had interviewed appellant and that appellant in that conversation had flatly denied receiving any money from the complaining witness and also denied any knowledge of any act of prostitution engaged in by Miss Strange.

Miss Strange testified that another woman, also a prostitute, had been present at certain conversations between Miss Strange and appellant. Appellant produced this woman and she denied even knowing Miss Strange, denied that she was present at any such conversation and denied that she was a prostitute.

At the time of appellant's alleged offense Miss Strange was under 18 years of age and defendant was tried before the Juvenile Court Judge.

Appellant requested a cautionary instruction in the classic pattern, that a charge of this character is easily made and difficult to disprove even if the defendant is innocent, that from the nature of the case the complaining witness and defendant usually are the only witnesses, and therefore the jury should examine the testimony of the complaining witness with caution. The refusal of this instruction is assigned as error.

The rule requiring the giving of such a cautionary instruction in cases involving sex-offenses, based on Sir Matthew Hale's comment, finds its origin in this state in People v. Benson, 6 Cal. 221. After some earlier hesitation, People v. Anthony, 185

Cal. 152, 196 P. 47, our Supreme Court has now adopted the view that such an instruction should be given in cases involving sex-offenses. See People v. Adams, 14 Cal.2d 154, 163–164, 93 P.2d 146, and its discussion of People v. Anthony, supra. The rule, originally limited to forcible rape cases, has latterly been applied to all character of sex-offenses, lewd acts with a child of the same sex, People v. Lucas, 16 Cal.2d 178, 105 P.2d 102, 130 A.L.R. 1485; People v. Putnam, 20 Cal.2d 885, 129 P.2d 367; lewd acts with a child of the opposite sex, People v. Adams, supra, 14 Cal.2d 154, 93 P.2d 146; statutory rape and incest, People v. Rankins, 66 Cal.App.2d 956, 153 P.2d 399; assault with intent to commit rape, People v. Nye, 38 Cal.2d 34, 237 P.2d 1. The Supreme Court has refused to extend it to cases which are not concerned with sex-offenses. People v. McCracken, 39 Cal.2d 336, 349–350, 246 P.2d 913.

The attorney general points out that no case can be found in which the cautionary instruction was required to be given where the charge was pimping. Before the first case which held that it should be given in cases involving violations of Penal Code, sec. 288 the same argument might have been made in such a case.

[1] The reasons given for requiring the cautionary instruction in cases involving sex-offenses, particularly where the testimony of the complaining witness is uncorroborated, as here, are (1) the fact that the only available direct witnesses are ordinarily the complaining witness and the defendant, and hence the charge is easy to make and difficult to disprove; (2) cases involving sex-crimes generally arouse passion and prejudice in the minds of decent people, including jurors; (3) the ease with which the charge can be made to satisfy spite, vengeance, vindictiveness and other base motives. See People v. Putnam, supra, 20 Cal. 2d 885, 889, 129 P.2d 367; People v. Nye, supra, 38 Cal.2d 34, 40, 237 P.2d 1.

All of these elements are present in this case. (1) The only evidence of appellant's guilt came from the complaining witness. The only direct denial of his guilt came from appellant, and no other direct evidence was available to him. (2) The sordid charge made against appellant by the complaining witness was calculated to revolt any decent person and hence had a strong tendency to arouse passion and prejudice in the jurors' minds. That a man should degrade himself to the point of profiting from the earnings of a woman's prostitution indicates a depth of shameless ignominy so revolting to the sensibilities of any decent man or woman that passion and prejudice would follow perhaps even more readily upon the recounting of such a tale, than it would from even the most flagrant story of criminal satisfaction of the sexual urge. Add to this the fact that the complaining witness was a minor, that she was white and appellant and most of the customers, according to her testimony, were Negroes, and the inflammatory tendency of her testimony is by that much more increased. (3) The possibility of spite and revenge is suggested by appellant's testimony that he ejected the complaining witness and her pseudo-husband from his hotel.

[2] Where the reasons for the rule requiring the cautionary instruction are satisfied as clearly as they are in this case, we are convinced that the instruction should have been given.

It is clear that the failure to give it resulted in prejudice in this case. The complete absence of corroboration of the complaining witness in any material detail makes it clear that if the jury had been instructed to examine her testimony with caution a different verdict might well have been rendered.

Judgment and order reversed and cause remanded for a new trial.

NOURSE, P. J., and KAUFMAN, J., concur.

Hearing denied; SHENK, EDMONDS and SPENCE, JJ., dissenting.

DAWSON et al. v. GOFF et al.*

Civ. 19911.

District Court of Appeal, Second District, Division 1, California.

Feb. 25, 1954.

Hearing Granted April 21, 1954.

Action was brought to recover damages for breach of contract. The Superior Court of Los Angeles County, Ellsworth Meyer, J., entered an order granting motion of defendants for change of venue to San Diego County, and plaintiffs appealed. The District Court of Appeal, White, P. J., held that where offer of prospective buyers to buy stock was made in San Diego County, but acceptance of offer was executed by prospective seller in Los Angeles County by placing acceptance in United States mails in Los Angeles County, contract was made in Los Angeles County, and Superior Court of Los Angeles County therefore had venue of action against prospective buyers for damages for breach of contract.

Order reversed.

1. Corporations ⚷116

Letter, which was written by prospective buyers of stock to prospective seller, and which was signed by prospective seller with the notation "accepted," and which provided that prospective buyers agreed to purchase from prospective seller, on demand at any time after certain date, not to exceed 40,000 shares of certain stock for certain price a share, and that terms of payment should be determined by negotiation at time demand was made, and that agreement should terminate if no demand was made by certain date, was merely an "offer," and no contract was created until timely demand was made by prospective buyers.

See publication Words and Phrases, for other judicial constructions and definitions of "Offer".

2. Contracts ⚷145

A contract is made at place where letter of acceptance is mailed, since that is the place where the last act necessary to formation of the contract is performed. Civ.Code, § 1583.

3. Venue ⚷7

Where offer of prospective buyers to buy stock was made in San Diego County, but acceptance of offer was executed by prospective seller in Los Angeles County by placing acceptance in United States mails in Los Angeles County, contract was made in Los Angeles County, and Superior Court of Los Angeles County therefore had venue of action against prospective buyers for damages for breach of contract, under statute providing that county in which contract was entered into shall be a proper county for trial of action founded on contract. Code Civ.Proc. § 395; Civ. Code, § 1583.

4. Corporations ⚷118

Place of performance of contract to sell shares of stock is at situs of stock or residence of seller, in absence of agreement, express or implied, to contrary. Civ.Code, §§ 1754, 1763.

5. Venue ⚷7

Where plaintiffs resided in Los Angeles County and held stock, which defendants, who resided in San Diego County, had contracted to purchase, in Los Angeles County, Superior Court of Los Angeles County had venue of action to recover damages for breach by defendant of contract to purchase stock. Civ.Code, §§ 1754, 1763.

6. Venue ⚷7

Where prospective buyers of stock made offer in San Diego County to purchase stock, and prospective seller accepted the offer in Los Angeles County, doctrine of relation back was not applicable so as to make the contract effective as of date of offer in San Diego County, and therefore venue of action against prospective buyers to recover damages for breach of contract was not required to be changed from Los Angeles County to San Diego County. Code Civ.Proc. § 395.

Warner, Jackson & Sutton, Ridgway Sutton, Caryl Warner, Los Angeles, for appellants.

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* Subsequent opinion 273 P.2d 1.

McInnis & Hamilton, John W. McInnis, San Diego, for respondents.

WHITE, Presiding Justice.

Dorothy C. Dawson, as special administratrix of the Estate of C. L. Dawson, Jr., deceased, and Dorothy C. Dawson and Howard D. Dawson as successors in interest of C. L. Dawson, Jr., brought an action in the Superior Court of Los Angeles County against the defendants and respondents to recover damages for breach of a contract whereby the defendants agreed to purchase certain shares of stock. The Superior Court of Los Angeles County granted defendants' motion for a change of venue to San Diego County, the motion being made upon the grounds that the defendants were residents of San Diego County and the contract sued upon was made in San Diego County. From the order granting the motion for change of venue plaintiffs appeal.

Plaintiffs alleged in their complaint that on or about the 26th day of February, 1953, in the County of Los Angeles, a contract in writing was entered into whereby plaintiffs agreed to sell and defendants agreed to purchase specified shares of stock at an agreed price, "payment therefor to be within three years from said date, with interest thereon at the rate of five per cent per annum on deferred payments; that plaintiffs tendered delivery of said shares of stock to defendants on said 26th day of February, 1953"; that defendants refused to accept delivery of the shares, and plaintiffs in writing notified defendants of plaintiffs' election to declare the default of defendants and to hold defendants for damages. The contract sued upon was not annexed to the complaint nor made a part thereof.

The defendants demurred and concurrently filed a notice of motion for a change of venue, with supporting affidavits.

It appears therefrom that on February 28, 1950, the defendants executed, in San Diego County, a document reading as follows:

"February 28, 1950

"Mr. C. L. Dawson, Jr.
2668 Victoria Drive
Laguna Beach, California

"Dear Mr. Dawson:

"The undersigned hereby agree to purchase from you, your heirs or assigns, upon demand written or verbal at any time after February 28, 1951, not to exceed forty thousand (40,000) common shares of Grand Stores Co. for a price of $2.53 per share. The terms of the payment for this stock to be determined by negotiation at the time demand is made but in any case full payment is to be made within three years from that date and interest on deferred payments to be at 5%.

Yours very truly,
Charles R. Goff
R. Hastings Garland

"This agreement terminates if no demand is made on February 28, 1953.
Charles R. Goff

"Accepted 2/28/50
C. L. Dawson, Jr."

On February 26, 1953, the plaintiffs made written demand that the defendants purchase 28,800 shares and tendered the shares to defendants (the agreement above quoted had been modified by reducing the number of shares to be purchased from 40,000 to 28,800). The demand was signed by the plaintiffs in Los Angeles and was deposited in the United States mail at Los Angeles, addressed to the defendants at their respective addresses in San Diego. Upon failure of the defendants to accept delivery of the stock, plaintiffs notified defendants of their election to declare a default.

Section 395 of the Code of Civil Procedure, so far as here pertinent, provides as follows: "* * * When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary. * * *"

It is respondents' position that the letter and acceptance of February 28, 1950, executed in San Diego County, constituted a contract—an offer, acceptance and meeting of the minds—, the performance of the contract being suspended until a demand was made upon respondents. Respondents further argue that the "demand" of February 26, 1953, was not an acceptance of an offer, but an act which "related back" to the original contract of February 28, 1950, fixing rights according to the terms of that contract.

[1] Appellants' position, however, is that no contract was created by the instrument of February 28, 1950, which constituted merely an offer. That the contract was created by the "demand" made by appellants on February 26, 1953, which constituted an acceptance of the offer of February 28, 1950, to purchase stock. Appellants' contention is sound. The instrument of February 28, 1950, was no more than an offer to purchase stock at a specified price, upon demand within a limited time. In the absence of a demand within the specified time there was no obligation upon the buyers to buy or the sellers to sell. The indorsement, "accepted" by C. L. Dawson, Jr., is of no significance, since it created no obligation upon him whatsoever. The situation remained that of an offer to buy which could be accepted by the seller within a specified time limit, which offer could be rejected by the seller, either expressly or by failure to make a demand and tender within the limited time. The letter of February 28, 1950, contains no language whatsoever binding the owner of the stock to hold it available for the buyers. The offeree (C. L. Dawson, Jr.) assumed no obligations, but was at liberty to accept or reject the offer within the prescribed time limits. See Los Angeles County Flood Control District v. Andrews, 52 Cal.App. 788, 205 P. 1085, and Caldwell v. Dalary Mines, Inc., 68 Cal.App.2d 180, 156 P.2d 52.

[2, 3] It follows that a determination of where the contract was made depends upon the rules applicable where there has been an offer followed by an acceptance. It is not disputed that an offer was made in San Diego County, but the "demand" made by the plaintiffs on February 26, 1953, (which "demand" we hold to be an acceptance of defendants' offer of February 28, 1950) was executed in Los Angeles County, and transmitted to defendants' by deposit in the United States mails in Los Angeles County. It is settled that a contract is made at the place where the letter of acceptance is mailed, such being the place where the last act necessary to the formation of the contract is performed. Civ.Code, § 1583; Parker Co., Inc., v. Exeter Refining Co., 26 Cal.App.2d 610, 612, 79 P.2d 1114, and cases cited. See also Morello v. Growers Grape Products Ass'n, 82 Cal.App.2d 365, 370, 186 P.2d 463.

[4, 5] Further, it appears to be settled that the place of performance of a contract to sell shares of stock, in the absence of agreement, express or implied, to the contrary, is at the situs of the stock or the residence of the seller. See Civ.Code, §§ 1763 and 1754; Robbins v. Pacific Eastern Corp., 8 Cal.2d 241, 270, 65 P.2d 42; Neer v. Lang, 2 Cir., 252 F. 575. The plaintiffs herein resided in Los Angeles County and held the stock in that county.

[6] Returning to respondents' contention that the "demand" of February 26, 1953, "related back" to the document of February 28, 1950, it must be held that the doctrine of "relation back", which is an equitable fiction adopted when necessary for the purposes of justice, Ludy v. Zumwalt, 85 Cal.App. 119, 259 P. 52, has no application to the situation here presented. As heretofore stated, there was no contract in existence until the holders of the stock transmitted their letter of February 26, 1953.

For the foregoing reasons the order appealed from is reversed.

DORAN and DRAPEAU, JJ., concur.

123 Cal.App.2d 418

In re VALENTINE'S ESTATE.

VALENTINE v. VALENTINE et al.

(two cases).

Civ. 19595.

District Court of Appeal, Second District,
Division 1, California.

Feb. 24, 1954.

Rehearing Denied March 8, 1954.

Hearing Denied April 21, 1954.

Proceeding involving an attack upon decrees determining what portions of decedent's estate constituted separate property or community property, determining parties entitled to distribution of the estate, and order and judgment setting apart a probate homestead. From orders and decrees of the Superior Court of Los Angeles County, sitting in probate, William R. McKay, J., certain contestants, cross-petitioners and petitioners appealed. The District Court of Appeal, White, P. J., held that whether by reconciliation testator and his wife intended to terminate a settlement agreement presented a question of fact, that an attack upon a judgment voiding a property settlement agreement could not be maintained and that the construction of will as determined by the trial court was authorized.

Decree in accordance with the opinion.

1. Appeal and Error 🔑989

Power of appellate court begins and ends with a determination as to whether there is any substantial evidence contradicted or uncontradicted, supporting findings of the trier of facts.

2. Husband and Wife 🔑279(3)

Whether by reconciliation spouses intended to terminate a property settlement agreement incorporated in interlocutory divorce decree presented a question of intent which was for the trier of fact.

3. Divorce 🔑255

Spouses were not barred from rescinding a property settlement agreement because it had been merely approved in a divorce action for entry in an interlocutory decree, where no final decree was ever entered.

4. Declaratory Judgment 🔑149

Where husband sought entry of a final decree in divorce action and wife opposed it on the ground there had been a reconciliation of the parties and a rescission of a property settlement agreement, a justiciable controversy existed as to whether the parties had by reconciliation rescinded their property settlement authorizing declaratory relief.

5. Husband and Wife 🔑278(1)

A property settlement agreement between spouses was not subject to being set aside on ground that the stipulation therefor was obtained through undue influence.

6. Wills 🔑703

Construction of will as leaving to the parents of the testator property described therein with exception of certain articles of personalty claimed by the wife to constitute her separate property was authorized under the evidence.

7. Wills 🔑703

Construction of will with respect to testator's debts and insurance policies, determining interest of parties therein, and payment of bequests from one-half the portion of the proceeds thereof and that a portion thereof constituted separate property and another portion community property and fixing the interest of the wife therein was authorized under the evidence.

Wm. J. Clark, Los Angeles, for appellants.

McGinley & Hanson, Los Angeles, for respondent Katherine L. Valentine.

WHITE, Presiding Justice.

Joseph L. Valentine died on May 18, 1949. He was survived by a son and by his widow, Katherine L. Valentine, who is the respondent herein, and also by his parents, Frank and Mamie Valentine, the appellants. The decedent left a holographic will which was admitted to probate.

The appellants attack three decrees of the Superior Court of Los Angeles County, sitting in probate, in the estate of the decedent: (1) a decree determining what part of decedent's estate constitutes his separate property and what part constitutes community property; (2) a decree determining the parties entitled to distribution of the estate; and (3) an "order and judgment setting apart probate homestead, no selection having been made during lifetime of decedent, and setting apart exempt property to surviving spouse."

The decedent and respondent, Katherine L. Valentine, were married in October, 1942. The marriage was an unhappy one, marked by frequent quarrels and separations. In March, 1946, husband and wife entered into a property settlement agreement and in May, 1946, the wife secured an interlocutory judgment of divorce in the Superior Court of Los Angeles County, the court approving the property settlement. When the time for entry of the final judgment of divorce arrived, in May, 1947, the wife opposed the entry upon the ground that there had been a reconciliation and that she had borne a child, of whom decedent was the father. The motion of the defendant (decedent) for entry of the final judgment of divorce was heard upon affidavits and counter-affidavits by the parties and others, and was denied, the court finding that there had been a reconciliation. Thereafter the wife brought an action for declaratory relief, asking to have the property settlement declared invalid upon the ground that there had been a reconciliation and cohabitation, and that following the reconciliation the parties had treated the property settlement as abrogated. The decedent filed an answer to the wife's complaint. In March, 1948, there was filed with the clerk of the superior court in said last-mentioned action a stipulation, reciting that the parties had "resumed full marital relationship and are residing at their home * * * with their son, Joseph Henry Valentine, age one year," acknowledging that the property settlement "has been mutually rescinded, dissolved and set aside," and asking that the court "enter its order setting aside and rescinding the said agreement." This document was executed by both the husband and wife and by their attorneys. A judgment in accordance with the stipulation was entered.

The holographic will executed by the decedent reads as follows:

"Aug 9 – 1948

Monday 2^{15} P M

10380 Glenbarr Ave

L A 34 Calif

"I Joseph A Valentine of sound mind and of my own free will make out the following will in the event of my death.

"My home at 10380 Glenbarr Ave L A 34 which I built and paid all expenses for before marring Katherine Louis Schramm Valentine on Oct 8—1942. and who divorced me in the Courts of Los Angeles in May of 1946. All the home furnishings included all nick nats and my home at 12000 Weddington Ave North Hollywood which I purchased previous to marriage to Katherine Louise Schramm Valentine including all furnishings I leave all this to my Mother & Father namely Mr. & Mrs. Frank Valentine who reside at 12000 Weddington Ave North Hollywood. My personal belongings such as my 1940 La Salle, all my jewelry and clothes I also leave this to my Mother & Father.

"Part II

Aug 9 – 1948

Monday

10380 Glenbarr Ave

L A 34 Calif.

"My Metropolitan Life Insurance of 3 policies I leave \$5,000 to my wife Katherine Louis Schramm and \$10,000 Ten Thousand to Catherine King Koster who now resides at 1143 No Doheny Los Angeles Calif one of the policies has double indemnity if I am killed any accident. I do expect my Mother & Father to pay all my outstanding debts.

"My Camera equipment which consists of a Mitchell Camera B. NC and investment of \$900000 plus all my other Cameras projectors and Camera excessories I leave this to Catherine King Koster.

"My policy of 10,000 Ten Thousand with New England Mutual Life Insurance is left to my Son Francis Joseph Valentine also all cash thats in the bank plus my bonds I leave to my Son (Francis) Joseph Valentine

"III

"I do expect that my Mother & Father and also Catherine King Koster in the event my Son 'Joseph Francis Valentine needs financial help that they will see to his and *only his* needs.

"Of sound mind and good health this 9th day of August 1948.

"this is my will

"Joseph A Valentine"

The decision of the trial court which resulted in the decrees here appealed from was arrived at after receiving evidence at a consolidated hearing upon three petitions. (1) The petition of Frank and Mamie Valentine (parents of decedent) for a determination of the parties entitled to distribution of the estate, wherein the petitioners claimed to be entitled to distribution of the real property on Weddington Avenue, North Hollywood, the real property at 10380 Glenbarr Avenue, Los Angeles, the La Salle automobile and jewelry, all of which it was alleged was the separate property of decedent. The petitioners also claimed all other personal property of the estate, including the proceeds of the three Metropolitan life insurance policies with the exception of the portions specifically bequeathed to the wife and to Catherine Koster (see will) and the camera and accessories. It was alleged that it was necessary for the court to ascertain what property was community and whether or not the property settlement of March, 1946, was effective at the time of the death of the decedent. Petitioners also sought determination of the meaning of the language of decedent in his will, "my personal belongings such as my 1940 La Salle, all my jewelry and clothes I also leave this to my Mother & Father"; the sentence, "I do expect my Mother & Father to pay all my outstanding debts,"; and the language in the same paragraph making specific bequests of portions of his life insurance.

(2) Katherine L. Valentine, the widow, filed a petition for an order setting apart as a probate homestead the property at 10380 Glenbarr Avenue, which had been appraised at $32,500, and certain furnishings necessarily used in the occupancy of the property. In this petition it was alleged that although the real property and some of the furniture were the separate property of the decedent at the time of his marriage, "substantial community earnings" were paid toward reducing an encumbrance thereon.

(3) Katherine L. Valentine also filed a petition to determine what part of decedent's estate constituted his separate property and what part constituted community property, and to determine her interest therein, claiming to be entitled to distribution of all the community property except as to one-half thereof which decedent might have disposed of by will, and one-half of his separate estate not disposed of by will and not subject to payment of his debts and costs of administration.

Objections and answers to these petitions were filed.

The hearing before the trial court also embraced evidence addressed to the issues presented by the petition of appellants for letters testamentary, contest of will by Katherine Valentine, and petition by Katherine Valentine for family allowance.

Appellants present sixteen points upon appeal, but their contentions may be properly considered solely as an attack upon the sufficiency of the evidence to support certain findings made by the trier of fact. Appellants argue that the property settlement was not abrogated by oral agreement and that the testimony of the wife, Katherine Valentine, was "without probative effect." That the wife's conduct was inconsistent with a belief on her part that the property settlement had been cancelled, and that her testimony, as to admissions of one who is dead, is "the weakest and least satisfactory" (citing Code Civ.Proc. § 1879). That the settlement could not be rescinded by oral agreement or reconciliation. That the complaint for declaratory relief which resulted in a stipulated judgment voiding the settlement did not set forth a justiciable controversy; that the stipulation was obtained by undue influence and extrinsic fraud; that the property settlement had been incorporated in the interlocutory decree and could not be set aside by agreement or by judgment in the declaratory relief action. Appellants also attack the court's construction of the holographic will of decedent.

[1, 2] The trial court found, upon substantial evidence, that the property settlement agreement had been cancelled, rescinded and set aside during the lifetime of the decedent. Appellants contend that the property settlement "continued effective" to the time of decedent's death, and that such fact "is decisive of all the major issues involved in these three appeals." The trial court had before it not only the testimony of respondent wife as to a reconciliation, but the written stipulation of March 2, 1947, rescinding the agreement, and the judgment entered pursuant to the stipulation. Appellants' contentions amount to no more than an attack upon the credibility of the testimony of respondent wife, based upon asserted inconsistencies in her statements and conduct. Nothing is more firmly settled than the rule that the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the findings of the trier of fact. Estate of Bristol, 23 Cal.2d 221, 223, 224, 143 P.2d 689. Despite the presence of testimony which might be deemed impeaching or contradictory of the wife, the trial court had before it the facts that the decedent by his will acknowledged paternity of the wife's child and executed a stipulation for rescission of the property settlement, as well as substantial evidence that husband and wife had resumed marital relations after the entry of the interlocutory decree (the superior court in the divorce action having found that there was a reconciliation), and that the parties had orally agreed upon a cancellation of the property settlement. Whether by the reconciliation the parties intended to terminate the settlement presented a question of their intent, a question of fact. DeVault v. DeVault, 90 Cal.App.2d 15, 16, 202 P.2d 375. This issue was resolved against appellants, and under well-settled rules the decision of the trial court may not be disturbed on appeal.

[3, 4] There is no merit to the contention that the parties could not rescind the settlement because it had been incorporated in the interlocutory decree. The settlement was not incorporated in the decree, but was merely approved, and no final decree was ever entered. Nor is there any merit or pertinence to the contention that the complaint in the declaratory relief action did not present a justiciable controversy. The facts were that the husband sought entry of the final decree and the wife opposed it on the ground that there had been a reconciliation and rescission of the settlement. There was thus presented a justiciable controversy as to whether the parties had by reconciliation rescinded their property settlement.

[5] The attack upon the judgment voiding the property settlement on the ground that the stipulation therefor was obtained through undue influence may not be sustained. Not only is such a collateral attack upon a final judgment untenable, Nielsen v. Emerson, 119 Cal.App. 214, 217, 219, 6 P.2d 281; Henderson v. Henderson, 85 Cal.App.2d 476, 479, 193 P.2d 135; 49 C.J.S., Judgments, § 178, p. 315; 50 C.J.S., Judgments, § 630, p. 55, but the issue of undue influence was concluded by the decision and findings of the trier of fact upon conflicting evidence. It is true that the decedent had been drinking heavily for many years, but there was also competent evidence that during the period in question he was rational. There was slight, if any, substantial evidence that the decedent was subjected to "undue" influence which impelled him to execute the stipulation for judgment cancelling the settlement.

The trial court interpreted the will of decedent as follows:

[6] The language reading "My personal belongings such as my 1940 La Salle, all

of my jewelry and clothes I also leave this to my mother and father," was interpreted as leaving to his parents the described property, with the exception of certain articles of personal property which the wife claimed had been given to her by her husband and constituted her separate property. The argument of appellants with respect to the asserted gifts amounts to no more than an attack upon the credibility of the respondent wife's testimony and upon the validity of the inferences drawn therefrom by the trial court. The credibility of the wife's testimony and the inferences to be drawn therefrom in the light of all of the circumstances presented problems addressed to the trier of fact, and it cannot be held that his findings are without substantial support.

[7] The trial court determined that with respect to decedent's debts and his life insurance policies, the decedent meant by the language of his will that his parents should pay his outstanding debts; that the wife receive $5,000 and Catherine Koster $10,000 from the proceeds of the Metropolitan policies, and that his parents receive only his (decedent's) interest in the remaining portion of the proceeds, but that his parents' share should be subject to the payment of his debts, whether matured or not; and further, that the $5,000 and $10,000 bequests should be paid out of decedent's one-half portion of the insurance proceeds. The court further found that one-ninth of the insurance proceeds constituted his separate property and eight-ninths thereof community property, and the wife was entitled to her community interest therein, or four-ninths.

Assuming that a construction other than that adopted by the trial court might be arrived at, nevertheless, it cannot be said that the trial court's construction was unreasonable, and furthermore, as heretofore pointed out, this court is powerless to disturb findings and conclusions arrived at by the duly constituted arbiter of the facts when there is any evidence, contradicted or uncontradicted, of sufficient substantiality to support the determination so made.

The decree determining parties entitled to distribution filed April 2, 1951, and entered in Book 20, page 99, of Probate Orders and Decrees; the order and judgment setting apart probate homestead, filed April 2, 1951, and entered in Book 20, page 141, of Probate Orders and Decrees; and the decree determining what part of decedent's estate constitutes separate property and what part community property, filed April 2, 1951, and entered in Book 20, page 63, of Probate Orders and Decrees, are, and each is, affirmed.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

123 Cal.App.2d 564

LOOS v. BOSTON SHOE CO. et al.

Civ. 19852.

District Court of Appeal, Second District, Division 3, California.

Feb. 26, 1954.

Rehearing Denied March 15, 1954.

Hearing Denied April 21, 1954.

Action involving question whether salesman at time of driving his automobile into pedestrian was acting within service of his employer. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., entered judgment as of nonsuit for the employer, and the pedestrian appealed. The District Court of Appeal, Shinn, P. J., held that where salesman attended sales meeting, left employer's office to attend dinner given by employer, returned to company office for salesmen's meeting but left office so as to move his automobile nearer office and ran into pedestrian while driving automobile to location near office, at time of accident he was acting solely for his own convenience and was not within his employer's service.

Affirmed.

1. Master and Servant 🔑302(1)

Fact that employee has not finished his day's work at time of act upon which tort action is based is not determinative of question whether such act was performed in his employer's service.

2. Master and Servant ⟹302(1)

In determining whether act of employee was performed in his employer's service or during deviation from such service, factors to be considered are intent of employee, nature, time, and place of his conduct, his actual and implied authority, the work he was hired to do, the incidental acts that employer should reasonably have expected would be done, and amount of freedom allowed employee in performing his duties.

3. Automobiles ⟹193(10)

Where salesman attended sales meeting, left employer's office to attend dinner given by employer, returned to company office for salesmen's meeting but left office so as to move his automobile nearer office and ran into pedestrian while driving automobile to location near office, at time of accident he was acting solely for his own convenience and was not within his employer's service.

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Hirson & Horn, Los Angeles, for appellant.

Schell, Delamer & Loring, Los Angeles, for respondents.

SHINN, Presiding Justice.

Plaintiff was struck by a car owned and operated by defendant Carey, an employee of Boston Shoe Company. Jack Smith also was sued as an owner of the car but there is no discussion in the briefs as to his connection with the accident. Plaintiff's evidence was presented to a jury. When plaintiff had rested the motion of Boston Shoe Company and Smith for a nonsuit was granted, and judgment was ordered in their favor for costs. Plaintiff and Carey stipulated to dismissal of the jury and to a trial to the court. It was also stipulated that if the office manager of Boston Shoe Company were called as a witness he would testify that there was no arrangement with Carey that he would have his car available at a given time. The cause was submitted, findings were waived and judgment was entered in favor of plaintiff against Carey. Plaintiff appeals from the order granting the motion for nonsuit which awarded costs to defendants Boston Shoe Company and Smith.

The appeal is on a partial reporter's transcript, consisting of the testimony of Carey.

The question is whether there was evidence which would have warranted a finding that at the time of the accident Carey was acting in the service of his employer.

Boston is a wholesaler of shoes; Carey was a salesman, selling inside his place of business; he did some errands for his employer; he used his own car, bought his own gas and received nothing for car expense; he occasionally went out to deliver samples; the company had a panel truck for the use of salesmen who did not have a car; Carey's hours were from 8 a. m. until 5 p. m. On the evening of January 4, 1951, there was a meeting of the salesmen at the company office preceding which the company took the men to dinner, which Carey attended, as was his custom. He parked his car on Santee Street between 9th and Olympic, walked a half block north to 9th Street, a block west on 9th Street to Los Angeles Street and a half block north to the company office. From there the men walked a half block north to 8th Street, two blocks west to Spring and a short distance north to the cafe. After dinner they walked back to the company office. It was raining lightly. The company's Mr. Wall mentioned to Carey that he thought he would move his car, which was parked on Santee Street, to a point nearer the office, as it might be raining harder when the meeting was over. Defendant thought it would be a good idea to move his car also; he walked to his car, entered it and drove north on Santee to 8th Street, intending to park it closer to the office. At the corner of 8th and Santee Streets he ran into plaintiff, a pedestrian who was crossing the street. After inquiring as to her injuries Carey hurried to the company office and telephoned for an ambulance.

In Lockheed Aircraft Corporation v. Industrial Accident Commission, 28 Cal.2d 756, 758, 172 P.2d 1, 3, it was said: "The established rule was repeated in Ryan v. Farrell, 208 Cal. 200, 204, 280 P. 945, viz.: That where the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of injury, unless it clearly appears that neither directly or indirectly could he have been serving his employer. See, also, Tingey v. Industrial Accident Commission, 22 Cal.2d 636, 640, 140 P.2d 410; Loper v. Morrison, 23 Cal.2d 600, 606, 145 P.2d 1; Broecker v. Moxley, 136 Cal. App. 248, 256, 28 P.2d 409."

It has been held repeatedly that where the employee has deviated from the normal course of his service in order to serve some purpose of his own, it is generally a question of fact whether he was merely combining his own affairs with those of his employer or had altogether departed from the latter's service. Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590.

[1, 2] The fact that the employee has not finished his day's work is not determinative. As said in Loper v. Morrison, 23 Cal. 2d 600, 605, 145 P.2d 1, 3: "In each case involving scope of employment all of the relevant circumstances must be considered and weighed in relation to one another. Waack v. Maxwell Hardware Co., 210 Cal. 636, 640, 292 P. 966; Cain v. Marquez, 31 Cal. App.2d 430, 441, 88 P.2d 200; Fiocco v. Carver, 234 N.Y. 219, 137 N.E. 309; Bryan v. Bunis, 208 App.Div. 389, 203 N.Y.S. 634; 2 Mechem on Agency (2d Ed.), sec. 1880, pp. 1461–1462, and, generally, pp. 1457–1491; Rest., Agency, secs. 228–237. Under these authorities the factors to be considered, insofar as pertinent to this case, are the intent of the employee, the nature, time, and place of his conduct, his actual and implied authority, the work he was hired to do, the incidental acts that the employer should reasonably have expected would be done, and the amount of freedom allowed the employee in performing his duties."

In the cases relied on by plaintiff the employee was engaged in some uncompleted service from which he had temporarily deviated in order to engage in some personal activity; the interests of the employer were being served, although not immediately or directly; the conduct of the employee was such as could reasonably have been anticipated by the employer as incidental to the employment. This will appear from an analysis of the following cases cited by plaintiff: Kruse v. White Brothers, 81 Cal. App. 86, 253 P. 178 (employee intending to call on customer); Vitelli v. Stanbrough, 118 Cal.App. 120, 4 P.2d 818 (employee returning employer's vehicle to employee's garage where it was regularly kept); Waack v. Maxwell Hardware Co., 210 Cal. 636, 292 P. 966 (same); Gayton v. Pacific Fruit Express Co., 127 Cal.App. 50, 15 P.2d 217 (employee returning employer's vehicle to employee's garage where it was kept part time); Barton v. McDermott, 108 Cal.App. 372, 291 P. 591 (employee returning home from completed errand); May v. Farrell, 94 Cal.App. 703, 271 P. 789 (salesman returning home from trip to interview customer); Ryan v. Farrell, 208 Cal. 200, 280 P. 945 (same); State Compensation Insurance Fund v. Industrial Accident Commission, 89 Cal.App. 197, 264 P. 514 (workman returning home after completing errand); Brimberry v. Dudfield Lumber Co., 183 Cal. 454, 191 P. 894 (corporation officer returning home after completing errand); Aubel v. Sosso, 72 Cal.App. 57, 236 P. 319 (juvenile employee took "joyride" while performing errand); Cain v. Marquez, 31 Cal.App.2d 430, 88 P.2d 200 (employee continuing errand after stopping to eat); Westberg v. Willde, 14 Cal. 2d 360, 94 P.2d 590 (employee continuing errand after detour to visit father); Loper v. Morrison, 23 Cal.2d 600, 145 P.2d 1 (employee intending to call again on previously absent customer after taking fellow employee home). It is sufficient to say of the other cases cited by plaintiff that the facts upon which they were decided distinguish them from the case at bar.

A case which is most nearly in point on the facts is Gordoy v. Flaherty, 9 Cal.2d 716, 72 P.2d 538, 539. A judgment for plaintiff was reversed for insufficiency of the evidence to prove that the employee, Flaherty, was engaged in the service of his employer, Union Oil Company, when his car came into contact with plaintiff's car. We quote from the opinion as follows:

"Flaherty was employed by the company as a service station attendant, and the question is whether he was acting within the scope of his employment. * * *

"The facts are not disputed. As part of his duties Flaherty was occasionally required to go into town to get change, and also to turn in money to the branch office of the company. There was no route prescribed for these errands. Just before noon on the day of the accident, Flaherty took his own automobile and drove to the bank to get change, intending thereafter to proceed to the branch office of the company to leave his money. While he was stopping at the bank, Mrs. Frantz, mother of a friend and fellow employee, asked him to take her to her home in Santa Clara, a few miles away from San Jose. He agreed, and after assisting her into the car with her parcels, he proceeded to drive on toward the company office. But instead of stopping there, he kept on driving in the direction of her home. The collision took place three blocks past the office.

"It seems perfectly clear that at the time of the accident Flaherty had departed from his employment and was performing services for another, outside its scope. This is not a case of a choice of different possible routes, or minor or immaterial deviations in the course of business errands. If Flaherty had taken Mrs. Frantz as a passenger, and driven her to some point between the bank and the branch office, or had even deviated by a short distance from the most direct route, it might still be held that he was within the general scope of his employment at the time of the accident. Gayton v. Pacific Fruit Express Co., 127 Cal. App. 50, 15 P.2d 217; Restatement, Agency, secs. 234, 236. But it was not a mere deviation when he actually passed the company office and proceeded in the direction of a place which had no relation to the company business. This was a real departure from the employment, despite the fact that he intended subsequently to return to his employer's business; and during such departure the employer was not liable for the employee's tort. See Kish v. California State Automobile Ass'n, 190 Cal. 246, 212 P. 27; Fiocco v. Carver, 234 N.Y. 219, 137 N.E. 309; Sauriolle v. O'Gorman, 86 N.H. 39, 163 A. 717; Restatement, Agency, §§ 234, 237."

The reasoning of the court is applicable to the facts of the present case. There is no tenable ground of distinction between the two cases.

[3] It was expected of Carey that he would attend the dinner and the company meeting, and he was acting in the performance of his duties when he went to the company office, joined the other men, went to dinner and returned with them to the office. But when he went to his car, and while he was moving it to a place closer to the office, he was on an errand of his own which did not concern his employer. He had done what was expected of him when he attended the dinner and returned to the company office. He then had nothing to do that was of interest to the company other than to remain for the salesmen's meeting. Of course it was not necessary for him to return to his car and move it in order to attend the meeting. When he left the vicinity of the office he was acting solely for his own convenience. He departed from the service of his employer in order to do something that was entirely unnecessary to the complete performance of his duties and which did not directly or incidentally further the interest of his employer. To be sure, he was returning to the company office at the time of the accident, but this was made necessary by his departure from his employer's business upon a mission of his own. See Peccolo v. City of Los Angeles, 8 Cal.2d 532, 539, 66 P.2d 651. It was a mission the employer could not reasonably have anticipated as having any connection with Carey's work, and concerning which he would not have been privileged to give instructions. As a matter of fact it was none of the employer's business or concern what Carey might do with respect to changing the location of his car.

The evidence as to liability under the doctrine of respondeat superior was undisputed and presented only a question as to its legal sufficiency. This question of law was properly decided by the order of nonsuit. Peccolo v. City of Los Angeles, supra, 8 Cal.2d 532, 66 P.2d 651; Martinelli v. Stabnau, 11 Cal.App.2d 38, 52 P.2d 956; Humphry v. Safeway Stores Inc., 4 Cal. App.2d 589, 41 P.2d 208; Gousse v. Lowe, 41 Cal.App. 715, 183 P. 295. A finding that Carey was acting in the service of his employer at the time of the accident would have been contrary to the undisputed evidence that he was upon an errand that was exclusively and purely personal.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied; CARTER, J., dissenting.

123 Cal.App.2d 426

FORMAN et al.

v.

DELAWARE CONST. CO.

Civ. 19805.

District Court of Appeal, Second District, Division 3, California.

Feb. 24, 1954.

Declaratory judgment action by plaintiffs on their own behalf and on behalf of others similarly situated, for definition of rights and duties under certain contracts to purchase dwelling houses from defendant. The Superior Court of Los Angeles County, Irvin Taplin, J., entered judgment from which plaintiffs appealed. The District Court of Appeal, Shinn, P. J., held that defendant, whose plan of operations with respect to sale of dwelling houses located on subdivided lands had gone into effect before 1947 amendment to statute including thereafter within the definition of subdivided lands, improved or unimproved land or lands, was not, in absence of allegation that it was any part of defendant's plan to sell unimproved lots, required to proceed under the statutory provisions and failure to do so did not render contracts for sale void.

Judgment affirmed.

Vendor and Purchaser 🔑39

Defendant, whose plan of operations with respect to sale of dwelling houses located on subdivided lands had gone into effect before 1947 amendment to statute including thereafter within the definition of subdivided lands, improved or unimproved land or lands, was not, in absence of allegation that it was any part of defendant's plan to sell unimproved lots, required to proceed under the statutory provisions governing the sale and lease of unimproved subdivided lands, and failure to do so did not render contracts for sale void. Business and Professions Code § 11000.

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Arthur R. Hemm, Los Angeles, for appellants.

Musick & Burrell, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiffs brought this action on their own behalf and on behalf of numerous other persons alleged to be similarly situated for the purpose of obtaining a declaratory judgment defining the rights and duties of the parties under certain contracts to purchase dwelling houses from defendant. An answer was filed by defendant and also a cross-complaint by which defendant sought to recover damages.

When the action came on for trial judgment was entered in favor of defendant, which recited that a general demurrer had been sustained to the complaint with leave to amend within ten days, and that plaintiffs had not amended. Plaintiffs appeal.

The complaint alleged the following facts: On or about April 4, 1947 defendant was the owner of a tract of land in Los Angeles County; it filed its Notice of Intention to Sell and Answer to Questionnaire with the Real Estate Commissioner; thereby it represented that it intended to sell certain houses to be built on the land at a price of $10,000 for single houses and $14,000 for double houses and that sales would be made for a down payment of $1,000 or 10 per cent of the purchase price and monthly payments of $66.91 including principal, interest, taxes and insurance, the rate of interest to be 4 to 4½ per cent with F.H.A. and G.I. financing. It was alleged that defendant did not file with the commissioner a form of contract that it intended to use in the sale of the houses. Without notice to the commissioner defendant proceeded to sell and dispose of certain houses for from $10,500 to $12,750 each with down payments of $1,000 to $2,500 and monthly payments of from $75 to $116 with interest at the rate of 6 to 6½ per cent; other charges were made for mortgage insurance, taxes and fire insurance. Plaintiff Forman agreed to pay $12,300 for a house and plaintiffs Coffey agreed to pay $12,864.73 for a house they purchased. Other purchasers to the number of 135 entered into contracts of purchase with defendant at prices substantially above the prices named in the above mentioned Answer to Questionnaire. It was alleged that a controversy existed between the several buyers and the defendant with respect to the validity of the contracts of purchase. Plaintiff claimed they were illegal because of the failure of defendant to comply with the requirements of law regulating the sale of real estate subdivisions, and the complaint listed numerous rights which the owners would have in case the contracts were void. It did not allege the existence of any controversy which did not depend upon the claimed invalidity of the contracts. It was alleged that the defendant disputed all the claims and rights asserted by the several purchasers. The answer of defendant admitted that it had not filed with the Real Estate Commissioner a form of contract that it intended to use in the sale of houses and lots, and it denied that in its Answer to Questionnaire it represented that it would or that it did offer to sell single houses or double houses for the prices and upon the terms alleged in the complaint. It admitted that a controversy existed between plaintiffs and itself as to the legality of the contracts, the plaintiffs claiming them to be void and defendant claiming them to be valid and enforceable. Defendant also filed a cross-complaint accusing plaintiffs and others with having conspired to involve it in litigation and to harass and annoy it for the purpose of avoiding their obligations under the contracts, and obtaining other unfair advantages as the price of peace, for all of which defendant asked for compensatory and punitive damages.

Since the action was dismissed on defendant's motion after its demurrer was sustained, trial of the issues raised by the cross-complaint and answer thereto was waived.

In final analysis the only question is whether defendant was required to comply with the requirements of law respecting the sale of subdivided lands. The law on the subject is found under the heading "Subdivided Lands", sections 11000 to 11021, Business and Professions Code. At the time of the transactions in question section 11000, added by Statutes 1943, page 862, read as follows: "'Subdivided lands' and 'subdivision' refer to land or lands divided or proposed to be divided for the purpose of sale or lease, whether immediate or future, into five or more lots or parcels." One intending to sell such subdivided lands was required to file with the commissioner a notice of intention to sell containing, among other statements, "A true statement of the terms and conditions on which it is intended to dispose of the land, together with copies of any contracts intended to be used." Sec. 11010(e). It was made unlawful for the seller to materially change the setup of the offering without notifying the commissioner thereof in writing. Other provisions of the law required inspection of the project by the commissioner, a public report of his findings, and imposed upon the commissioner a duty to issue an order prohibiting the sale or lease of the property if the same would constitute misrepresentation to or deceit or fraud of the purchasers of "lots or parcels in the subdivision." Violation of any of the provisions of law on the subject is made a criminal offense punishable by fine and imprisonment in the county jail. Sec. 11020.

On April 10, 1946 it was held in People v. Embassy Realty Associates, 73 Cal.App.2d 901, 167 P.2d 797, that the word "subdivision" as used in sections 11000 and 11010 meant unimproved property. After quoting dictionary definitions of "subdivide" as "to divide a tract of land into lots to sell before developing or improving them" and a "subdivision" as "an unimproved tract of land surveyed and divided into lots for purposes of sale", and citing supporting authorities, the court said, 73 Cal.App.2d at page 906, 167 P.2d at page 800: "In view of the foregoing, it would appear that in referring to a subdivision, the courts of this state have had in mind the generally accepted meaning of the word, i. e., *the division of a large tract of unimproved land or acreage into smaller lots or parcels.* * * * Respondent has not directed attention to any authority in which the term subdivision has been used in referring to improved city lots, such as the property here under consideration." The property there involved was a bungalow court. The plan was to organize a corporation and sell stock to individuals who would thereby become entitled to lease one of the bungalows at a nominal rent for a period of 99 years. However, neither the fact that the plan was to dispose of the property by long term leases, rather than by outright sales, nor the fact that the land was already improved was a factor in the decision. The only ground of the decision was that the sections of the law in question did not relate to improved city lots, and for that reason it was not necessary for Embassy to procure a permit from the State Real Estate Commissioner before proceeding with its plan.

The decision in the Embassy case no doubt came to the attention of the Legislature. By Statutes 1947, chapter 454 and also chapter 1445, section 11000 was amended, the pertinent language of each amendment being "'Subdivided lands' and 'subdivision' refer to improved or unimproved land or lands divided or proposed to be divided for the purpose of sale or lease, whether immediate or future, into five or more lots or parcels". Thus the sale or lease of subdivided lands after they had been improved was brought under the supervision of the commissioner. Chapter 454, p. 1353, provided that the amendment of section 11000 should go into immediate effect for reasons stated as follows: "Due to the prevailing housing shortage, various schemes for the subdividing of bungalow courts and other similar property are being promoted and offered to the public by real estate operators without the safeguards which a permit from the Real Estate Commissioner would provide. It is essential for the protection of the public that such matters be subjected to regulation and control without delay." The amendment became effective May 31, 1947. According to the allegations of the complaint defendant's plan, and its operations thereunder, had gone into effect before the amendment became effective. Defendant therefore was not required to proceed under the law which governed the sale and lease of unimproved subdivided lands. Plaintiffs did not allege that it was any part of defendant's plan to sell unimproved lots or parcels. To the contrary the allegations were that the sales in question were of lots improved with dwellings. It is not contended by plaintiffs that the 1947 amendments were retroactive.

The record discloses that the demurrer was sustained upon the ground that the complaint failed to state a cause of action. It was properly sustained. The basic controversy was merely a dispute as to the validity of the contracts. The facts alleged were insufficient to show that they were invalid. Although plaintiff sought different forms of relief, such as reformation of the contracts to conform to the statements made by defendant to the Real Estate Commissioner, the right to the return of moneys paid, and escape from numerous obligations imposed by the contracts, no facts were alleged which would have entitled them to have the contracts reformed or to call for any other form of equitable or legal relief. Plaintiffs have not suggested that they have any claims of right, or that the defendant has any duty, which could be the subject of a declaratory judgment if their contracts with the defendant are valid. The facts they allege, if proved, would not establish invalidity.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

123 Cal.App.2d 348

SAN FERNANDO VALLEY CHAMBER OF COMMERCE v. THOMAS.

Civ. 19845.

District Court of Appeal, Second District, Division 2, California.

Feb. 18, 1954.

Action by creditor for reformation of trust deed and for $1,000 damages. Debtor sought an order requiring creditor to pay balance of loan as originally agreed upon. The Superior Court, Los Angeles County, H. S. Farrell, J., entered judgment ordering description in deed of trust to be changed as demanded by complaint, and debtor appealed. The District Court of Appeal, Moore, P. J., held that, where facts, which would have tended to support defense of waiver of alleged fraud of grantor of trust deed or of grantee's ratification of trust deed as originally executed, were not pleaded, defenses of waiver and ratification were not in issue at trial of action for reformation of trust deed.

Judgment affirmed.

1. Appeal and Error ⚷236(1)

Fact that motion for change of place of trial had not been made foreclosed, upon appeal, question of venue.

2. Venue ⚷5(1)

Action for reformation of trust deed to include land upon which were improvements made from money lent upon security of trust deed was not an action for purpose of obtaining possession of, quieting title to, or of enforcing a lien upon realty, and, therefore, constitutional provision requiring that such actions shall be commenced in county in which realty affected was situated was not applicable. Const. art. 6, § 5.

3. Reformation of Instruments ⚷41

Where facts which would have tended to support defense of waiver of alleged fraud of debtor under trust deed, or of creditor's alleged ratification of trust deed as originally executed were not pleaded, defenses of waiver and ratification were not in issue at trial of action for reformation of trust deed.

4. Pleading ⚷396

A defense which is not pleaded cannot be considered even though shown by evidence.

5. Pleading ⚷400

Rule pertaining to curing defects by litigating matter without objection applies only where pleading is defective not where there is a total absence of averment.

6. Reformation of Instruments ⚷46

In action by creditor for reformation of trust deed to include land upon which improvements financed by money lent were located and for $1000 damages, wherein debtor sought an order requiring creditor to pay balance of the total amount of loan as originally agreed upon, finding that creditor had not refused to advance balance was sufficient to sustain court's determination not to order creditor to advance balance.

7. Appeal and Error ⚷931(1)

In absence of attack upon judgment on ground that it is not supported by the findings or attack upon findings on ground that they are not supported by the evidence, findings are presumed to be based upon sufficient substantial evidence.

8. Courts ⚷475(10)
Judgment ⚷585(3)

Fact that creditor's action for reformation of trust deed, and for $1,000 damages was not for purpose of foreclosing either the original or reformed trust deed would preclude debtor's objection that creditor should be barred from foreclosing trust deed as reformed because of prior foreclosure action to foreclose the trust deed and that Superior Court of county in which such prior action had been brought had exclusive jurisdiction. Code Civ.Proc. § 726.

◆

John Martell, Santa Ana, for appellant.

George M. Pierson, Los Angeles, for respondent.

MOORE, Presiding Justice.

Respondent agreed to loan appellant $10,000 to be secured by a trust deed upon certain real property in San Bernardino County. Five thousand of such sum was to be used to pay off an existing trust deed on the property, the balance to be expended for improvements on buildings and a well located on the property. Respondent advanced $5,179.58 to pay off the trust deed and $2,252.27 for materials and labor on improvements. Subsequently, respondent discovered that the buildings and the well were not located on the property described in the trust deed given by appellant but on a contiguous parcel of 1/64 section also owned by appellant. Respondent instituted the instant action in Los Angeles County for reformation of the trust deed to include the land on which the improvements were located and for $1,000 damages. It alleged that appellant had represented that the land in question was included in the description contained in the trust deed.

After appellant's demurrer on the ground that the court did not have jurisdiction of the action had been overruled, appellant answered with the affirmative defense that respondent had refused to advance the full $10,000 and sought an order requiring it to pay the balance. After a trial of the factual issues, judgment was awarded to respondent in which it was ordered that the description in the deed of trust be changed as demanded by the complaint.

[1, 2] On appeal the argument is repeated that the superior court of Los Angeles County does not have jurisdiction over the subject matter of the action. A number of cases on the question of venue are cited but a motion for change of place of trial was never made, hence that question is foreclosed on appeal. Wadleigh v. Phelps, 147 Cal. 541, 542, 82 P. 200. Appellant contends that jurisdiction in the present action is controlled by that part of Article VI, section 5 of the Constitution which reads: "all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated. * * *" The present action is not for the purpose of obtaining possession of, or quieting title to property, or of enforcing a lien thereon. Hence, the quoted provision of Article VI is not applicable. Such constitutional limitation on the jurisdiction of the court is to be strictly construed and its action is confined to those instances in which the complaint without reference to any pleading by defendant states a case coming within the actions enumerated. Cohen v. Hellman Bank, 133 Cal.App. 758, 765, 24 P.2d 960.

[3–5] Appellant contends that respondent has waived its right to complain of the fraud of appellant and has ratified the trust deed as originally executed by reason of acts occurring subsequent to the filing of the present action but prior to the trial of same; namely, (1) respondent filed suit in San Bernardino County to foreclose the trust deed, and (2) respondent filed suit in San Bernardino County to foreclose a mechanic's lien against the property on which the well is located. Neither these facts nor any others which would tend to support a defense of waiver or ratification were pleaded in the answer or in any supplementary pleading; therefore the defenses of waiver and ratification were not in issue at the trial. A defense which is not pleaded cannot be considered, although shown by the evidence. The rule as to curing defects by litigating a matter without objection applies only where the pleading is defective, and not where there is a total absence of averment. Wilson v. White, 84 Cal. 239, 241, 24 P. 114; Germo Manufacturing Co. v. McClellan, 107 Cal. App. 532, 540, 546, 290 P. 534. By this it is not meant to imply that the admission of the evidence in question over objection of counsel was correct or that the evidence admitted established a valid defense.

[6, 7] Appellant assigns as error the failure of the court to order respondent to advance the remainder of the agreed $10,000. The court found that respondent had not refused to advance the balance This finding is sufficient to support the judgment. Appellant does not attack the

judgment as unsupported by the findings, nor the findings as unsupported by the evidence. In the absence of such attack, the presumption that findings of the trial court are based on sufficient substantial evidence is fatal to this ground of his appeal.

[8] Appellant cites Code of Civil Procedure, section 726, which restricts a party to one action to recover a debt or enforce a right secured by mortgage, and contends that because of the foreclosure action filed in San Bernardino County (1) respondent "ought to be barred from foreclosing the trust deed as reformed," and (2) "the Superior Court of that County now has exclusive jurisdiction of the action." Since the present action is not for the purpose of foreclosing either the original or the reformed trust deed, the objections are not pertinent.

The judgment is affirmed.

We concur.

McCOMB and FOX, JJ., concur.

Ex parte CHAPMAN.

Cr. 5118.

District Court of Appeal, Second District, Division 1, California.

Feb. 24, 1954.

Rehearing Denied March 8, 1954.

Hearing Granted March 25, 1954.

Petition for writ of habeas corpus. The District Court of Appeal, White, P. J., held that where but one offense was committed and petitioner was being held under consecutive sentences, petitioner was entitled to a judicial decision declaring his rights, notwithstanding the valid portion of his sentence had not expired.

Order in accordance with the opinion.

1. Habeas Corpus 🔑50

In habeas corpus proceeding, the reviewing court does not, generally, consider any question of excess of sentence until the expiration of the time for which the prisoner may lawfully be confined.

2. Habeas Corpus 🔑50

In habeas corpus proceeding where petitioner did not seek his immediate release but sought an adjudication that the second of his consecutive sentences was illegal, reviewing court was not precluded from considering the petition under the established practice that courts do not consider on habeas corpus, any question of excess of sentence until the expiration of the time for which the prisoner may lawfully be confined. Pen.Code, § 3024(b).

3. Criminal Law 🔑29

Where evidence disclosed that striking of the victim either was by a weapon or the defendant's fists and the taking of the victim's money and consummation of the robbery constituted a single indivisible transaction, one offense only was committed and it could not be carved into two offenses in order to inflict double punishment. Pen. Code, §§ 3021, 3043.

4. Habeas Corpus 🔑50

In habeas corpus proceedings where under circumstances but one offense was committed and petitioner was being held under consecutive sentences of robbery while armed and assault by means of force likely to produce great bodily injury, petitioner was entitled to a judicial decision declaring his rights as to when he may be eligible for parole, notwithstanding the valid portion of his sentence had not expired. Pen.Code, §§ 3021, 3024(b), 3043.

Al Matthews, Los Angeles, for petitioner.

Edmund G. Brown, Atty. Gen., William E. James, Dep. Atty. Gen., for respondent.

WHITE, Presiding Justice.

This is a petition for writ of habeas corpus. Upon the filing thereof this court issued an order to show cause why the writ should not issue.

Petitioner was tried in the Superior Court of Tuolumne County and convicted of the crimes of robbery while armed with a deadly weapon, and assault by means of force likely to produce great bodily injury. Judgment was pronounced and petitioner was sentenced to state prison on both of the aforesaid counts, the sentences to run consecutively.

From the foregoing judgments of conviction petitioner appealed, resulting in an affirmance thereof by the District Court of Appeal of the Third District. People v. Chapman, 91 Cal.App.2d 854, 206 P.2d 4. Subsequent thereto, petitioner sought a writ of error coram nobis in the Superior Court of Tuolumne County, in September of 1949, which petition was denied and an appeal was taken to the District Court of Appeal, Third Appellate District. This appeal was dismissed. People v. Chapman, 96 Cal.App.2d 668, 216 P.2d 112. Petitioner also sought a writ of habeas corpus in the Superior Court of Los Angeles County which was denied July 14, 1953. It is urged, however, by petitioner, that the grounds for the present petition are raised here for the first time and accordingly, we have examined them with great care.

The contention is here made that in the foregoing information filed against petitioner in the Superior Court of Tuolumne County the two counts upon which he was convicted both arose from one offense, to-wit, the taking of approximately $75 from one Jim Gulley by the use of force and violence upon and against the victim of said robbery.

It is set forth that count I alleged in part, "Robbery of the First Degree, In that, on or about the 2nd day of April, 1948, * * *", petitioner, "while armed with a dangerous and deadly weapon, to-wit: a revolver, did wilfully, unlawfully, feloneiously, and forcibly, take from the person and immediate presence of one Jim Gulley, personal property, to-wit: Seventy-five ($75.00) dollars or thereabouts in money, * * * against his will, by means of force and fear, * * *."

It is further charged in the petition that count III of the information alleged, "Assault by Means of Force Likely to Produce Great Bodily Injury in that, on or about the 2nd day of April, 1948, * * *", petitioner herein, "did wilfully, unlawfully and feloniously assault one Jim Gulley, a human being, by means of force likely to produce great bodily injury."

The petition further averred that following petitioner's conviction upon both of the foregoing counts, the court pronounced judgment as aforesaid, sentencing him to two consecutive terms of imprisonment in the state penitentiary.

Petitioner earnestly insists that the verdict, judgment and commitment were erroneous insofar as count III of the information is concerned, and that his present confinement and imprisonment thereunder are illegal in that said count III arose out of the same act as set forth in count I.

By his return to the order to show cause, respondent Superintendent of the Medical Facility of the Department of Corrections, Terminal Island, California, interposed a demurrer to the petition on the ground that the latter does not state facts entitling petitioner to a writ of habeas corpus in that said petition shows on its face that the petitioner is not entitled to release and that he is not illegally imprisoned or restrained of his liberty by respondent.

By way of answer to the petition, respondent set forth the foregoing convictions of petitioner in Tuolumne County and the appeal therefrom. He further alleged that subsequent to the convictions in Tuolumne County, petitioner was also convicted of the crime of burglary in the Superior Court of Alameda County, which judgment was affirmed on appeal. People v. Chapman, 93 Cal.App.2d 365, 209 P.2d 121.

The sole question presented for determination is whether a writ of habeas corpus is available to challenge an allegedly excessive sentence until the valid portion of the sentence has expired. Respondent insists that since petitioner, as a twice previously convicted felon and being armed with a deadly weapon at the time of the commission of the robbery charged in count I of the information now before us, must serve a minimum of ten years and will not be eligible for release for a number of years hereafter, Penal Code, § 3024, Subd. (b), habeas corpus is not available.

[1, 2] Respondent insists that it is established practice in this state not to consider on habeas corpus any question of excess of sentence until the expiration of the time for which the prisoner may be lawfully confined. In support of his argument regarding the claimed prevailing practice in this state, respondent relies strongly on the case of In re Rosencrantz, 211 Cal. 749, 752, 297 P. 15, 17, wherein the supreme court said, quoting from In re Morck, 180 Cal. 384, 181 P. 657, "It is the established practice of the Supreme Court not to consider any question of excess of sentence until the expiration of the time for which the prisoner may be lawfully confined. * * *". See, also, In re McInturff, 37 Cal.2d 876, 880, 881, 236 P.2d 574; In re Morck, supra; In re Glancy, 139 Cal.App. 766, 767, 34 P.2d 834; In re Spaulding, 8 Cal.App.2d 497, 498, 48 P.2d 133; In re Stein, 4 Cal. App.2d 267, 40 P.2d 934; In re Buchanan, 4 Cal.App.2d 269, 40 P.2d 935. In the instant proceeding, however, petitioner does not seek his immediate release, but asks for an adjudication by this court that the second of his consecutive sentences is illegal in that the one act of inflicting force with the deadly weapon cannot be presented both as assault by means likely to produce great bodily injury and availed of by the People as the force necessary to constitute the crime of robbery, for the reason, as said by the Supreme Court in People v. Logan, 41 Cal.2d 279, 260 P.2d 20, 26, " 'co-operative acts constituting but one offense when committed by the same person at the same time, when combined, charge but one crime and but one punishment can be inflicted.' (citing cases)."

There has been filed in this court a stipulation entered into by respective counsel that certain excerpts taken from the reporter's transcript of petitioner's trial in Tuolumne County, constitute the portion of the testimony of the complaining witness therein, Jim Gulley, and the codefendant, Donald Larios, concerning the charges contained in the aforesaid information as filed against petitioner.

A review of that document reflects that petitioner and the victim drove out of Jamestown, in Tuolumne County, towards Oakdale. Petitioner was driving. The codefendant, Larios, was following in another car. The victim testified he "kept telling him (petitioner) that I could drive. I told him to stop pretty soon, and he said he would when he found a place wide enough to stop, so he stopped there." Larios also stopped the vehicle he was driving, petitioner alighted from the vehicle he was driving, went back and talked with the codefendant Larios. As to what then ensued, the victim testified: "I started to get in the driver's seal, and he came back and said 'get on the other side of the car.' I thought he was going to drive on further. He stopped in front of the car and showed me a gun and said, 'This is a hold-up.' "

The victim further testified that petitioner then ordered him to, "Get around the other side of the car and put your hands up". The petitioner then demanded the victim's wallet and "the change in my pocket and lay it on the ground". The victim handed his wallet to petitioner and taking the loose change from his pocket placed it on the ground. According to the victim's testimony, after placing his money on the ground, "* * * I got up and started to run towards Rosasco's house, and one of them overtook me and started clubbing me on the head and knocked me down."

The victim testified the petitioner inquired of him why he ran, twice saying, "I ought to blow your guts out". The victim was then compelled to remove his boots, whereupon petitioner and the codefendant Larios departed.

The foregoing testimony of the victim was in substance corroborated by the codefendant Larios, except that the latter testified that when the victim started to run he (Larios) pursued him, "* * * just tackled him and got him down". That petitioner came up and started "hitting Jim (the victim)". That petitioner said to the victim, "where is the rest of your money, and Jim said he didn't have any more. He (petitioner) said 'Quit lying' and Jim said he wasn't lying. He told him to lay over on his stomach, and then he said 'I ought to shoot your guts out. Where is your money?' Jim said he didn't have any, so then he started walking across the highway." That petitioner then went back to the car and drove away.

[3] From the foregoing description of the criminal transaction as disclosed by the victim and the codefendant Larios, it seems manifest that the striking of the victim, either with the weapon or petitioner's fists, the taking of the victim's money and consummation of the robbery, constituted a single, indivisible transaction. Under such circumstances, but one offense was committed, and it cannot be carved into two offenses in order to inflict a double punishment. People v. Logan, supra, 41 Cal.2d 279, 260 P.2d 20.

[4] And we are further persuaded that under the facts here present, petitioner, in a habeas corpus proceeding, is entitled to a judicial decision correctly declaring his rights when the constituted authority determines his sentence and as to when he may be eligible for parole, in accordance with the declaration of his rights as set forth in this opinion. As was said in In re McVickers, 29 Cal.2d 264, 281, 176 P.2d 40, 51, a prisoner is "entitled to be accorded the benefits as well as the penalties of the law * * *."

The importance to petitioner of an adjudication similar to that found in In re McVickers, supra; In re Seeley, 29 Cal.2d 294, 176 P.2d 24, and In re Lamey, 85 Cal. App.2d 284, 193 P.2d 66, is manifest from a consideration of various Penal Code sections, including section 3021, which provides that when a prisoner has imposed upon him two or more consecutive sentences the board may determine and redetermine after the expiration of six months of his first sentence, what length of time he shall serve on all such consecutive sentences; section 3043 which provides that no prisoner who has had imposed upon him two or more consecutive sentences may be paroled until he has served at least two calendar years of the aggregate of such consecutive sentences; and section 3049 which provides, in part, that no prisoner may be paroled until he has served the minimum term of imprisonment provided by law for the offense of which he was convicted.

For the reasons above stated, it appears that petitioner's conviction under Count III of the information, and the sentence imposed thereunder, was without authority of law, and that the Adult Authority should consider and act on his case without regard to the penalty imposed under Count III of the information.

However, since petitioner is legally imprisoned because of the judgment pronounced under Count I of the information, he is not presently entitled to discharge or to release on parole.

The demurrer of respondent is overruled; the order to show cause heretofore issued is discharged, and the petition for a writ of habeas corpus is denied.

DORAN and DRAPEAU, JJ., concur.

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123 Cal.App.2d 439

COFFENBERRY v. LEVI et al.

Civ. 4646.

District Court of Appeal, Fourth District, California.

Feb. 24, 1954.

Action to recover a loan arising out of the construction of houses on lots owned by defendants. From an adverse judgment in the Superior Court of Kings County, Clark Clement, J., denying a recovery the plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that the evidence established that the loan was not made to defendants so that no recovery could be had from the defendants.

Judgment affirmed.

1. Joint Adventures 🔑1.13

Where contractor was to furnish labor and materials and owner of lots on which houses were built was to furnish the proceeds of loans and sales and contractor was obligated to build houses for the total of the sums and owner was to get a small amount, guaranteed as against the contractor and the balance, if any, to go to the contractor as payment for services, relationship was that of owner and contractor rather than that of a joint venture.

2. Contracts ⚷350(2)

Evidence supported finding that loan made by plaintiff to carry on construction of houses on lots owned by defendants was made solely to third person though "approved" by defendants and hence on default, the amount of the loan could not be recovered from defendants.

Van Dyke & Shaw, James C. Van Dyke, Stockton, for appellant.

William M. Martin, San Marino, for respondents.

BARNARD, Presiding Justice.

This action arose out of the construction of certain houses on lots owned by the defendants. In December, 1950, an "Owner-Contractor Agreement" was entered into by Myron B. Levi and C. M. Maaskant as "Owner" and Richard Goodenough, Robert Goodenough and Dick B. Williams as "Contractor", for the erection of houses on these lots.

This contract provided that the "Contractor" agreed to provide all labor and material, to construct one house, and to construct additional houses "when and as Owner so notifies Contractor", all in accordance with certain specifications. It was further provided that before such additional units should be commenced, contracts for the sale of the houses by the owner to third parties must have been entered into, with down payments deposited in escrows placed with the Security Title Company; that the owner would make every reasonable effort to thus sell the units contemplated as soon as possible, such sales to be made at a minimum price of $8,950; and that "only Owner shall have the right to sell said units, and that the rights of the Contractor herein are only those of an independent contractor engaged in the construction thereof." The owner agreed to pay the contractor "as full compensation for Contractor services hereunder, in the manner and amounts hereinafter set forth, to wit:". It was then provided that a "Building Account" should be started in a Hanford bank in the joint names of the "Owner" and "Contractor"; that no withdrawal should be made without the signature of one of the owners and one of the contractors; that the owner should secure construction loans on the various units and deposit the proceeds in this building account; that the owner should deposit in said building account all sums received from the sale of houses "as and when escrows are terminated"; and that, in the event the building account proved insufficient, the owner was to deposit into the building account a sufficient amount to cover construction costs, provided that the owner should not be required to deposit more than $1,000 for the cost of any one house.

It was then provided that the owner should pay, from this building fund, for all materials and labor supplied by the contractor, including wages of the "Contractor" for actual construction labor performed in the work, by delivering to the contractor checks drawn on this building account signed by either Mr. Levi or Mr. Maaskant, reserving the right in the owner to refuse such payment on any item not incurred in conformance to the terms of the contract; that after the completion of construction of all houses requested by the owner, and the close of all sale escrows, the owner was to pay the contractor all funds remaining in the building account, less any amounts up to $1,000 on each house which had been deposited by the owner to make up a deficiency, and less $400 for each house completed; that such sum was to be in full compensation for all contractor's services under the contract; and that "In other words, Owner is guaranteed the amount represented by such formula from the Building Account before any sums are guaranteed Contractor." It was further provided that the title to all work completed and in the course of construction should be in the owner; that the owner should have the right to terminate the contract at any time the contractor violated its terms; that the contractor should have the sole right to hire and fire and to direct all labor and work upon said construction "without any interference of Owner whatsoever"; that "It is understood and agreed that the relationship between the parties hereto is that of Owner and an independent contractor * * * and that the parties hereto are not partners or joint venturers, or employees and employers, or principal and agent," and that neither party shall be responsible for the "Contracts or obligations" of the other.

One house was built and sold in December, 1950, and 12 others were then built and sold through escrow, the proceeds being placed in the building fund. The defendants secured construction loans and deposited the proceeds in the building fund. The defendants, as "Owner", also deposited in the building fund the required $1,000 for each house built, since that became necessary. The building fund was established in a bank under the name of Hanford Construction Company, a fictitious name used for that purpose alone, and bills were paid by checks on that fund, signed by one of the owners and one of the contractors.

In May, 1951, the building fund was exhausted and a labor payroll was due. The owners told the contractors that it was their responsibility to get the money, and the contractors said they would do so. The contractors contacted the plaintiff and borrowed $12,000 from him, promising him a bonus of $200 on each house. On May 18, 1951, they gave Coffenberry a note for $14,400 with interest at 6%, signed by Richard Goodenough and Robert Goodenough. Before completing the loan Coffenberry demanded and received an order on the Security Title Company authorizing the title company to pay to Coffenberry, as credits on this note, all proceeds due to these defendants from the sales of any of these houses, on completion of the respective escrows. This order was signed by the two Goodenoughs and "approved" by these defendants. On May 20, Coffenberry issued a check to the Security Title Company for $6,000 which was endorsed by the title company and by "Hanford Construction Company, G. M. Levi", and deposited in the building fund. On June 11, 1951, Coffenberry issued his check to "Goodenough Bros." for $3,000, which was endorsed by them and placed in the building fund. On July 2, Coffenberry issued his check to "R. A. Goodenough" for $3,000, which was endorsed by R. A. Goodenough and deposited in the building fund.

By September, 1951, it became apparent that there would not be sufficient funds in the escrows with the title company to pay the note thus given to Coffenberry, and he brought this action against the owners, without joining the contractors. The amended complaint, in three causes of action, alleged that on May 18, 1951, the defendants were indebted to the plaintiff in the sum of $12,000 for money theretofore loaned them, and which they had orally promised to pay; that on that date the defendants were indebted to the plaintiff in the sum of $12,000 for money theretofore received by the defendants for the use of the plaintiff, and which they had orally promised to pay; and that on that date the defendants were indebted to the plaintiff in the sum of $12,000 for money theretofore expended by the plaintiff for the use of the defendants, at their request, and which they had orally promised to pay. After a long trial the court found, among other things, that none of the material allegations of the complaint were true; that the plaintiff had not loaned any money to the defendants and they were not indebted to him in any amount; that the defendants had not received any sum for the use or benefit of the plaintiff; that the plaintiff had not expended any money for the use of the defendants; that the defendants had not authorized the Goodenoughs to borrow any sum from the plaintiff; that the defendants were not partners or joint venturers with the three contractors, or with any of them; and that no part of the $12,000 was loaned by the plaintiff to the defendants or expended for their use, but that this amount was loaned by the plaintiff to the Goodenoughs. Judgment was entered in favor of the defendants, and the plaintiff has appealed.

The appellant contends that under the rules stated in Parker v. Trefry, 58 Cal. App.2d 69, 136 P.2d 55, it conclusively appears that this was a joint enterprise between the owner and contractor, and that it follows, as a matter of law, that the respondents are liable for the full amount of the loan made by the appellant to the joint venture. It is argued that the contract provides that each party shall furnish part of the capital, that they shall have joint control of the finances, and that they shall divide the profits; and that the parties acted as joint adventurers in that they jointly purchased materials and handled the finances, jointly authorized the escrow holder to apply proceeds of the escrows on the note, and placed the $12,000 borrowed from the appellant into the building fund, where it was jointly used to pay the costs of the project. It is further argued that there is no evidence that the appellant knew or even suspected that the Goodenoughs did not have authority to secure this loan and to bind the coadventurers for its payment.

[1] The contract itself provides for an owner and contractor relationship rather than for a joint venture. The contractor was to furnish all labor and materials and the owner was to furnish the proceeds of the loans and sales, with a limited amount in addition, if this became necessary. The contractor was obligated to build the houses for the total of these sums. Instead of providing for a division of the profits it was provided that the owner would get a small amount, guaranteed as against the contractor, and the balance, if any, would go to the contractor as payment for his services. Since the owners furnished the lots it would not appear that the $400 per house would give them much, if any, profit. The fact that the owners signed checks on the building fund was merely a safeguard to insure proper use of the funds by the contractor.

We find nothing in the evidence as to the actions of the parties which would conclusively disclose a joint venture relationship. There is ample testimony that the contractors hired all labor and procured all materials although a few items were, at their request, purchased for them by the owners, and that the owners had no supervision or control over the construction. Bills incurred by the contractors were paid from the building fund, as provided for in the contract, and only after they were approved by the contractors.

When additional money was needed to pay for materials and labor the contractors recognized that this was their responsibility, and proceeded to get it through the loan in question. While the owners knew that the contractors were obtaining this loan, they neither participated in getting the loan nor signed the note. The order on the title company, which they signed, gave the appellant a priority with respect to certain funds, but did not purport to obligate the respondents to pay the amount of the loan. While this assignment referred to "the proceeds due" to the respondents, these proceeds did not belong to the respondents but were funds which were to go into the building fund, in accordance with the contract. These funds were "due" to the respondents only because they, as sellers, were parties to the escrow. Respondents testified that at the time they approved the assignment they told the contractors that they would not be responsible for the loan, and that they were signing the document solely to give the lender priority with respect to the balance of the escrow funds. The employee of the title company who drew the assignment confirmed this, and testified that the owners approved the assignment at the request of the title company, since it could not act on Goodenough's instruction alone.

[2] There is ample evidence to support the finding that this loan was made solely to the Goodenoughs. The appellant was well acquainted with the Goodenoughs, having made them two previous building loans, and he had never met the respondents prior to the making of this loan. While there is some conflict in this respect, there is evidence that the respondents did not ask the contractors to approach the appellant for a loan, and that the contractors did not mention the respondents' names to the appellant when they applied to him for a loan. On May 20, 1951, the appellant wrote to this title company stating that "in accordance with an agreement between myself and Goodenough Bros." he was enclosing a

check for $6,000, which the title company was to deliver to Goodenough Bros., on an acceptance of the order "which they filed with you, and approved by" the respondents. The letter then stated: "The balance of the loan to Goodenough Bros. will be consummated in about 10 days, after I arrived home in Stockton." The appellant testified that he felt he was lending the money only to the respondents, and later said that he was putting the money into respondents' property with the intention that they should use it. He finally stated that when he made the deal with the Goodenoughs he understood that the relation between them and the respondents was one of owner and contractor, and that he made the loan upon the basis that the owner would be obligated to pay the bills. He also testified that he had read the written agreement showing that these parties were owner and contractor "but I didn't rely on that too much"; that before making the loan he had read the part of the agreement limiting the amount to be supplied by the owners to $1,000 per house but that he considered this "absurd, and I didn't pay any attention to it"; and that he interpreted the contract as requiring the owners to pay all costs of construction, and considered that they would have to pay this loan since it would be a part of the construction costs. He further testified that about six weeks after the loan was made he saw Mr. Levi for the first time, and that Levi then said to him "You will get all of your money, I am the one that is going to lose on this deal." Later on, he testified that Mr. Levi's remarks on that occasion had reference to this fund; that at that time this "was confirmed at the title company"; that "it appeared at that date I would get my money without any difficulty"; and when asked "But Mr. Levi did not tell you that he would pay you, he told you he thought there would be enough in that fund to pay you?", he replied "That is right."

The loan was made to the Goodenoughs and, as far as the respondents are concerned, was payable only from a specific fund. In the interest of brevity we have not discussed several evidentiary matters relied on by the appellant, since they are merely a part of such conflict as appears in the evidence.

If it could be assumed that a part of the evidence was sufficient to have supported contrary findings the evidence is amply sufficient to sustain the findings made and it can neither be said, as a matter of law, that a joint venture relationship here existed nor that such a relationship was relied upon by the appellant in making this loan.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

* * *

123 Cal.App.2d 404

RICH v. CRIEGER et al.

Civ. 20024.

District Court of Appeal, Second District, Division 1, California.

Feb. 23, 1954.

Quiet title action by equitable owner against holder of legal title, who had rented property to others, collected rentals and had spent time and money keeping property in repair. The Superior Court of Los Angeles County John F. Aiso, J., found balance due from equitable owner to holder of legal title computed at 5 per cent of rent money collected and entered judgment accordingly. Equitable owner's motion for a new trial was denied and the judgment was reduced equitable owner appealed. The District Court of Appeal, Drapeau, J., held, inter alia, that evidence would sustain award computed on time basis which would result in more than 5 per cent of rent money collected and that reviewing court would presume that trial court rested its judgment on findings that supported computation on time basis.

Affirmed.

1. Appeal and Error ⇐931(1)

It is duty of reviewing court to construe findings liberally in support of judgment, to give judgment effect rather than to destroy it and to read all findings together and to reconcile recitals to prevent any conflict on material points.

2. Appeal and Error ⚷931(7)

If there is one clear, consistent and sufficient finding upon which judgment may rest, reviewing court will presume that trial court rested its judgment on that finding.

3. Quieting Title ⚷44(3)

In action by equitable owner against holder of legal title, who had rented the property, collected rentals and had spent time and money keeping property in repair, to quiet title and for accounting, evidence sustained award to holder of legal title on time basis equal to 5 per cent of rent money collected by him.

4. Appeal and Error ⚷931(7)

Where judgment of trial court awarding defendant compensation for services rendered on basis of 5 per cent of rent money collected could have been computed on time basis, and use of such basis was attacked on appeal, reviewing court would assume trial court rested its judgment on findings that supported use of time basis.

5. Appeal and Error ⚷110

In a civil nonjury action an order denying a motion for a new trial is not appealable.

6. Appeal and Error ⚷110

An order denying new trial which reduces amount of the judgment is a special order made after final judgment and is appealable.

◆

Barry Sullivan, Los Angeles, for appellant.

William Hicks, Hollywood, for respondent.

DRAPEAU, Justice.

In this action to quiet title it was stipulated that plaintiff, Selea Rich, was the owner of three parcels of real property, title to which was in defendant, Walter M. Crieger. Defendant collected the rents and took care of the property for plaintiff from December of 1948, when she deeded it to him, until this suit was filed October 2, 1951.

It was further stipulated that in the accounting between the parties, which was the only issue left for trial, any sums found due from plaintiff to defendant would be a lien upon the real estate in the judgment quieting title.

The trial court found that there was a balance due from plaintiff, Mrs. Rich, to defendant of $2,180.25, and judgment followed.

On motion for a new trial the court ordered the balance cut down to $1,530.25. This defendant agreed to and the judgment was reduced accordingly.

Plaintiff appeals from the order denying her motion for a new trial and from the judgment. She contends that the evidence is insufficient to support the findings, and that the judgment for a lien is contrary to law. She argues that defendant's claim in the accounting should have been pleaded by way of counterclaim.

Defendant was the only one who kept any record of the transactions. This record shows the balance due to him, and is supported by his testimony. And plaintiff is bound by the stipulation that the balance found due would be a lien against the real property.

Plaintiff complains of a recital in the findings that part of defendant's compensation for his services was computed at 5% of the rent money he collected. She contends that this may not be done because defendant was not a real estate broker.

It is not necessary to a decision in this case to determine this contention, for several reasons.

[1, 2] It is the duty of this court to construe the findings liberally in support of the judgment; to give the judgment effect rather than to destroy it; to read all of the findings together and to reconcile the recitals to prevent any conflict on material points; and if there is one clear, consistent, and sufficient finding upon which the judgment may rest, to presume that the trial court rested its judgment on that finding. 4 Cal.Jur.2d p. 444.

[3, 4] Tried by these rules, that part of the findings is unnecessary. The trial court could have computed defendant's compensation on a time basis and allowed him a great deal more for his services. As stated, he not only rented the property and collected the rentals, but he also spent time and money keeping it in repair. Moreover, counsel for plaintiff prepared the findings, including the recital now questioned.

[5, 6] In a civil non-jury action an order denying a motion for a new trial is not appealable. In re Fama's Estate, 112 Cal. App.2d 309, 245 P.2d 1101. But when an order denying a new trial reduces the amount of the judgment it is a special order made after final judgment, and is appealable. Phelan v. Superior Court, 35 Cal. 2d 363, 217 P.2d 951.

The judgment and the order denying a new trial are each affirmed.

WHITE, P. J., and DORAN, J., concur.

* * *

123 Cal.App.2d 256

SHUTES v. CHENEY et al.

Civ. 15665.

District Court of Appeal, First District, Division 1, California.

Feb. 17, 1954.

Action to recover damages for defendant partners' refusal to be bound by two agreements, granting plaintiff exclusive rights to buy patented chip steaks for resale and delivery in certain counties, after succeeding to the rights of a corporation, to which one of grantors assigned an agreement whereby patentees granted assignor the sole right to manufacture and distribute such steaks in the state, and to enjoin defendants from selling such steaks in the territory wherein plaintiff claimed the exclusive right to sell them. From a judgment of the Superior Court in and for the county of Alameda, A. J. Woolsey, J., for defendants, plaintiff appealed. The District Court of Appeal, Finley, J. pro tem., held that plaintiff stated no cause of action in his third amended complaint and could not do so under the facts shown.

Judgment affirmed.

1. Courts 🔑489(3)

A state superior court had jurisdiction of subject-matter of action for damages for defendants' refusal to be bound by agreements granting plaintiff exclusive rights to buy patented chip steaks for resale in certain counties after defendants succeeded to rights of corporation to which one of grantors assigned new agreement whereby patentees granted assignor sole right to manufacture and distribute such steaks in state, as action did not involve dispute concerning patent rights, over which federal courts have jurisdiction, where plaintiff did not question and all parties assumed validity of patent.

2. Courts 🔑489(3)

A state court may construe and enforce contracts relating to patents.

3. Appeal and Error 🔑1078(2)

On plaintiff's appeal from judgment entered for defendants when plaintiff declined to amend his third amended complaint after trial court sustained demurrer thereto, point raised in demurrer, without stating reason therefor and not discussed by defendants in their brief, that plaintiff lacked legal capacity to sue, will be deemed not well taken and hence abandoned.

4. Patents 🔑203

Contracts whereby assignees of exclusive right granted their assignor by patentees of chip steaks, to manufacture and sell such steaks, and one to whom such assignees subsequently assigned such right granted another exclusive right to buy such steaks for resale and delivery in certain counties, did not create in, or convey to, such grantee an interest in master license granted by patentees.

5. Patents 🔑216

An agreement, whereby patentees of chip steaks granted another sole right to manufacture and distribute such steaks, did not create in grantee and corporation, to which he subsequently assigned agreement, an interest in patent rights, but merely gave him a license or right in personam to enjoy certain privileges thereunder.

6. Contracts ⚷147(2)

In construing written contract, court must be guided by parties' intention as expressed therein, in absence of any attempt to reform contract or claim of mistake or fraud.

7. Contracts ⚷186(4)

A person not a party to contract cannot maintain action for violation thereof because he indirectly suffered detriment thereby or would have been benefited had contract been observed by parties thereto, as there must be privity and remote damages to third parties cannot be recovered.

8. Contracts ⚷187(1)

While a contract made expressly for benefit of third person may be enforced by him at any time before parties rescind it, the test in deciding whether a promise inures to third party's benefit is whether intent to benefit him appears from terms of contract. Civ.Code, § 1559.

9. Contracts ⚷187(1)

To sustain action for enforcement of contract by one not a party thereto, intent to make contractual obligation inure to plaintiff's benefit must have been clearly manifested by contracting parties. Civ. Code, § 1559.

10. Contracts ⚷187(1)

Where a contract incidentally benefits a person not a party thereto, but is not expressly made for his benefit, he cannot recover thereon.

11. Sales ⚷86

A purchaser's mere assignment of his rights under executory contract does not cast on assignee any of personal liabilities imposed by contract on assignor, though contract provides that its stipulations shall apply to and bind respective parties' assigns, unless assignee expressly obligates himself to perform covenants binding on assignor, recognizes personal obligation to vendor, or claims or accepts benefits of full performance of contract.

12. Patents ⚷203

Partners, to whom one with whom patentees of chip steaks entered into agreement, granting him exclusive right to manufacture and distribute such steaks in state, assigned agreement, assumed no personal responsibility to one previously granted exclusive right to sell such steaks in certain counties by such assignor and prior assignees of right to manufacture and sell steaks, in absence of any provision in agreement for such assumption, though agreement contained provision purporting to bind parties' assigns; there being no fiduciary relationship between partners and assignor's grantee.

13. Appeal and Error ⚷786

Plaintiff's appeal from judgment entered for defendants when plaintiff declined to amend his third amended complaint after court sustained demurrer thereto was not subject to dismissal as frivolous, as plaintiff, under statute, would have three years after filing of remittitur with trial court clerk to bring action to trial. Code Civ.Proc. § 583.

14. Injunction ⚷118(2)

In action for damages and injunction against defendants' sale of patented chip steaks in certain counties, plaintiff stated no cause of action in third amended complaint, alleging defendants' refusal to be bound by agreements granting plaintiff exclusive right to sell such steaks in those counties after succeeding to rights of corporation to which one of grantors assigned new agreement, entered into with him by patentees after cancelling their agreement granting person under whom grantors and plaintiff claimed exclusive authority to manufacture and sell such steaks, and could not state cause of action on facts shown.

◆

Allan, Miller & Groezinger, San Francisco, for appellant.

Marvin Sherwin, Milo Ayer, Oakland, for respondents.

FINLEY, Justice pro tem.

This is an appeal from a judgment entered in favor of respondents following the sustaining of a demurrer to appellant's third amended complaint which appellant thereafter declined to amend.

As set forth in the complaint, the facts appear quite complicated. In their bare essentials, they are as follows: On August 25, 1936, W. J. Dubil and E. J. Hubik obtained a U. S. Patent for the preparation of meat to be sold under the trade name of "Chip Steaks." Some time prior to November 28, 1938 Dubil and Hubik granted to W. T. Carpenter exclusive authority to manufacture, sell and dispose of this commodity. W. T. Carpenter assigned this right to W. L. Perry and J. A. Carpenter, who in turn by agreement dated November 28, 1938 granted to appellant the right to buy "Chip Steaks" and an exclusive right to sell and deliver said product in San Joaquin County, California.

On February 7, 1939 W. L. Perry and J. A. Carpenter assigned all of their rights to manufacture, sell and dispose of "Chip Steaks" to C. V. Jacky, and on March 5, 1940 C. V. Jacky by agreement wherein it is stated that he is "doing business under the firm name and style of Chip Steak Company of San Francisco," granted to appellant the exclusive right to buy "Chip Steaks" for resale and delivery within the Counties of Sacramento, Yolo, and part of Solano.

Some time prior to September 19, 1942 Dubil and Hubik cancelled their agreement with W. T. Carpenter, under whom W. L. Perry, J. A. Carpenter, and in turn C. V. Jacky and appellant claimed, and on September 19, 1942 entered into a new agreement directly with C. V. Jacky. On December 1, 1945 this latter agreement was cancelled and Dubil, Hubik and Jacky entered into a new agreement. It is not so stated in the complaint but apparently somewhere along the way Jacky had ceased to do business under the fictitious name "Chip Steak Company of San Francisco" and had turned it into a corporation, for shortly after December 1, 1945 Jacky's agreement with Dubil and Hubik was assigned by him to the "Chip Steak Company of San Francisco," a corporation, and on November 16, 1946 this corporation assigned the contract to respondent "Cheney Bros. Chip Steak Company," a copartnership. Only three paragraphs of this assignment which contains all of the express undertakings by respondent are relevant here. They read as follows:

(1) "Whereas, seller and C. V. Jacky have heretofore entered into certain contracts for the distribution of such Chip Steaks in portions of such territory with the following persons; i. e." Ray Shutes (among others.)

(2) "Seller hereby releases and transfers to buyer the *sole* right to manufacture and *distribute* Chip Steaks in the State of California and to make use of the trade name of 'Chip Steaks' in said State and agrees that it will not compete with buyer in the manufacture or sale of such Chip Steaks in the said State during such time as buyer or buyer's successor in interest may be engaged in the manufacture or distribution of such product in said territory." (Emphasis added.)

(4) "It Is Further Agreed that buyer accepts the transfer of the privileges of said agreement subject to all the conditions thereof and will preserve seller harmless from any claim of violation of said agreement by buyer or any breach of agreements heretofore made between *buyer* and the persons named in the third paragraph of this agreement." (Emphasis added.)

From the above it will be noted that appellant had two separate contracts for the sale and distribution of Chip Steaks, both of which were operative and appellant's rights thereunder recognized by respondent's assignor at the time the assignment was made. The first was with W. L. Perry and J. A. Carpenter dated November 28, 1938, and the second was with C. V. Jacky dated March 5, 1940. The first granted appellant his rights thereunder "during the life of said patent," and further provided that it "is binding upon and shall inure to the successors and assigns of Licensor and upon the written consent of Licensor, to the successors and assigns of Licensee."

In the second contract rights given therein were to extend "during the life of said patent, or as long as first party has the right to manufacture said product within the territory herein designated * * *." It also provides: "This agreement is to bind the successors, heirs, executors, administrators and assigns of the respective parties hereto."

The complaint is in two causes of action. In the first appellant relies upon his agreement entered into on November 28, 1938 with Perry and Carpenter, and in the second he relies upon his agreement with C. V. Jacky dated March 5, 1940.

In the first cause of action appellant alleges that he "enjoyed all of the rights and benefits granted to him in his agreement of November 28th, 1938 * * * without interruption, to November 15th, 1946," and that although defendants at all times knew that the Perry and Carpenter agreement was still in full force and effect, they refused to be bound thereby after succeeding to the rights of the "Chip Steak Company of San Francisco."

In the second cause of action appellant alleges: "That although defendants at all times knew that the agreement between plaintiff and C. V. Jacky * * * was in full force and effect, nevertheless said defendants after succeeding to the rights of said Chip Steak Company of San Francisco have refused to recognize said agreement and have notified plaintiff that they refuse to be bound thereby."

Appellant seeks damages and an injunction restraining respondents "from soliciting for sale or selling the product known as 'Chip Steaks'" in the territory in which he claims this exclusive right.

Respondents' demurrer is both general and special. A number of items of claimed uncertainty, ambiguity and unintelligibility are specified. In addition to the general claim that neither count states a cause of action the demurrer further urges (1) "That the * * *, court has no jurisdiction of the subject" matter of either cause of action, and (2) "That the plaintiff has not legal capacity to sue."

The two latter points will be first discussed, for if either be well taken we would not have to go further.

[1, 2] Respondents' claim that a state court has no jurisdiction of the subject matter is apparently predicated upon the premise that the action involves a dispute concerning patent rights over which the federal courts have jurisdiction. But such is not the case. Appellant is not questioning patent rights or infringements or the validity of the alleged patent. From all that can be gathered from the complaint the rights claimed by both sides assume the validity of the patent and depend upon it for their existence. A state court may construe and enforce contracts relating to patents. Pendleton v. Ferguson, 15 Cal.2d 319, 101 P.2d 81, 688.

[3] Although the point that plaintiff has not legal capacity to sue is raised in the demurrer, no reason is stated, and respondents do not discuss the point in their brief. We therefore deem it to be not well taken and therefore abandoned.

[4] The main point to be decided is raised by the general demurrer. The question is whether respondents are under any legal obligation to appellant on account of respondents' accepting an assignment of and exercising the *sole* right to manufacture and *distribute* Chip Steaks in the State of California under the condition that in the assignment itself it was recited that respondents' assignor had outstanding contracts with appellant permitting appellant to distribute "Chip Steaks" in *parts* of California and where those contracts contained provisions purporting to bind assigns, but where these contracts were not assigned to respondents and where respondents entered into no express undertaking concerning them.

If under these circumstances respondents are under a legal duty to appellant it is because respondents' assignor could not by assigning to repondents the *sole* right to distribute "Chip Steaks" in California divest appellant of a previous license in good standing to buy "Chip Steaks" and to distribute them in specified areas of California or that by accepting the assignment with knowledge respondents impliedly recognized the rights claimed by appellant and took subject to these rights and the obligations owed by their assignor to appellant, thus constituting appellant pro tanto a third party beneficiary.

From our examination of the contracts to which appellant is a party we find nothing which could be interpreted as creating in appellant or conveying to him an interest in the master license granted by the patent owners any more than an agreement by an owner to furnish water under certain conditions would amount to a conveyance of an interest in the owner's water right. In Gause v. Pacific Gas & Electric Co., 60 Cal. App. 360, 212 P. 922, 923, (wherein the court held that the complaint did not state a cause of action) the Pacific Gas & Electric Co. was alleged to have entered into a written contract with one Levisee to sell and deliver to him water for the irrigation of certain rice land. It was alleged in the complaint that " 'Levisee sublet all of the above described parcels of land to plaintiff * * * for the crop season of 1919, * * for the planting and growing of rice, which facts the defendant well knew.' "

Plaintiff in that case claimed that the agreement to furnish water to the land conveyed an interest in the water right which became appurtenant to the land in question. In passing upon the point the court said, 60 Cal.App. at page 368, 212 P. at page 926: "There was no conveyance of a water right, but the contract was executory and provided for the sale of so much water under conditions therein enumerated. It was not a sale, but an agreement to sell, and respondent's obligation thereunder could be modified, suspended, or fully canceled by the happening of the conditions mentioned in said contract. The situation was therefore entirely inconsistent with the view that a water right was thereby vested in Levisee.' "

[5] By analogy we believe it may properly be said here that the agreement between Jacky and the patentors of "Chip Steaks" did not create in Jacky and his assignee an interest in the patent rights but merely a license to enjoy certain privileges thereunder, a right in personam, a part of which privilege he delegated to appellant also as a right in personam.

[6] Appropriate also to this case is this further language in Gause v. Pacific Gas & Electric Co., supra, 60 Cal.App. 360, at page 365, 212 P. 922, at page 924: "The obligation undertaken by respondent was to furnish water under certain conditions to said Levisee. Plaintiff was not a party to said contract and was not referred to in any manner. There is some pretense that the parties to said agreement had in view other persons and contemplated the irrigation of certain lands, but no attempt has been made to reform said contract, nor has any mistake or fraud been alleged or claimed. We must be guided, therefore, by the intention of the parties as expressed in said written instrument and conclude that said obligation was created in favor of Levisee and him alone, or one in privity with said contract. There is no claim, however, of privity."

It is true that in the instant case appellant was mentioned in the agreement of assignment to respondents, and the word "mention" about covers it. There was no undertaking of any kind for plaintiff's protection or benefit.

[7] Also the language in Diggs v. Pacific Gas & Electric Co., 57 Cal.App. 57, 206 P. 765 seems applicable here. The court there states, 57 Cal.App. at pages 63 and 64, 206 P. at page 768: "We are dealing with the question whether a person not a party to a contract may maintain an action for its violation, because he may have indirectly suffered detriment thereby or would have been benefited if the contract had been observed by the parties thereto. * * * The rule is that there must be privity and that remote damages to third parties cannot be recovered."

[8–10] It is the law, of course, that under the provisions of section 1559 of the Civil Code, a contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it. But in deciding whether a promise inures to the benefit of a third party the test is whether an intent to so benefit the third person appears from the terms of the contract. Le Ballister v. Redwood Theaters, Inc., 1 Cal.App.2d 447, 36 P.2d 827. The rule is well-established that in order to sustain an action an intent to make the obligation inure to the benefit of the third party must have been clearly manifested by the contracting parties. Wilson v. Shea, 29 Cal.App. 788, 157 P. 543. Where a contract incidentally benefits a third person but is not expressly made for his benefit, he cannot recover thereon. Chung Kee v. Davidson, 73 Cal. 522, 15 P. 100; Buckley v. Gray, 110 Cal. 339, 42 P. 900, 31 L.R.A. 862; Smith v. Anglo-California Trust Co., 205 Cal. 496, 271 P. 898; Ferguson v. Marsh, 37 Cal. App. 482, 174 P. 678.

The cases of Lisenby v. Newton, 120 Cal. 571, 52 P. 813, and Wilson v. Beazley, 186 Cal. 437, 199 P. 772, both involve assignments of contracts to buy real property. In both cases it was held that the assignee could not force a conveyance without paying but on the other hand he could not be compelled to pay the purchase price as there was no assumption of this obligation.

[11] The case of Armstrong Co. v. Shell Co. of California, 98 Cal.App. 769, 277 P. 887, involved the assignment of a royalty contract for the use of a patent. The contract was by its terms made binding upon the assigns of the licensee. The court there said, 98 Cal.App. at page 775, 277 P. at page 890: "The mere assignment by the purchaser of its rights under an executory contract does not cast upon the assignee any of the personal liabilities imposed by the contract upon the assignor, even though the contract provides that its stipulations are to apply and bind the assigns of the respective parties, unless the assignee expressly obligates himself to perform the covenants binding upon the assignor or recognizes his personal obligation to the vendor or claims or accepts the benefits of a full performance of the contract." See, also, Bryant v. Smith, 57 Cal. App. 214, 206 P. 1025.

[12] If respondents expressly assumed any responsibility toward appellant, it must be through some provision in the contract of assignment, and there is none. Respondents accepted no benefits from appellant nor sought any under his agreements. Appellant alleges in his complaint that after the assignment respondents refused to recognize his contracts or to be bound thereby. The assignment was obviously not made for the benefit of appellant as a third party beneficiary. According to the authorities discussed above, respondents would not even be liable, without express undertaking, to the patent owners for the obligations owing by their assignors, and this is so even in view of the fact that the very contract assigned contains provisions purporting to bind the assigns of the respective parties. This being the case, then certainly there would be no personal responsibility to strangers to the assigned contract without an express undertaking to that effect, and as stated above there is none. No fiduciary relationship of any kind existed between respondents and appellant. Appellant's cause of action, if any, lay against Jacky or the "Chip Steak Company of San Francisco," and not respondents. Bryant v. Smith, supra, 57 Cal.App. 214, 206 P. 1025.

[13] Respondents' contention that this appeal should have been dismissed as frivolous is without merit. Under the provisions of section 583 of the Code of Civil Procedure appellant would have three years after the filing of the remittitur with the clerk of the trial court within which to bring the action to trial.

[14] We hold that appellant has failed to state a cause of action against respondents in either count of his complaint and on the facts as they appear cannot do so.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

123 Cal.App.2d 376

PEOPLE v. REKULA.

Cr. 2956.

District Court of Appeal, First District, Division 1, California.

Feb. 19, 1954.

Prosecution for forgery. From adverse judgment of Superior Court, Alameda County, James R. Agee, J., accused appealed. The District Court of Appeal, Bray, J., held that where witnesses testified accused, in their presence, endorsed two checks on check blanks which had been stolen from business places, evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Forgery ⚷44

Evidence was sufficient to sustain conviction for forgery. Pen.Code, § 470.

2. Criminal Law ⚷742(1)

In action for forgery of two checks, whether mistake of witnesses who cashed the checks in testifying at preliminary hearing that they were endorsed in their presence was due to fact that defendant may have appeared to endorse checks, although actually not doing so, to witnesses' assuming that general practice was followed, to mistake, or to some ulterior motive, was a question of credibility for the jury.

3. Criminal Law ⚷671

In action for forgery wherein jury was excused for a brief period when district attorney stated he wanted to make a showing in absence of jury concerning unexpected testimony of a witness, court did not err in excusing the jury.

◆

Henry E. Rekula, San Quentin, in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Charles E. McClung, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendant appeals from a conviction of two counts of violation of section 470, Penal Code, and from denial of his motion for a new trial.

While represented at the trial by the public defender, defendant appears here in propria persona. He makes the blanket contention that the evidence was insufficient, that he was denied due process of law, that the witnesses against him committed perjury, that the district attorney was not "fair and impartial," that many sections of the United States Constitution, the California Constitution, and the Penal Code were violated, and that he is entitled to a reversal on all the "statutory grounds contained in Section 1181" Penal Code. He does not attempt to show in what manner his rights were violated nor give any specific support for his contentions. He merely refers to various pages of the transcript without indicating any connection between those pages and his blanket contentions. We have carefully studied the transcript and cannot find any instance of error nor of any denial of any of defendant's rights. While we doubt if the district attorney was wholly impartial (obviously he was endeavoring to convict defendant) we find no instance (and defendant has pointed out none) in which he was unfair.

Evidence.

In the first count it was charged that defendant falsely made, altered, forged, uttered, published and passed a certain described check that appeared to be a payroll check of Ace Dye Works and cashed by Robert Hall Clothing Company, knowing it to be false, altered and forged. Count 2 contained a similar charge as to what appeared to be a payroll check of A. M. Castle & Co. and cashed by Lucky Stores. A prior conviction of forgery charged was admitted by defendant.

First Count.

During the Columbus Day (October 12th) week end the Ace Dye Works was burglarized. Nothing appeared to be stolen but a book of blank payroll checks and a checkwriter. On October 22nd defendant appeared at the Robert Hall Clothing store in Oakland, made a $12 or $13 purchase and tendered a check for $67.94 identified as one of those stolen, which was signed for the Ace Dye Works with fictitious signatures and was made payable to "Paul Esterly." Defendant falsely stated that he was employed by the Ace Dye Works and presented an automobile driver's license issued to Paul Esterly. At the preliminary examination the witness who cashed the check testified that defendant endorsed it in his presence. At the trial the witness admitted he may have been mistaken in this respect, that while usually he required that a check be endorsed in his presence he could not recall whether or not that occurred in this instance.

Second Count.

The facts here were quite similar to those in the first count. Defendant had been employed by A. M. Castle & Co. from July 17th to August 15th. During the week end of October 24th, the Castle office was burglarized. Here, too, all that was taken were blank payroll checks and the check protector. October 28th defendant appeared at one of the Oakland Lucky Stores with one of these stolen checks signed for Castle with fictitious names and payable to Paul Esterly. Again defendant identified himself as Paul Esterly and produced an operator's license in that name. The witness who approved the check for cashing by the cashier testified at the preliminary that defendant endorsed the check in his presence. Like the witness in the first count, at the trial he testified that the check was already endorsed when he received it but that he asked defendant where Haight Street was (apparently the endorsement included Esterly's purported address), and defendant stated "San Francisco," so he asked defendant to write that on the check. Defendant then wrote the initials "S. F."

Defendant did not take the stand. A handwriting expert produced by him testified that in his opinion the "Paul Esterly" endorsement was not written by defendant but by one Phillip Esterly, now deceased, exemplars of whose handwriting the expert had, and that the signatures of the purported makers of the checks were not written by defendant. The witness could not say whether the "S. F." on the second check was or was not written by defendnat.

[1, 2] It is obvious that the evidence was sufficient under both counts. Whether the mistake of the witnesses who cashed the checks in testifying at the preliminary that they were endorsed in their presence was due to the fact that defendant may have appeared to endorse the checks, although actually not doing so, to the witnesses assuming that the general practice was followed, to mistake, or to some ulterior motive, was a question of credibility for the jury to determine.

The modus operandi here was almost identical with that in People v. Graff, 104 Cal.App.2d 32, 230 P.2d 654, where, as here, the charge was the same and none of the writing on the checks was that of the defendant. There the conviction was upheld, as it should be here.

[3] Defendant states that the court "transcended its jurisdiction" by allowing the jury to recess while the trial continued. Apparently he refers to the situation which arose when a witness for plaintiff evidently surprised the district attorney by testimony contrary to what the latter expected the witness to testify. Thereupon the district attorney stated he wanted to make a showing in the absence of the jury. The jury was excused. Thereupon the district attorney asked the witness if the preceding Friday the witness had not stated in the presence of a certain witness that the witness was present with defendant when the latter broke into the Castle office and got a check book. The witness denied making such statement. It was brought out that the witness was in custody and the previous night had been placed in the jail tank with defendant and talked to him concerning the case. When the jury returned the witness was excused. Not only was there no error in excusing the jury, but it was the eminently proper thing to do.

The judgment and order denying new trial are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

123 Cal.App.2d 406

LOUKNITSKY v. LOUKNITSKY.

Civ. 15681.

District Court of Appeal, First District, Division 1, California.

Feb. 24, 1954.

Rehearing Denied March 26, 1954.

Suit by wife against husband for divorce on ground of extreme cruelty. The Superior Court, City and County of San Francisco, Theresa Meikle, J., awarded wife a divorce and divided the community property, and wife appealed with respect to findings as to community property and as to alimony. The District Court of Appeal, Fred B. Wood, J., held that evidence sustained finding that all the property belonged to the community.

Judgment affirmed.

1. Evidence 🔑81

In absence of evidence in divorce action as to the applicable laws of China wherein husband and wife resided before entering California, the laws of China regarding property of husband and wife would be presumed to be the same as the laws of California.

2. Divorce 🔑266

Intent of husband and wife at time husband executed a writing apparently relinquishing all claims to money in possession of wife who was attempting to procure visa for entry into the United States, was question of fact for determination by trial court, and the execution of such writing did not, as a matter of law, operate to convert the money in possession of the wife from community into separate property of the wife.

3. Husband and Wife 🔑264

In divorce suit, wherein wife claimed certain realty as her separate property, and it appeared that deed of conveyance named only wife as grantee, evidence indicating that husband did not know that property had been taken in wife's name only, and that he had made payments on the mortgage, was sufficient to rebut presumption that house was separate property of wife, and supported finding that the home property belonged to the community. Civ.Code, § 164.

4. Divorce 🔑252

Award to wife, who obtained divorce because of extreme cruelty of husband, of household furnishings and equipment, linens and dishes, and which required husband to make all payments on real estate mortgages for six months, during which time wife was to occupy the home rent free, with home to thereafter be sold and proceeds equally divided between husband and wife, was not an abuse of discretion as to wife, when such division alone gave the wife more than half the community property. Civ.Code, §§ 146, 147.

5. Divorce 🔑252

The question of the amount of the award of community property in excess of 50 percent to be made to the nonoffending party rests largely in the discretion of the trial court. Civ.Code, §§ 146, 147.

6. Divorce 🔑235

Where both husband and wife, who obtained divorce because of extreme cruelty of husband, were gainfully employed, and their only child was over eighteen years of age and in active military service, and wife was awarded more than half the community property, and husband was ordered to make mortgage payments for six months on home which wife was to enjoy rent free, refusal of court to grant wife alimony as such was not an abuse of discretion.

Olga Louknitsky, in pro. per.

Alfred J. Hennessy, San Francisco, for respondent.

FRED B. WOOD, Justice.

Plaintiff Olga Louknitsky has appealed from an interlocutory decree which awarded her a divorce upon the ground of extreme cruelty. She asserts error in (1) the finding that all the property belonged to the community, (2) the portion of the judgment which ordered sale of the realty and division of the proceeds, and (3) failure to award alimony to her.

The parties waived findings of fact. However, the court included in the introductory portion of the decree a finding that from all the evidence it appeared "that all the material allegations of the complaint are true, save and except that, that certain real property commonly known as No. 248—10th Avenue, San Francisco, California, and the contents thereof, consisting of household furnishings and equipment, linens and dishes, is the community property of the parties hereto, and such is found to be the fact." Also appellant has furnished a reporter's as well as a clerk's transcript.

(1) *Does the evidence support the finding that the property described is community property?*

There is substantial evidence that the major portion of the funds[1] available for investment in the property described were derived from the earnings and the proceeds of the earnings of the husband, defendant Vladimir Louknitsky, while the parties resided in Shanghai, China, before coming to California.

[1] There being no evidence concerning the applicable laws of China or of Hongkong (where they resided for a short time before coming to California), those laws are presumed to be the same as the laws of California. Christ v. Superior Court, 211 Cal. 593, 598, 296 P. 612. Accordingly, the funds acquired in China, under the circumstances indicated, are deemed community property. Olga came to this country, directly to California, some little time ahead of Vladimir, who joined her here. Each has resided here ever since arrival.

The only other source of funds since they took up residence in this state has been the compensation received by either of them when gainfully employed. For a period of about ten months after her arrival here, he sent her $70 a month from his earnings. There is evidence that since his arrival he has been paying the installments on the purchase price mortgages which she executed upon acquiring the house and lot in San Francisco.

There are only two factors which might cast a doubt upon the community character of the property thus acquired.

In January, 1946, Vladimir left Shanghai for Indo China as a member of the French police. Prior to departure he endorsed certain checks to Olga for collection, the funds being "frozen," and assigned to her the lease of the premises in which they resided, so that she might sell it and join him. She also sold a piano, and then joined him in Hongkong.

She later decided to come to this country. Shortly prior to her leaving he executed the following document: "Hongkong, September 23rd, 1947, to whom it may concern: I, the undersigned, state that I have no objection to the departure for the United States of America of my wife, Olga Louknitsky, and our son, Vladimir Louknitsky, thirteen years of age, and I shall not have any claims to money my wife has in her possession. (sgd.) V. Louknitsky."

Olga claims that Vladimir's execution and delivery of this document, had the effect of an "engagement or transaction" or "contract" between them, as husband and wife, converting into her separate property all of the money and property mentioned. See Civil Code, §§ 158 and 159. That does not necessarily follow, in view of the circumstances which attended that transaction.

Asked if her husband gave her a writing in which he stated he had no claim on the money, Olga responded: "Yes—and but for—unless I had this money, I would not have left; I could not have left without that money" [$4,750 of the community funds above described]. The court then asked and the witness replied: "Well, isn't it true that when you are getting a visa in China and you are leaving there, before you can come into the United States, you must show that you have enough money of your own to take care of you; and isn't it true that in order for you to come into the United States, your husband signed for you saying that this was your money, because otherwise you could not have gotten the visa? A. You see, your Honor, my case was different. I came here with a nonpreference visa. It took me two years to wait for this visa, and nobody asked me if I had any money in the United States Consulate." Upon cross-examination, asked if her husband signed that paper so that she would be able to come into the United States, she said, "Yes, he signed that I had the money." Asked if he signed that which enabled her to come in and to bring him in, she replied, "Well, if you say so."

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[1] Those funds also included about $700 received by Olga in settlement of a claim of hers for injuries caused by the negligence of a medical or dental practitioner.

Vladimir testified that he signed and gave Olga that paper, adding "It was indispensable; otherwise she wouldn't be able to come to America." At the conclusion of the trial, the court made this statement: "Now we come to the house and there is no question in my mind that that is community property and that there should be an order for the sale of this house and for the division of the amount of money realized therefrom. Then each one can purchase a place if he or she desires to do so and I feel that that is fair to both sides."

It was competent for the trial court to draw the inference that the community character of the property involved was not intended to be changed and was not changed by the paper which Vladimir signed and gave to Olga upon the eve of her departure for America. It did not take the form of a bilateral agreement between them. She was not a formal party to the instrument, nor did she sign it. The paper did not speak of the character of the money (whether community or separate property for example) or of an intended change in its character. It merely said he had no objection to the departure of his wife and son and that he would "not have any claims to money my wife has in her possession." That, conceivably, evinced merely an intent that she have and be able to show to the appropriate immigration officials that in seeking to enter this country she possessed a substantial sum of money (over $4,000) available for her support and that of her son, after their arrival. Such interpretation is supported by the testimony of both parties that he gave her this paper to enable her to enter the country.

[2] The intent of the parties in such a transaction is a question of fact for determination by the trial court; a determination that is not to be disturbed when, as here, supported by the evidence. Perdicalis v. Perdicalis, 92 Cal.App.2d 274, 206 P.2d 650. Certainly, we cannot hold, as a matter of law, that the transaction described operated to convert that money from community property into separate property of the wife.

[3] The other factor which might cast a doubt upon the community character of the house and lot acquired in San Francisco, inheres in the fact that the deed of conveyance ran to Olga only, not to Olga and Vladimir as grantees. Normally, in such a case, there arises a disputable presumption that land thus conveyed is the separate property of the wife; in this case, Olga. Civil Code, § 164.

However, the purchase was made and the deed executed and delivered before Vladimir's arrival here. He testified that he did not know, until some time after the event, that she took the property in her name only; also, that after his arrival here he paid all the installment payments on the mortgage until he was "vacated" by the court from the house, some time prior to the trial. These circumstances, particularly the husband's lack of knowledge at the time of the purchase that Olga was the sole grantee and the absence of any agreement that the money, already held to be community property, should be converted into separate property by the wife investing it in her name, tend to rebut the presumption. There is thus ample support for the trial court's finding that the home property belongs to the community.

(2) *We find no error in the division which the court made of the community property.*

[4, 5] The court awarded the wife all the household furnishings and equipment, linens and dishes, and then ordered Vladimir to make all payments on the real estate mortgages for six months (Olga to occupy the home during that period, rent free), the home to be sold and the proceeds equally divided between them. This alone

gave the wife more than half the community property. It comports with the division sanctioned by statute, Civil Code, § 146, which commits the segregation and allotment of the community property to the sound discretion of the trial court, when a divorce is decreed upon the ground of extreme cruelty. See Webster v. Webster, 216 Cal. 485, 14 P.2d 522. The nonoffending party is entitled to more than one-half in such a case. The question of the amount of the award in excess of fifty percent is largely in the discretion of the trial court. LeFiell v. LeFiell, 108 Cal.App.2d 321, 239 P.2d 61. The trial court has authority to order the sale of community property and a division of the proceeds if partition is not practicable. Civil Code, § 147. It would not seem practicable to divide a single family dwellling house.

Appellant directs attention to the award to her of all bank accounts standing in her name and questions that award because, she asserts, there are no such bank accounts. Our attention has not been directed to any testimony on this subject. We do find that in describing the travelers' and other checks which she brought into this country, appellant spoke of two checks (the proceeds of the sale of a lease in China) which she said "were combined; and the money is here; I have a statement from the bank"; and that the amount is $812. This, apparently, is what the court had in mind when awarding Olga all bank accounts standing in her name. In her opening brief appellant refers to this as "check No. 10562 of the National City Bank of New York for $ U. S. dollars 811.49" and says it "was given to the appellant by her husband when he was leaving Shanghai for Indo China. At that moment this check was still 'frozen' in the bank could not be cashed by the defendant and he endorsed it to his wife." We interpret the award of bank accounts standing in Olga's name as including an award of this check to her. The value of this check, whatever it is, adds to the share of the community property awarded appellant. We find no error in this portion of the decree.

(3) *Appellant assigns as error the failure of the court to grant her alimony.* We find no error in it.

[6] Both parties are gainfully employed. Their only child, a son 18 and one-half years old, was in active military service at the time of the trial. The order that the husband make the mortgage payments for six months (the wife to enjoy possession rent free) and the award of attorney fees to the wife, coupled with other factors discussed herein, indicate no basis for a reviewing court to find that the trial court committed any abuse of discretion in not granting alimony as such.

Moreover, it appears that at the conclusion of the trial the court stated the awards which would be made and would not be made, expressly stating that there would be no alimony. Thereupon appellant's counsel suggested that findings be waived, and they were waived. If appellant had any additional evidence bearing upon her need for alimony, then was the time to request a reopening of the case to offer it.

There remains for consideration a motion by the defendant to strike plaintiff's reply brief from the files of the court upon the asserted ground that it consists of irrelevant and scandalous statements.

We have examined that brief. It does treat of a number of matters that are not in the record, but a litigant who appears in his or her own behalf and is not an attorney should not be held to the same standard in that regard as a member of the State Bar. However, the brief does contain some matter that is scandalous in nature as well as outside the issues and the record. Those portions should be stricken.

The judgment is affirmed. That portion of appellant's reply brief which begins with the first full paragraph on page 4 thereof and ends at the bottom of page 7 is stricken from the brief.

PETERS, P. J., and BRAY, J., concur.

123 Cal.App.2d 380

SECURITY-FIRST NAT. BANK OF LOS ANGELES

v.

TAYLOR et al.

Civ. 19869.

District Court of Appeal, Second District, Division 2, California.

Feb. 19, 1954.

Rehearing Denied March 15, 1954.

Hearing Denied April 14, 1954.

Action was brought to quiet title to two motor vehicles. The Superior Court of Los Angeles County, J. A. Smith, J., entered judgment adverse to certain of the defendants, and they appealed. The District Court of Appeal, Moore, P. J., held that where entruster and trustee executed written agreement whereby entruster was to supply funds to trustee to procure motor vehicles to be floored on trustee's premises for sale at retail, and entruster's interest was to be secured by trustee's trust receipts, and they filed with Secretary of State statement of trust receipt financing as provided by Uniform Trust Receipts Law, and buyers of automobile from trustee, before buying automobiles, arranged with bank for loans, and purchase prices of automobiles were paid in full to trustee, and bank took conditional sales contracts as assignee to secure loans to buyers, bank was "purchaser in ordinary course of business" within meaning of Trust Receipts Law and took title to automobiles free of entruster's security interest.

Judgment affirmed.

1. Chattel Mortgages 🔑138(1)

Where entruster and trustee executed written agreement whereby entruster was to supply funds to trustee to procure motor vehicles to be floored on trustee's premises for sale at retail, and entruster's interest was to be secured by trustee's trust receipts, and they filed with Secretary of State statement of trust receipt financing as provided by Uniform Trust Receipts Law, and buyers of automobile from trustee, before buying automobiles, arranged with bank for loans, and purchase prices of automobiles were paid in full to trustee, and bank took conditional sales contracts as assignee as security for loans to buyers, bank was "purchaser in ordinary course of business" within meaning of Trust Receipts Law and took title to automobiles free of entruster's security interest. Civ. Code §§ 3012 to 3016.16, 3016.3, 3016.5(2)(a)(i).

2. Banks and Banking 🔑116(1)

Incidental knowledge of manager of one branch of bank that new depositor was planning to engage in trust receipt financing with automobile dealer did not give loan officers of other branches of bank actual notice of such financing arrangement so as to preclude bank from taking title to automobiles free of new depositor's security interest in automobiles when bank financed purchase of automobiles by buyers from dealer and took conditional sales contract as assignee for security. Civ.Code §§ 2332, 3012 to 3016.16, 3016.3, 3016.5(2)(a)(i).

John W. Preston, Millsap & Schaumer, Los Angeles, for appellants.

Chester E. Cleveland, Jr., Los Angeles, for respondent.

MOORE, Presiding Justice.

Respondent sued to quiet title in itself to two motor vehicles. The judgment declaring respondent to be the legal owner and enjoining appellants from requesting the issuance of certificates of ownership in the name of Ellis R. Taylor or his corporation or of any other person, firm or corporation is here under attack. The subjects of the action are a sedan and a coupe.

Respondent has its principal office in the city of Los Angeles and numerous branches throughout the county of Los Angeles and the state. The Taylor Manufacturing Company, an Illinois corporation, is referred to herein as "Taylor Company." Its president is Ellis R. Taylor who resides in Los Angeles. "Car Leasing of America, Inc.," herein referred to as "CLA" or trustee, while not a party to the action, was at the time of the events narrated herein engaged in buying and selling used automobiles on a lot on West Pico Boulevard in Los Angeles. The events that gave birth to the controversy arose out of the respective transactions of respondent and Taylor Company with CLA. For the sake of clarity, it is to be observed at the outset that the facts involved in this discussion relate primarily to "The Uniform Trust Receipts Law", a legislative enactment of 1935 as sections 3012 to 3016.16 of the Civil Code.

On October 11, 1951, Taylor Company as entruster and CLA as trustee executed an agreement in writing whereby the entruster was to supply funds for procuring motor vehicles to be floored on the premises of CLA to be sold at retail, the interest of the entruster to be secured by trust receipts of the trustee. Such arrangement is referred to as "flooring automobiles for sale." Seven days later they filed with the secretary of state a "statement of Trust Receipt Financing" as provided by section 3016.3.[1] Coeval with such filing, Taylor Company by its president opened a commercial account in the sum of $25,000 with respondent's branch office on Pico Boulevard at Alvarado Street. According to his testimony, in his conversations with the manager and assistant manager of that branch, President Taylor made certain statements with respect to trust receipt financing and his company, but Mr. Wyneken, assistant manager of the Pico branch, testified that Taylor merely said that his company "was going to carry on some business with CLA in connection with financing," and that nothing was said about an actual agreement between Taylor Company and CLA. Mr. Wyneken testified that he told Mr. Taylor that he was familiar with the operation of what they call trust receipts or flooring cars, but he further testified that he knew of no such arrangement between Taylor Company and CLA; that he had never been employed at respondent's Vermont Branch; had no part in the negotiations for a loan to buy the sedan; and had never previously seen the conditional sale contract. This testimony is the sum total of the proof of "actual notice" to respondent of the contract between CLA and Taylor Company. No positive mention was made to Wyneken that Taylor Company had filed the statement with the secretary of state.

The Sales of the Two Automobiles

The pertinent facts concerning the manner of the sales of the sedan and the coupe are substantially identical. The buyers were total strangers to each other. They purchased from CLA at different times. Both used the same method of financing. Each was a patron of a different branch bank of respondent. Chronologically, the sedan was sold first.

CLA had the 1950 sedan on its floor. Taylor Company held an interest under the flooring agreement. About October 25 along came customers, Mr. and Mrs. Mizrahi, who immediately determined to acquire the car. They engaged the All State Insurance Company as agent to arrange for a loan with which to make the purchase. It applied to the branch of respondent at 85th Street and Vermont Avenue. After an investigation as to the responsibility of the Mizrahi family, that branch agreed to extend them credit to the extent of $1251. Such sum, added to other assets of the customers, would pay the $1879.52 price to CLA. The sale was handled by Mr. Dawson on behalf of CLA. The court found that neither of the buyers nor respondent had any knowledge of the trust receipt now relied upon by Taylor Company. It may serve to keep clear the evidence of notice by observing at this point that the branch on 85th Street is about six miles from the Pico branch where Taylor Company had its account; that Mr. Weigel, manager of the loan department at the 85th Street branch, testified that all his negotiations and the final agreement to make the loan to Mizrahi were with an agent of the All State Insurance Company acting for Mizrahi; that he had no contact with CLA and the latter had no financing agreement with respondent at any branch. In consummating the purchase, Mizrahi delivered to CLA his old car at $578.51; paid cash $50; delivered the draft drawn on the Vermont branch for $1,251 and executed a conditional sale contract which Mr. Weigel had prepared. After Mizrahi and CLA had executed the conditional sale contract, he delivered the draft and the contract to CLA. Thereupon, the latter forwarded to the branch at 85th and Vermont (1) the conditional sale contract duly assigned to respondent; (2) its warranty of the sedan's title in CLA; (3) a dealer's certificate of report of sale; (4) an application for the car's registration showing Mizrahi as registered owner and respondent as legal owner; (5) the purchase draft with request for payment. The warranty of CLA declared itself to be owner of the sedan, subject only to the rights of the purchaser (Mizrahi) under the contract then about to be assigned and delivered by CLA to respondent.

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[1] Civil Code, section 3016.3. "(1) (a) If the entruster within the period of thirty days specified in subdivision one of section 3016.4 files as in this title provided, such filing shall be effective to preserve his security interest in documents or goods against all persons, save as otherwise provided by sections 3016.4, 3016.5, 3016.6, 3016.7, 3016.10, and 3016.11 of this chapter.

"(b) Filing after the lapse of the said period shall be valid; but in such event, save as provided in paragraph (b) of subdivision two of section 3016.5, the entruster's security interest shall be deemed to be created by the trustee as of the time of such filing, without relation back, as against all persons not having notice of such interest.

"(2) The taking of possession by the entruster shall, so long as such possession is retained, have the effect of filing, in the case of goods or documents; and of notice of the entruster's security interest to all persons in the case of instruments."

On receipt of the papers, the Vermont branch issued its check for $1251 payable to CLA which promptly cashed it. Aside from the last mentioned transaction and exchange of documents and payment of the draft, the Vermont branch had no prior or concurrent dealings with CLA; no experience with or knowledge of the Taylor Company; no knowledge of the latter's dealings with CLA. There is an utter lack of proof (1) that the transaction of Mizrahi and the Vermont branch of respondent was not in good faith, or (2) that either Mr. or Mrs. Mizrahi had actual knowledge of a prior encumbrance on the sedan adverse to the title warranted by CLA.

Referring to the "trust receipt" and its function with regard to the sedan sale, it is dated November 1, 1951, exactly twenty-one days after Taylor Company made its flooring agreement with CLA, fourteen days after the agreement had been filed with the secretary of state, and *seven days after* Mizrahi had made his purchase of the sedan. On the latter date, the ownership certificate on the vehicle was not in the name, or possession of GLA or of Taylor Company. That certificate was then at the Seventh and Grand branch of respondent as *security for a debt of Transportation Lease Company* which had sold the sedan to CLA.

As further proof of the dissociation of the sale to Mizrahi from the trust receipt, on October 21, 1951, CLA executed a draft on Taylor Company at the Alvarado branch of respondent payable to Transportation Lease Company for $1275 for the sedan in question. It was endorsed by the payee and forwarded to the Seventh and Grand branch with directions to sign the name of such payee to the certificate of ownership of the sedan. The draft was received at the Seventh and Grand office on October 26, 1951, and it was by that branch, as attorney in fact for Transportation Lease Company, promptly so signed and was also signed by the bank as legal owner. The signature of respondent was affixed "without warranty" which was a release of any debt that might be due the bank by the Transportation Lease Company. In other words, neither condition nor title of the automobile was warranted.

The purchase of the coupe for $1978 was consummated in a manner similar to that of the sedan's purchase. It was effected by means of a loan to Mr. and Mrs. Knaggs by respondent's branch on Ventura Boulevard, about eight miles west of the CLA premises. After the latter had signed the conditional sale contract and delivered the coupe to its customers, it promised the Knaggs to cause the transfer of registration showing them to be the registered owners and respondent the legal owner. At the same time, it returned to the Ventura Boulevard branch the conditional sale agreement properly assigned to respondent accompanied by a warranty of title, dealer's certificate of report of sale, and an application for registration showing Mr. and Mrs. Knaggs as purchasers and respondent as legal owner. The warranty forwarded to the Ventura Boulevard branch declared CLA to be the owner subject only to the rights of the new purchasers. The latter branch had never dealt with CLA; had no knowledge of Taylor Company. There is neither proof nor suspicion that the loan transaction of the Ventura Boulevard branch with Mr. and Mrs. Knaggs was otherwise than sincere and honest. Neither had any actual knowledge of a claim of lien by Taylor Company.

Appellants contend that their right to the legal title of the cars must prevail because their security interest was protected by trust receipts that existed prior to respondent's acquisition of the conditional sale contracts. It is true that a "trust receipt transaction" is legal and valid and protects the interest of the entruster in many situations. However, the Uniform Trust Receipts Law, Civil Code, § 3016.5(2)(a)(i) [2] provides that where the trustee under the trust receipt transaction has liberty of sale and sells to a buyer in the ordinary course of trade, *such buyer takes free of the entruster's security interest* in the goods so purchased and no filing shall constitute notice of the entruster's security interest to such a buyer. Such provision emphasizes that a purchaser in due course of trade is under no duty to consult the records of the secretary of state.

Although it is admitted that Mr. and Mrs. Mizrahi were buyers in the ordinary course of trade, appellants contend that the bank is not in the position of such a buyer, but is rather the purchaser of a conditional sale contract after the goods have been sold. In support of this they argue that there was no loan from the bank to Mizrahi since there is no note or other evidence of such debt, and that the bank did not enter the automobile purchase transaction until it acquired the conditional sale contract as assignee. The evidence and findings do not support appellant's position.

[1] Before the sale was consummated, a loan from the bank was applied for, the credit standing of the prospective purchasers was checked, the bank made a commitment to the purchasers for the amount desired and an automobile purchase draft for this amount was issued to the purchasers. Instead of taking the promissory note of the purchasers at that time, the bank utilized the conditional sale contract and made assignment of same to itself a condition of payment of the draft. CLA never envisioned itself as the party carrying the financing transaction and there is no indication that it would have sold the car without the prior commitment by the bank to the purchasers. The contract was, itself, evidence of the purchaser's debt to the bank. Such a transaction does not prevent respondent from being in the position of a purchaser in the ordinary course of business. Commercial Credit Co. v. Barney Motor Co., 10 Cal.2d 718, 719, 721, 76 P.2d 1181; Bank of America Nat. Trust & Savings Ass'n v. National Funding Corp., 45 Cal.App.2d 320, 322, 330, 333, 114 P.2d 49. In Bank of America Nat. Trust & Savings Ass'n v. National Funding Corporation, supra, the purchase transaction was identical with those involved in the instant action. There, a Mr. Knights examined a coupe in the sales room of the merchant and was pleased with the car, but was in need of financial aid to con-

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[2] Civil Code, § 3016.5

"(2) Where a purchaser from the trustee is not protected under subdivision one hereof, the following rules shall govern:

"(a) Sales by trustee in the ordinary course of trade.

"(i) Where the trustee, under the trust receipt transaction, has liberty of sale and sells to a buyer in the ordinary course of trade, whether before or after the expiration of the thirty-day period specified in subdivision one of section 3016.4 of this chapter, and whether or not filing has taken place, such buyer takes free of the entruster's security interest in the goods so sold, and no filing shall constitute notice of the entruster's security interest to such a buyer."

summate his purchase. He requested the Bank of America to arrange a loan of $754.21. The bank approved his application and the money was advanced in the following manner: A conditional sale contract was drawn and executed wherein Knights was named as purchaser and the merchant as seller. It described the coupe and recited the usual provision of reservation of title in the seller until payment is made. The merchant then executed an assignment of the contract to the bank, coupled with a warranty of title. The contract, assignment and warranty were delivered to the bank which thereupon issued its sight draft for $754.21 and on December 23, 1936, the money was paid to the merchant. When six weeks passed without receipt of his license and registration slip as promised by the seller, Mr. Knights investigated and learned that the seller had gone out of business. It was determined that the automobile had been in the possession of the merchant pursuant to a flooring agreement and that defendant, National Funding Corporation, was the entruster, holding a trust receipt executed by the vendor-merchant. The judgment awarding legal title of the coupe to plaintiff bank was based on two independent grounds. It is true that not all the facts which were held to estop National Funding Corporation from asserting title against the Bank of America are present in the case at bar; however, the court stated, "In addition to what we have said with reference to estoppel, we have reached the conclusion that the provisions of the Uniform Trust Receipts Law are decisive of the questions presented on this appeal and require an affirmance of the judgment * * * the coupe was sold in the ordinary course of trade to a buyer acting in good faith and without notice of the lien of the National Funding Corporation. As the purchase price was paid in full it follows that the buyer took 'free of the entruster's interest in the goods so sold'." In the instant action, the total purchase price was paid in full to the trustee, CLA. Hence, the buyers took title free of the entruster's interest.

[2] Appellants present the argument that respondent had actual notice of the flooring arrangement between the Taylor Company and CLA and therefore the Company's prior interest in the automobiles must prevail. This contention that respondent had actual notice of the Taylor-CLA flooring contract is based on the facts (1) that the manager and assistant manager of the branch wherein both the Taylor Company and CLA had their accounts, were told by Mr. Taylor that such an arrangement existed, and (2) the imputation of such knowledge to the loan officers of the other two branches at which the loans were transacted. Such contention is contrary to law. While the Civil Code, § 2332, provides that as "against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other", yet it cannot be said that the incidental knowledge of the manager of one branch of a bank that a new depositor is planning to engage in trust receipt financing with a used automobile dealer ought, in good faith and in the exercise of ordinary care and diligence, to be communicated to the loan officers of all other branches of the bank. It would be an unreasonable burden on trade and commerce to require a bank and each of its branches in a sprawling empire of banks to know the innumerable facts daily communicated to each branch by its numerous patrons. In Hansen v. Bank of America Nat. Trust & Savings Ass'n, 101 Cal.App.2d 300, 303, 225 P.2d 665, the court did not impute the knowledge of one clerk as to the purpose of a depositor's check to another clerk in the same branch dealing with the same check later in the same day. In Wiese v. Corn Exchange Bank Trust Co., 240 App.Div. 198, 269 N.Y.S. 740, 742, written notice to five branches of defendant bank was held not to be notice to the manager of a sixth branch in the same city that certain bonds which he had accepted as security for a loan had been stolen.

In Commercial Credit Co. v. Barney Motor Co., 10 Cal.2d 718, 76 P.2d 1181, the sale of an automobile was involved in circumstances not unlike those of the case at bar. It was contended that the lender bank had notice of the prior interest of the entruster by reason of the facts that the bank was familiar with trust receipt financing and that the dealer had previously indicated to the bank that he planned to floor automobiles with some financier and had inquired whether the bank were interested in participating. The court rejected this argument and held that this information was not sufficient to put the bank on inquiry as to the title of the automobile in question. Id., 10 Cal.2d at page 721, 76 P.2d at pages 1182, 1183.

In support of their contention that respondent did not acquire title to the sedan and the coupe free of Taylor Company's security interest by its purchase of the conditional sale contracts on the two cars, appellants cite General Motors Acceptance Corporation v. Associates Discount Corporation, Mun.Ct., 38 N.Y.S.2d 972. G.M.A.C. floored cars with Mr. New, a new and used car dealer, and the latter sold many of his conditional sale contracts to Associates Discount Corporation who furnished the blank contract forms for Mr. New's use. In making such sales, there were no arrangements between the buyers and Associates Discount Corporation prior to the purchases of the cars. There was actual notice to Associates Discount Corporation of the trust receipt financing of New by G.M.A.C. Such notice resulted from the facts (1) that the office manager of ADC and his assistant who purchased the conditional sale contract were also engaged in trust receipt financing with Mr. New; and (2) that they and G.M.A.C. kept each other informed as to the serial numbers of cars on which each held trust receipts. Not to be overlooked is the fact that this municipal court judgment was reversed on the ground of election of remedies and the trust receipt priority issue was not considered on the appeal. It is thus seen that the General Motors Acceptance Corporation case holds merely to the general law: The holder of such a contract of conditional sale which is not negotiable is an assignee thereof who stands in the shoes of the assignor; he takes only such rights as the assignor had and is subject to the same defenses as he. There is nothing in the cited case bearing specifically upon the issues at bar.

Appellant relies upon C. I. T. Corporation v. Commercial Bank, 64 Cal.App.2d 722, 149 P.2d 439, and National Funding Corporation v. Stump, 57 Cal.App.2d 29, 133 P.2d 855. Neither is applicable to the present action. In the C. I. T. Corporation case, the contest was between two parties who claimed to be entitled to the protection afforded entrusters under the Uniform Trust Receipts Law. C. I. T. had sold cars to the dealer and held his trust receipts for security. The bank had advanced money to the dealer on the same cars while on the sales floor, taking an instrument which the court construed as a trust receipt. There was never a sale to a buyer in the ordinary course of trade. In the National Funding Corporation case, the plaintiff had loaned money to the dealer and taken a chattel mortgage on the automobile in question as security. The defendant's prior interest in the vehicle was secured by a trust receipt. The court held that plaintiff was negligent in not discovering the prior interest in that it relied upon an invoice which on its face showed that the dealer was not the owner, and, that the dealer made out the usual dealer's report of sale from himself as dealer to himself as an individual in the presence of the plaintiff. Here, also, there was no sale in the ordinary course of trade.

Appellants assert that findings XI and XII fail to support the judgment. Not only do they misread these findings, but they ignore findings IV, V, VI, VII, IX, XV, XVI, XVII, XVIII, and XX which also support the judgment. By the latter findings it was determined that by virtue of the loan, the preparation and execution of the conditional sale contract, the delivery of the automobile purchase draft, the assignment of such contract to respondent, and the warranty of a clear title by CLA, respondent's ownership was established. If the officers of CLA could not remember Taylor Company's claim to a lien on the automobiles in question while issuing its warranty of title, how could the scattered officers of respondent's branches have knowledge of conversations of its branch managers with patrons concerning the deposits of the latter and their plans for business?

Appellants present additional arguments in their briefs, including one that some twenty findings "are not supported by any competent sufficient evidence and are insufficient to support the judgment herein." Underlying all these assignments of error is their divergent view of the status of the bank as a buyer in the ordinary course of trade without actual knowledge of a prior interest held by appellants. Since the status of respondent has been determined, these arguments are no longer pertinent.

The judgment is affirmed.

McCOMB and FOX, JJ., concur.

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123 Cal.App.2d 944

PEOPLE v. WEXNER.

Cr. 5096.

District Court of Appeal, Second District, Division 1, California.
March 1, 1954.

Accused was convicted of grand theft. The Superior Court, Los Angeles County, Orlando H. Rhodes, J., entered judgment of conviction and accused appealed. The District Court of Appeal, Drapeau, J., held that amended information that charged grand theft was sufficient and that evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Larceny 🔑28(4)

Amended information that charged grand theft was sufficient.

2. Larceny 🔑65

Evidence was sufficient to sustain conviction for grand theft.

Meyer L. Wexner, in pro. per.

Edmund G. Brown, Atty. Gen., and Alan R. Woodard, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

Defendant was convicted of grand theft. He admitted two prior felony convictions, for which he was imprisoned in other states.

The public defender represented defendant on his trial by the judge of the superior court. On his appeal, defendant has prepared his own briefs. He contends that the amended information does not state a criminal offense, and that the evidence is insufficient to support his conviction.

[1, 2] This court has carefully gone over the record. There is no merit in either contention.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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123 Cal.App.2d 512

MATTOON v. STEIFF.

Civ. 8317.

District Court of Appeal, Third District, California.
Feb. 25, 1954.

Action to recover for services rendered. The Superior Court, Yuba County, Arthur Coats, J., entered judgment for plaintiff and denied defendant's motion for new trial and defendant appealed. The District Court of Appeal, Schottky, J., held that evidence was sufficient to support finding that defendant had employed plaintiff to use certain men and equipment to prepare defendant's land for planting at an agreed hourly rate rather than as an independent contractor.

Judgment affirmed.

1. Appeal and Error ⚷931(1)

In reviewing the evidence on defendant's appeal from judgment on findings in plaintiff's favor, all conflicts must be resolved in favor of plaintiff, and all legitimate and reasonable inferences indulged to uphold judgment if possible.

2. Appeal and Error ⚷989

Where court's findings are attacked as not supported by the evidence, reviewing court's power begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by trial court.

3. Appeal and Error ⚷996

When two or more inferences can be reasonably deduced from the facts, reviewing court is without power to substitute its deductions for those of trial court.

4. Master and Servant ⚷80(9)

In action to recover for services rendered, evidence was sufficient to support finding that farmer had employed plaintiff to use certain men and equipment to prepare farmer's land for planting at an agreed hourly rate rather than as an independent contractor.

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Robert W. Steel, Marysville, for appellant.

Manwell & Manwell, Marysville, for respondent.

SCHOTTKY, Justice.

Plaintiff commenced an action against defendant to recover the sum of $1,004 alleged to be due from defendant to plaintiff. Defendant filed an answer denying the material allegations of the complaint and also filed a cross-complaint alleging that plaintiff had agreed to do and complete certain work for defendant within a specified time and because of plaintiff's failure to do so defendant had been damaged in the sum of $2,750.

The action was tried by the court without a jury and the court found that defendant rented and hired from the plaintiff a Ford tractor with an operator, at the agreed and reasonable sum of $3.50 an hour for a total of 70½ hours, the total rental earned therefor being $246.75; that defendant similarly rented and hired a TD-14 tractor together with operator at the agreed and reasonable value of $6.50 an hour for 116½ hours, for which defendant became indebted to plaintiff in the sum of $757.25. The court further found defendant was forced to and did expend the reasonable sum of $150 in reworking certain farm lands owned by him for the purpose of making them suitable for his use and that said defendant should be entitled to a credit against the plaintiff's demands in the said sum of $150; and the court concluded that plaintiff was entitled to judgment against defendant in the sum of $854. Judgment was entered accordingly, and in ruling upon and denying defendant's motion for a new trial the court ordered that the findings of fact and conclusions of law be amended in accordance with section 662 of the Code of Civil Procedure so that instead of finding that defendant had hired certain tractors and operators from plaintiff, the findings be made to read that defendant employed plaintiff to use certain men and equipment and agreed to pay plaintiff therefor the reasonable sum of $3.50 per hour for a Ford tractor and $6.50 per hour for a TD-14 tractor.

Defendant has appealed from the judgment and the substance of his contentions are: (1) That the court's findings are not supported by the evidence which shows, without conflict, that respondent undertook, as an independent contractor, to perform a specific job at the prevailing rate for such work, and that respondent did not complete the performance of his contract and therefore is not entitled to recover the contract price; (2) that the court's finding that appellant had to have some of the work redone shows that respondent did not complete his performance under the contract; and (3) that appellant is entitled to judgment in the sum of $900, appellant having lost his crop by reason of respondent's nonperformance and the amount sought being the pasturage rental value of the acreage in question. Appellant admits that if there was a hiring of equipment or employment of respondent, then appellant (as hirer or employer) would be responsible for the hours consumed and the result of the work. Appellant does not claim that the hourly rates for the equipment were excessive in themselves, but he does complain that the total charge was excessive—that the job required more work hours than it should have, due to respondent's frequent layoffs and the consequent redoing of work.

[1–3] In reviewing the evidence, all conflicts must be resolved in favor of respondent, and all legitimate and reasonable inferences must be indulged in to uphold the judgment if possible. The power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trial court. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689.

According to the record appellant had approximately 30 acres of land which he wanted to plant to clover. The preparation of the land for planting involved disking, landplaning and the construction of checks to contain and channel the irrigation water. Checks are constructed by raising ridges so as to enclose and contain the water within a given area. This work requires special equipment, and at appellant's request respondent furnished equipment and operators to perform the work. Appellant agreed to pay respondent at the rate of $3.50 per hour for work performed with a Ford tractor and equipment, and at the rate of $6.50 per hour for work performed with a TD–14 tractor and equipment. The findings of fact show, and appellant does not deny, that between March 22 and May 18, 1951, the Ford tractor and equipment were used for a total of 70½ hours in performance of the work, and that between March 18 and May 12, 1951, the TD–14 tractor and equipment were used for a total of 116½ hours. The total hours worked and the equipment used are also shown by respondent's testimony.

There was no written agreement covering the performance of the work, and the chief dispute is whether appellant employed respondent to use certain men and equipment in the performance of the work or whether respondent undertook to perform the work as an independent contractor. As is usual in such cases there is a conflict in the evidence as to what was said by the parties when they discussed the work. Respondent testified that he walked through the field with appellant and they reached an agreement there. Appellant testified that the agreement was made during a conversation between them in the Plumas Lake store. Don Chism was present during this conversation. Chism was employed by a company which was to lay a pipe line through the field, apparently for irrigation purposes, and this work could not be done until after certain other work was done in connection with the preparation for planting.

The substance of appellant's testimony regarding the conversation in the store is as follows: Appellant told respondent that he wanted the ground prepared for clover and asked whether respondent had the equipment and would do the work. Respondent replied that he did have the equipment and would do the work, and appellant then asked him if he wanted to do it by the acre or by the hour, to which respondent replied that it did not make any difference—that it would add up to about the same. Appellant then said that he would rather have the work done at an hourly rate, so that respondent would do a nice job. Appellant told respondent that he wanted the work done as fast as possible so that he could plant before the rains ended, and respondent said that if the weather did not change he could start in a week and go on through with the work. Respondent agreed to notify Chism when the disking and planing were finished, so that the pipe layers could come in and lay the pipe. Chism confirmed the general tenor of the conversation, but admitted, on cross-examination, that he only took part in it "off and on" and that he was interested in the part that had to do with the pipe laying. There is no definite showing, from this conversation, that respondent undertook to perform the work as an independent contractor; it can be as readily inferred that appellant was hiring respondent to perform the work.

Respondent testified that appellant told him that he (appellant) did not want to contract the work because he "wanted the work done right and he didn't want any corners cut." This statement by appellant is sufficient to disprove the independent contractor relationship.

Respondent commenced the work on March 18, 1951. The work did not proceed continuously; there were numerous interruptions, and no work at all was performed during the period between March 27th and April 22nd. During these periods of work stoppage, the ground became hard and volunteer grass started to grow. At appellant's request, respondent redid some of the work, such as disking. On one occasion respondent's operator had started to construct the ridges for the checks when appellant stopped him and had him redisk the ground. This, of course, took additional hours. Respondent testified that these delays in the work were due to the wet condition of the ground, but admitted that he might have been a little "slack here" for a couple of days during the layoff from March 27th to April 22nd. Appellant testified to the contrary, and introduced in evidence the record showing rainfall in the Marysville area during the period in question. Appellant also testified that respondent's equipment broke down on a number of occasions and that at other times the tractors ran out of gasoline during the progress of the work. There is a clear conflict in the evidence regarding the cause of the interruptions in the work.

Appellant had the land seeded after the checks were in, and then had respondent cultipack the ground, i. e., turn the seed under. This was done about the middle of May and after the spring rains. Although appellant irrigated the land, he did not get a crop. There is considerable evidence that the checks were high in the center and low along the ridges (where dirt was borrowed to form the ridges), so that the land could not be irrigated properly. These high and low areas were apparent to appellant before he commenced the irrigation. Apparently the land had been leveled some years before, but there is no showing that respondent was to do a land leveling job based on surveying data. Respondent admitted that the checks were high in the center, but attributed this to the uneven condition of the ground contours.

After the work was finished, respondent submitted his bill to appellant. Respondent testified that appellant did not express any dissatisfaction with the work, but did complain about the amount of the charge. Appellant did not pay the bill, so respondent brought an action against him for the money due.

[4] From the record it appears that the evidence was highly conflicting, and that both parties and other witnesses testified fully as to the transaction between the parties and as to the manner in which the work was performed. Appellant has made a very able argument in support of his contention that the evidence does not support the findings and judgment, and were we a trial court, instead of an appellate tribunal, it would be very persuasive. But it was for the trial judge who heard the testimony and observed the witnesses to resolve the conflicts in the evidence. Disregarding, as we must, the conflicts in the evidence, we are satisfied that the evidence supports the findings and judgment of the trial court.

No other points raised require discussion.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

123 Cal.App.2d 487

PEOPLE v. WEISS.

Cr. 4983.

District Court of Appeal, Second District,
Division 2, California.
Feb. 25, 1954.

Prosecution for issuing a check without sufficient funds. The Superior Court, Los Angeles County, Jesse J. Frampton, J., entered judgment on verdict and denied defendant's motion for a new trial. Defendant appealed. The District Court of Appeal, Fox, J., held that evidence sustained conviction.

Affirmed.

1. Criminal Law ⟹1159(2)

Before a judgment of conviction can be set aside by a reviewing court on the ground of insufficiency of the evidence, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached below.

2. Criminal Law ⟹260(11)

It is for a trial court to resolve conflicts in evidence and to determine facts established and inferences properly drawn therefrom.

3. Criminal Law ⟹1159(6)

Where a verdict is reasonably justified by the circumstances, the opinion of the reviewing court, that those circumstances might be reconciled with the innocence of the defendant, will not warrant a reversal.

4. False Pretenses ⟹49(2)

In prosecution for issuing a check without sufficient funds, evidence, that defendant, who was the general manager of the furniture company and entrusted with handling its finances, drew check on an account, which he knew was closed and after he had been told not to draw any checks, justified inference that defendant had issued check with intent to defraud.

5. False Pretenses ⟹39

Specific intent to defraud another by issuance of a check without sufficient funds may be inferred from all the surrounding circumstances. Pen.Code, § 476a.

6. False Pretenses ⟹49(2)

In prosecution for issuing a check without sufficient funds, court was not required to give credence to testimony of defendant, who was general manager of a furniture store, and who allegedly drew a check on an account, which was closed, after he had been told not to draw any checks, that he had not issued check, in payment of merchandise for the store, with the intent to defraud. Pen.Code, § 476a.

7. Criminal Law ⟹260(11)

Reviewing court is without authority to reweigh the testimony, re-evaluate the credibility of witnesses, and to draw inferences contrary to those drawn by trial court.

8. False Pretenses ⟹26

Information, which charged defendant with issuing a check without sufficient funds, and which declared the offense in such manner that defendant was intelligibly apprised of the offense charged with sufficient certainty to enable defendant to make any defense thereto, and which so identified the alleged crime that, by proper plea, defendant could protect himself against another prosecution for the same offense, was not required to state that defendant in issuance of check was acting as an agent of furniture company for which he was general manager. Pen. Code, §§ 870, 952.

9. False Pretenses ⟹23

Defendant, who was the general manager of a furniture store and entrusted with handling its finances, and who drew check on a company account, which he knew was closed and after he had been told not to draw any checks, was criminally responsible for the issuance of such check for which there were insufficient funds even though such check was issued by him as agent of the furniture company in particular transaction. Pen.Code, § 476a.

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D. L. Di Vecchio, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Normal H. Sokolow, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant was convicted of issuing a check without sufficient funds, in violation of Penal Code section 476a. He appeals from the ensuing judgment and order denying his motion for a new trial.

Defendant was general manager of the Summit Furniture Manufacturing Company, a copartnership comprised of the four Rogal sisters. Elizabeth was the active partner of the firm. The company was engaged in assembling bedroom suites, of which there were a number in stock in the process of completion. When defendant was made general manager he was placed in charge of the company's entire operations. At about 4:00 o'clock in the afternoon on March 31, 1952, defendant telephoned the W. E. Cooper Lumber Company seeking to open an account for the furniture company and stated that he wanted to purchase for the company 2,000 feet of Ponderosa pine. He was advised that it was too late to open an account because his references could not be checked. Defendant then stated that he had already dispatched the truck to the lumber company hence could not send a check along with the driver. He suggested, however, that someone from the lumber company could come by and pick up the check. Based on this arrangement, the order was filled and Mr. Rene, assistant manager of the lumber company, was handed a check by the defendant in the sum of $180 in payment for the lumber. This check was signed by defendant, who was authorized to sign for the furniture company, and was drawn on the Vermont and Hollywood branch of the Security-First National Bank of Los Angeles. That account, however, had been closed on March 5th by the bank's applying the balance of $11.34 to an overdraft and then ordering the account closed. The account was not thereafter opened and no arrangements were made for credit. Accordingly, the check was not paid and is the basis of this prosecution.

During the latter part of March the furniture company was in a precarious financial condition; defendant was aware of that fact. The company actually went into bankruptcy on April 14th. Some time during the period between March 23d and March 31st Miss Rogal instructed defendant not to make out any more checks. Defendant, however, instructed Miss Rogal to make out the payroll checks for April 2d. She did this upon his promise that he would not sign them.

Defendant testified he had nothing to do with the company's books or finances. He denied having any intent to cheat or defraud when he ordered the lumber from the lumber company and gave the check of March 31st in payment. He also denied the conversation testified to by Miss Rogal concerning the payroll checks, and that he had been told, in the period between March 23d and 31st, not to sign any more checks. He admitted he knew the business was struggling and that the payroll of April 2d would be difficult to meet. He was hoping, he said, to get an order made up, to make delivery, and to get the money in. He stated that when his services were terminated on April 9th the company owed him approximately $1,150 back pay. He acknowledged that he and his assistant took care of the company bills, wrote checks in payment, and that when money came in he would send his assistant or Miss Rogal to the bank to make the deposit.

Defendant contends (1) that the evidence is insufficient to sustain the conviction; (2) that the amended information fails to state a public offense; and (3) that he did not have a fair trial. There is no merit in any of these contentions.

[1–3] Before a judgment of conviction can be set aside on the ground of insufficiency of the evidence it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. It is, of course, for the trial court to resolve the conflicts in the evidence and determine what facts are established and what inferences may be properly drawn therefrom. If the circumstances reasonably justify the verdict, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant, will not warrant a reversal. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

[4–6] Applying these principles, it is clear that there is ample evidence to support the judgment. First, it must be noted that the trier of the facts has resolved the conflicts in the testimony against the defendant. Hence it is established that defendant was general manager of the furniture company, and handled its books and finances; that he knew the account on which the check in question was drawn had been closed since he conveyed this information to Miss Rogal; that no arrangements for credit with the bank had been made; that he knew of the precarious financial condition of the company; that he had been told prior to March 31st not to draw any more checks; that notwithstanding this knowledge and instruction he executed and delivered the check in question in order to induce the lumber company to furnish the lumber which he had ordered. Defendant also knew that he could not get this lumber without paying or purporting to pay for it upon delivery, since he had not been able to establish credit. The check was thus used to accomplish his desired purpose. These facts justify an inference that defendant had an intent to defraud and a present knowledge that there were neither funds nor credit with the bank upon which the check was drawn with which to honor it upon its presentation. The requisite, specific intent to defraud may be inferred from all the surrounding circumstances. Ex parte Shackleford, 64 Cal.App. 78, 81, 220 P. 430; People v. Walker, 15 Cal.App. 400, 403–404, 114 P. 1009; People v. Rose, 9 Cal.App.2d 174, 175, 48 P.2d 1009. As stated in People v. Wallin, 34 Cal.2d 777, 780, 215 P.2d 1, 3, "* * * it cannot be said, as a matter of law, that there is no evidence in the present record from which the trial court could have drawn inferences necessary to support a finding of guilt." The court was not required to give credence to defendant's testimony that he did not give the check to the lumber company with the intent to defraud. People v. Rose, supra; People v. Walker, supra, 15 Cal.App. at page 404, 114 P. 1009; People v. Boyce, 87 Cal.App.2d 828, 830, 197 P.2d 842.

[7] The basic difficulty with defendant's argument on this phase of the case is that he would have us reweigh the testimony, re-evaluate the credibility of the witnesses, and draw inferences contrary to those drawn by the trial court. Under firmly established principles, we are not at liberty to do this. People v. Gould, 111 Cal.App.2d 1, 8, 243 P.2d 809.

[8, 9] Defendant's contention that the amended information failed to state a public offense is based on the theory that since he was acting as the agent of Summit Furniture Manufacturing Company in the issuance of said check such fact must be alleged. This, however, is not necessary, for a criminal offense may be pleaded "in any words sufficient to give the accused notice of the offense of which he is accused." Pen.Code, § 952. "Notice of the particular circumstances of the offense is given not by detailed pleading but by the transcript of the evidence before the committing magistrate", People v. Roberts, 40 Cal.2d 483, 486, 254 P.2d 501, 503, of which defendant is entitled to receive a copy, Pen.Code, § 870. Here the amended information declared the offense in such phraseology that defendant was intelligibly apprised of the act with which he was charged with sufficient certainty to enable him to make any defense thereto. He was not misled by any statement contained in or omitted from the pleading. The transaction was so identified that defendant, by a proper plea, could protect himself against another prosecution for the same offense. People v. Silverman, 33 Cal.App.2d 1, 5, 92 P.2d 507. It would not have assisted defendant to include the fact that he was acting as an agent of the furniture company since this fact was best known to him. See United States v. Lynch, D.C., 11 F.2d 298, 300. Furthermore, such fact was not an element in the offense. And, of course, defendant cannot escape

criminal responsibility for his own acts even though he was also acting as the agent of the furniture company in the particular transaction. If all the necessary elements are present one may be guilty of the offense of issuing a check without sufficient funds whether he acts "for himself or as the agent or representative of another". Pen.Code, § 476a. There is no language in People v. Newell, 192 Cal. 659, 221 P. 622, essential to the holding therein that is not in harmony with the conclusion herein announced.

In support of defendant's contention that he did not have a fair trial he asserts that considering the evidence and his sentence to the penitentiary he "cannot help but feel that the trial court permitted itself to become prejudiced against him." The record contains nothing to justify such claim.

The judgment and the order are affirmed.

MOORE, P. J., and McCOMB, J., concur.

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123 Cal.App.2d 535

PEOPLE v. VOSBURG.

Cr. 2928.

District Court of Appeal, First District,
Division 1, California.
Feb. 26, 1954.

Defendant was convicted of performing abortions. The Superior Court, in and for the County of Alameda, James R. Agee, J., entered judgment of conviction and order denying new trial, and defendant appealed. The District Court of Appeal, Bray, J., held that evidence of alleged abortions performed by defendant on women other than complaining witnesses was properly admitted to show intent, preparation, guilty knowledge, identity, scheme, plan, or design.

Judgment and order affirmed.

1. Criminal Law 🔑369(15), 370, 371(1), 372(1)

Evidence of commission of similar crimes is admissible to show intent, preparation, guilty knowledge, identity, scheme, plan, or design.

2. Criminal Law 🔑369(15), 370, 371(1), 372(1)

In prosecution for abortion, evidence concerning alleged abortions performed by defendant on women other than complaining witnesses was properly admitted to show intent, preparation, guilty knowledge, identity, scheme, plan, or design. Pen.Code, § 274.

3. Abortion 🔑9

Evidence of possession of instruments suitable for performance of abortions is admissible in abortion prosecution, without necessity of connecting instruments with commission of abortion. Pen.Code, § 274.

4. Abortion 🔑9

In abortion prosecution, wherein there was evidence that defendant in performing abortions had used a speculum, catheter, gauze and penicillin, evidence that similar instruments and equipment had been found in defendant's automobile, apartment, and home, was properly admitted. Pen.Code, § 274.

5. Criminal Law 🔑783(1)

In abortion prosecution, wherein prosecution properly introduced evidence concerning alleged abortions performed by defendant on women other than complaining witnesses, instruction limiting evidence concerning other abortions to question whether defendant was innocent or guilty of abortions charged, and stating that value of such evidence depended on whether it tended to show identity of person, who committed abortions charged, or that defendant was familiar with means alleged to have been used in commission of abortions, and that defendant possessed knowledge that might have been useful in commission of abortions was proper. Pen.Code, § 274.

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Benjamin F. Marlowe, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendant appeals from her conviction of four counts of violating section 274, Penal Code (abortion), and from the order denying new trial.

Defendant was charged with abortions on four women respectively. She concedes the sufficiency of the evidence. She could hardly do otherwise, in view of the testimony of the four prosecuting witnesses and other evidence in the case. It is therefore unnecessary to discuss the evidence other than that affecting her legal points. She makes three contentions, none of which is sound.

1. Similar Abortions.

[1, 2] Plaintiff introduced evidence of abortions performed by defendant on three women other than the complaining witnesses. It is well settled that evidence of the commission of similar crimes is admissible to show intent, preparation, guilty knowledge, identity, scheme, plan or design. Other abortions: People v. Green, 111 Cal.App.2d 794, 245 P.2d 526; other lewd acts: People v. Zabel, 95 Cal.App.2d 486, 213 P.2d 60; other homicide: People v. Peete, 28 Cal.2d 306, 169 P.2d 924; other thefts: People v. Gordon, 71 Cal.App.2d 606, 163 P.2d 110; other abortion: People v. Clapp, 67 Cal.App.2d 197, 153 P.2d 758.

2. Abortion Equipment.

[3, 4] Defendant was taken into custody when she drove up to her home. In the back of her car was found an overnight case containing many instruments and other items of equipment. On the same day, in her apartment was found a brown paper bag containing rubber gloves, packs of gauze, catheters, and penicillin. Additional equipment, including a speculum, was found in defendant's home in Alameda. A doctor testified that many of these instruments and equipment were suitable for use in the performance of abortions, although they had other uses, too. There was evidence that defendant in performing the abortions had used a speculum, a catheter, gauze and and penicillin. It is well settled that evidence of possession of instruments suitable for performance of abortions is admissible without the necessity of connecting the instruments with the commission of the crime. "Possession of the instruments was evidence that defendant's office was equipped for the performance of operations of the nature described by the witnesses." People v. Pollum, 97 Cal.App.2d 173, 178, 217 P.2d 463, 466; see also People v. Stone, 89 Cal.App.2d 853, 865, 202 P.2d 333; People v. Ramsey, 83 Cal.App.2d 707, 719, 189 P.2d 802; People v. Clark, 122 Cal.App.2d 342, 265 P.2d 43.

3. Instructions.

[5] The instruction complained of is CALJIC No. 33. It limits the purpose of the evidence of similar acts to "such bearing, if any, as it might have on the question of whether defendant is innocent or guilty" of any of the crimes charged. It states that the value of such evidence depends upon whether it tends to show (1) the identity of the person who committed the crimes charged, or (2) that defendant was familiar with the means alleged to have been used in their commission; (3) that defendant possessed knowledge that might have been useful in their commission. This correctly states the law. See authorities above cited. Moreover, the instruction is similar to the one approved in People v. Warren, 120 Cal.App.2d 257, 260 P.2d 973.

The judgment and order are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

123 Cal.App.2d 395

Ex parte McMANUS.

Cr. 2941.

District Court of Appeal, First District, Division 1, California.

Feb. 23, 1954.

Proceeding in the matter of the application of petitioner for writ of habeas corpus. The District Court of Appeal, Wood, J., held that statute providing that term of imprisonment for escape by one who was serving a life term shall commence from time he would otherwise have been discharged from prison prevails over statute dealing with sentencing of any person, who is convicted of two or more crimes, and which provides that if punishment for any of the crimes is expressly prescribed to be life imprisonment, whether with or without possibility of parole, then terms of imprisonment on other convictions, whether prior or subsequent, shall be merged and run concurrently with life term, and former statute is applicable to one convicted of escape while confined in prison for life.

Petition denied and writ discharged.

1. Criminal Law ⚷977(1)

Where defendant pleads guilty to charge of first degree murder, it is exclusively within province of trial court to determine whether death penalty or life imprisonment should be imposed. Pen. Code, § 190.

2. Criminal Law ⚷1208(9)

When the only term of imprisonment that can be imposed is imprisonment for life, the indeterminate sentence law is inapplicable.

3. Statutes ⚷164

Where two statutes were amended in same year, but one was amended later in that year, rule that when two laws on same subject, passed at different times, are inconsistent with each other, the one last passed must prevail, was applicable.

4. Statutes ⚷141(1)

Amendment of a statute by implication does not come within constitutional provision that no law shall be revised or amended by reference to its title, but in each case the act revised or sections amended shall be reenacted and published at length as revised or amended. Const. art. 4, § 24.

5. Escape ⚷13

Statute providing that term of imprisonment for escape by one who was serving a life term shall commence from time he would otherwise have been discharged from prison prevails over statute dealing with sentencing of any person, who is convicted of two or more crimes, and which provides that if punishment for any of the crimes is expressly prescribed to be life imprisonment, whether with or without possibility of parole, then terms of imprisonment on other convictions, whether prior or subsequent, shall be merged and run concurrently with life term, and former statute is applicable to one convicted of escape while confined in prison for life. Pen.Code, §§ 669, 4530.

6. Pardon ⚷4

Where more than seven years had elapsed from time of conviction for escape of one who was serving life sentence at time of escape, there was no legal barrier to his parole should Adult Authority determine that he merited privilege of parole. Pen.Code, §§ 3041 to 3044.

7. Pardon ⚷1

A parole is a privilege and not a right. Pen.Code, §§ 3041 to 3044.

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E. John Kleines, San Francisco, for petitioner.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Petitioner, having prepared and filed this petition for habeas corpus and being without funds, requested the court to appoint counsel to represent him in the presentation of his case. Counsel was appointed and has discharged his duties toward his client with commendable zeal and efficiency, thoroughly developing every facet of the case.

May 6, 1936, petitioner McManus was sentenced to state prison for life, upon his plea of guilty of first degree murder.

[1, 2] August 9, 1946, for escape from the state prison in violation of section 4530 of the Penal Code, he was sentenced to state prison "for the term prescribed by law," the "sentence to commence at the time said defendant would otherwise have been discharged." This was in exact compliance with the literal requirement of § 4530 that the term of imprisonment for an escape "commence from the time he would otherwise have been discharged from said prison." It runs contrary to section 669 of the Penal Code which deals with the sentencing of any person who is convicted of two or more crimes and contains a proviso which declares that "if the punishment for any of said crimes is expressly prescribed to be life imprisonment,[1] whether with or without possibility of parole, then the terms of imprisonment on the other convictions, whether prior or subsequent, shall be merged and run concurrently with such life term."

Is it reasonably possible to reconcile the provisions of § 4530 and § 669?

Prior to 1943, § 4530 applied to the escape of a prisoner confined in a state prison "for a term less than for life." That, it would appear, excluded punishment of a prisoner who escaped while undergoing punishment (1) for a crime the punishment for which is expressly prescribed to be life imprisonment, or (2) for a crime the maximum punishment for which is life imprisonment if, in the latter case, the escape occurs before the term is fixed by the appropriate administrative board or thereafter if the term is fixed at the maximum.[2] The 1943 deletion of the words "for a term less than for life" *literally* imposes the penalties of § 4530 upon both types of life-timers and requires the term of imprisonment for the escape to "commence from the time he would otherwise have been discharged from said prison."

If § 4530 had been thus amended before § 669 was amended to require all terms to run concurrently if one of them is "expressly prescribed to be for life imprisonment," reconciliation of the two sections would not be difficult. In that case it would be a fair inference that the Legislature intended § 669 to prevail, to the extent of the conflict, it being the latest legislative expression on the subject.

But that is not the fact. Of the two, § 669 was the first amended in a manner to create this conflict. From 1872 until 1927 it dealt with the sentencing of a person who was "convicted" of two or more crimes before pronouncement of sentence for any of them. In such a case, it declared, "the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment * * * or of the second or other subsequent term of imprisonment * * *" In 1927 § 669 was amended to enlarge its scope by removing the limitation that it apply only to convictions incurred prior to sentencing and by giving the trial court discretion to make the terms concurrent in "exceptional cases." Stats.1927, ch. 626, p. 1056. In 1931 it was amended by removing the mandate and giving the trial court discretion to make the subsequent terms run concurrently or consecutively. Stats.1931, ch. 481, p. 1050 at 1052. In 1935 the section was recast to read much as it does today, without the proviso under discussion. Stats.1935, ch. 576, p. 1670. In 1941 the proviso was inserted, declaring that "if the punishment for any of said crimes [whether conviction occurred in the same proceeding or court or in different proceedings or courts and whether judgment was rendered by the same or by different judges] is expressly prescribed to be life imprisonment, then the terms of imprisonment on the other convictions, whether prior or subsequent, shall be merged and run concurrently with such life term." Stats.1941, ch. 742, p. 2262. This section was amended in 1943 by insertion of the clarifying words "whether with or without possibility of parole" after the words "expressly prescribed to be life imprisonment". Stats. 1943, ch. 219, p. 1122.[3]

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[1] The punishment for petitioner's first offense (murder in the first degree) was expressly prescribed to be for life imprisonment: "death, or confinement in the state prison for life, at the discretion of the jury * * *; or, upon the plea of guilty [as in this case], the court shall determine the same * * *." Pen.Code, § 190. In such a case it is exclusively within the province of the trial court to determine whether the death penalty or life imprisonment should be imposed. People v. Hawk, 17 Cal.2d 812, 814, 112 P.2d 225; People v. Phyle, 28 Cal.2d 671, 674, 171 P.2d 428. When, as in our case, the only term of imprisonment that can be imposed is imprisonment for life, the indeterminate sentence law is inapplicable. People v. Vaile, 2 Cal.2d 441, 445, 42 P.2d 321, and cases cited. There is no determination of sentence to be made by the Adult Authority.

It is unlike the punishment for second degree murder, "five years to life", Pen. Code, § 190, which is not "expressly prescribed to be life imprisonment". Pen. Code, § 669; People v. Collins, 99 Cal. App.2d 780, 781, 222 P.2d 686, citing People v. Rivas, 85 Cal.App.2d 540, 193 P.2d 151. When the term of imprisonment for second degree murder is pronounced it is "indeterminate" and so remains "until fixed by the board which by law has the power to determine the duration of sentences." Page 782 of 99 Cal.App.2d, page 688 of 222 P.2d.

[2] For example, a person committed to the state prison for first degree robbery (not less than five years; Pen.Code, § 213) is subject to imprisonment for life. Accordingly, until the administrative board fixes the term at less than life such a person is "undergoing a life sentence" as the latter expression is used in § 4500 (former § 246) of the Penal Code. People v. McNabb, 3 Cal.2d 441, 444, and 456, 45 P.2d 334.

The term fixed by the Adult Authority "shall not exceed the maximum or be less than the minimum term of imprisonment provided by law * * *." Pen.Code, § 3023.

It was in 1943, as we have noted, that § 4530 was amended to apply to the lifetimer and to require that the term of imprisonment for an escape by him "commence from the time he would otherwise have been discharged from said prison", in direct conflict with the concurrent term requirement of the 1941 proviso of § 669. Petitioner's counsel directs attention to the 1943 amendment of that proviso and earnestly and with much persuasiveness contends that such amendment evinces a clear legislative intent that the concurrent term requirement of § 669 continue to prevail. However, there are several factors to consider before we can say that such is the expressed legislative intent.

[3] Counsel speaks of these 1943 amendments as having been made "at the same time, i. e. 1943." Although made in the same year they were not made at the "same time." The amendment of § 4530 was later in time than the amendment that year of § 669; illustrated by the chapter numbers. The § 4530 amendment was effected by chapter 635; the § 669 amendment, by chapter 219. The holding in Davis v. Whidden, 117 Cal. 618, 49 P. 766, indicates that in such a case the amendment which was later in time (chapter 635, amending § 4530) should and does prevail. The court in the Davis case applied the rule that "'* * * when two laws upon the same subject, passed at different times, are inconsistent with each other, the one last passed must prevail'", and the principle that "a law is not finally passed until it is approved by the governor, and transmitted by him to the secretary of state. And, when public justice requires it, the exact time at which an act was approved may be ascertained." 117 Cal. at page 622, 49 P. at page 767. In applying that rule and that principle, the court said: "Since the publication of the first volume of our statutes it has been the uniform custom to print and publish all laws approved on different days in the order of their approval, and it is only a fair presumption that all laws approved on the same day are printed

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3. Counsel have not considered and we do not decide the question whether the 1943 amendment of § 669 made such a change as to effect a repeal and reenactment (a new enactment) of the entire proviso in 1943. (See Gov.Code, § 9605.)

Nor have we considered whether § 4530 may be a special provision and the proviso of § 669 a general provision, giving § 4530 precedence regardless of the sequence of enactment or amendment of either of them. See Peairs v. Chambers, 28 Cal.App. 584, 153 P. 410.

and published in the same chronological order. And under the provisions of section 528 of the Political Code [see §§ 9500–9516, 9700–9704, and 9760–9768, Govt. Code] this order of printing and publication would seem to be required. It appears from the statutes of 1897 that the Clark road law commences on page 374, and is headed 'Chapter CCXLIV,' while the county government act commences on page 452, and is headed 'Chapter CCLXXVII.' From this order we infer that the last-named act was last approved. * * * Resorting for aid to the office of the secretary of state, we learn that the county government act was in fact last approved by the governor, and was filed in the office of the secretary of state some hours after the filing of the Clark road law."[4] 117 Cal. at page 623, 49 P. at page 767. Accordingly, the court held that the County Government Act was the later act and therefore prevailed.

The highest chapter number test[5] seems quite logical. The governor participates importantly and significantly in the legislative process when considering and acting upon legislative bills after their passage through the two houses, approving them and filing them with the secretary of state or vetoing them and returning them to the house of origin. See Const. art. IV, §§ 16 and 34; Lukens v. Nye, 156 Cal. 498, 501, 105 P. 593, 36 L.R.A., N.S., 244.

The Senate, the Assembly and the governor, it may be assumed, are aware of the highest chapter number test (the bill last filed with the secretary of state) as enunciated in Davis v. Whidden, supra, 117 Cal. 618, 49 P. 766, and have consistently over the years acted in view of it in reliance upon it. This is reflected in an opinion of the legislative counsel to the governor, under date of February 27, 1948, discussing the applicability in California of the rule enunciated in Illinois. People ex rel. Schlaeger v. Mattes, 396 Ill. 348, 71 N.E.2d 690, that, of two conflicting legislative bills passed by the Legislature on the same day, the bill last passed by the Legislature prevails regardless of the order in which signed by the governor. That opinion concludes with these words: "We believe that Davis v. Whidden, 117 Cal. 618, 49 P. 766, represents the law on the subject in this state. In that case the Supreme Court of California pointed out that a law is not finally passed until it is approved by the Governor and transmitted by him to the Secretary of State, and went on to hold that, of two conflicting bills approved on the same day, the one last signed by the Governor would prevail. Davis v. Whidden was decided in 1897 and has never been disapproved or overruled by our Supreme Court. On the contrary, implied approval of the reasoning of that case is found in Ex parte Sohncke, 148 Cal. 262, 82 P. 956, 2 L.R.A., N.S., 813. The rule of Davis v. Whidden has been accepted by the legislature and the California courts for more than fifty years and we do not believe that a decision of the Supreme Court of one other state would influence our court to change its opinion."

General recognition of the principles enunciated in Davis v. Whidden, supra, is reflected, also, by the practice of the compilers and publishers of our laws (when a section is more than once amended at a session) of treating the amendment bearing the highest chapter number as the latest, printing its text with a footnote citing the lower chapter number and referring to the latter as an earlier amendment. See, for example, 2 Deering's General

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[4] In our own case, also, the record shows that the 1943 amendments of §§ 669 and 4530 were approved by the governor and filed with the secretary of state in the time sequence indicated by their chapter numbers. Chapter 219, amending § 669, was approved by the governor and filed with the secretary of state on April 24; chapter 635, amending § 4530, on May 20, 1943. (See Stats.1943, pages 1122 and 2255; also Final Calendar of Legislative Business, 55th Session, 1943, Senate Bill 678 [ch. 219], and Assembly Bill 479 [ch. 635].)

[5] The chapter numbers normally reflect the relative dates of approval by the governor or of final action in the Senate and Assembly if a measure is vetoed by the governor and then passed over his veto. If there be a doubt, the original, permament records in the office of the secretary of state may be consulted.

Laws, 1949 Pocket Supp. 43–44, § 7 of Act 3796, amended by chapters 1348 and 1418, Stats.1949.

[4] Counsel for petitioner advances the additional point that even if the amendment of § 4530 were later than the last amendment of § 669, it could not constitutionally affect the latter because that would be an amendment by "implication." He invokes §§ 15, 16 and 24 of article IV of the state Constitution and concludes that no statute, or section of a statute, can be amended by "implication"; i. e., that the statute revised or the section amended must be "reenacted and published at length as revised or amended". Art. IV, § 24. An early case gave support to that view but it was later held that the amendment of a statute by "implication" is "not within the evils aimed at by the inhibition [of § 24 of art. IV], and to apply it to statutes which amend others by implication would almost prohibit legislation." Hellman v. Shoulters, 114 Cal. 136, 152, 44 P. 915, 920, 45 P. 1057.

[5] The conclusion seems inescapable that the provisions of § 4530, as amended in 1943, prevail over the 1941–43 proviso of § 669.

Petitioner urges that such a conclusion results in an incongruous situation, not reasonably inferable as intended by the Legislature. Whether specifically intended or not, it seems unavoidable. Indeed, it is no more incongruous to prescribe the commencement of a term of imprisonment for an escape at the end of a life term expressly prescribed by law than it is to commence it at the end of an indeterminate life sentence if in fact the Adult Authority fixes the particular prisoner's term at life. The proviso of § 669 would not operate in the latter case, would not require the terms to run concurrently.

Nor does our interpretation result in any greater degree of incongruity than clearly obtained under § 669 as it read from 1872 until 1927. If the earlier of the two convictions to which the section then applied required a life term the section by its very terms required the sentence for the second conviction to commence at the end of the life term.

Nor is it any more incongruous than the rule applied by the statute which preceded § 4530 (§ 1 of act of April 30, 1855, Stats. 1855, chapter 160, p. 203). That statute, which continued operative until the adoption of the Penal Code (see § 105 thereof as enacted in 1872), declared that whenever "any prisoner legally committed to the state prison * * * shall escape therefrom * * * such person * * * if found guilty of such escape * * * prior to pardon, discharg (discharge) or expiration of his term of service * * * shall be punished by a recommitment for the same length of time for which he was sentenced when he escaped from said prison; said second term of imprisonment to commence at the expiration of the term for which he was last sentenced." In other words, if during that period a life timer escaped, he would be subject to another life term upon the expiration of his first life term, or upon the earlier ending thereof by pardon or by commutation of sentence.

Indeed, the 1855 statute suggests that § 4530 in its application to life-timers is considerably less incongruous than at first might appear. Suppose, for example, the governor should commute a prisoner's life term to time served, or pardon him of the first offense; or, suppose that after the conviction for an escape the judgment of imprisonment for life is reversed upon appeal or is annulled in a proceeding in habeas corpus or coram nobis. Any such termination of the life sentence would operate as a "discharge" and mark the commencement of the prisoner's term for any escape he may have committed.[6]

Thus, it appears that there is no great incongruity in imposing a postponed term of imprisonment upon a life-timer who escapes. There are contingencies in which the life term might be shortened. Also, there is no reason why an escape by a lifetimer should not be regarded as serious as an escape by any other felon, to be treated on the same basis and punished in the same fashion. In addition, prosecution of such an offense to judgment makes a record of one aspect of the prisoner's conduct, authentic information which is readily available to the Adult Authority when determining if the prisoner merits the privilege of parole.

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[6] Release upon parole would, of course, not be such a "discharge." (See Pen. Code, § 3056; 9 Cal.Jur. Ten-Year Supp. 1949 Revision 45, Parole of Prisoners, § 11.)

We conclude, therefore, that no error was committed when in 1946 the superior court ordered that the sentence for the escape commence at the time when the petitioner herein "would otherwise have been discharged."

Petitioner has evinced considerable concern over his status as affected by the sentence for the escape, particularly in regard to his eligibility for parole. Such consequences, whatever they may be, are not strictly material to the present inquiry in view of our conclusion that the sentence for the escape was correct, but it seems desirable, under the circumstances of this case, to discuss them.

First, the legal consequences do not appear at all serious.

The "matter of parole may be determined by the board [Adult Authority] at any time after the expiration of six months from and after the actual commencement of such imprisonment; provided, however, that where the maximum sentence is five years or less, such determination may be made by the Adult Authority after a period of 90 days." Pen.Code, § 3041. "No prisoner who has had imposed upon him two or more consecutive sentences may be paroled until he has served at least two calendar years of the aggregate of such consecutive sentences." Pen.Code, § 3043. The concept that consecutive sentences comprise a single, continuous term for the purpose, among others, of allowing and forfeiting good-time credit, In re Cowen, 27 Cal.2d 637, 644, 166 P.2d 279; cited in In re Pedrini, 33 Cal.2d 876, 880, 206 P.2d 699, seems clearly applicable to the provisions of § 3043. "No prisoner confined in the State prison and no prisoner under sentence to the State prison who is convicted of an escape or an attempt to escape from the prison or the guards may be paroled until he has served at least two calendar years from and after the date of his return to the prison after such conviction." Pen.Code, § 3044.

[6, 7] In view of the fact that more than seven years have elapsed since petitioner's conviction of the escape and his return to the state prison, there is no *legal* barrier to his parole should the Adult Authority determine that he merits the privilege of parole. It is a privilege, not a right.

Second, in response to petitioner's evinced belief that the Adult Authority has thus far failed to grant him parole under the misapprehension upon its part that he is ineligible to parole until after the expiration of his life term, the respondent made an offer of proof. The parties stipulated, during the oral argument, that if the members of the Adult Authority were called to testify herein they would testify to the effect that the facts stated in the offer are true.

The stipulated testimony, in the terms of the offer of proof, is that "the Adult Authority has on several occasions considered the case of William McManus for parole consideration"; that "the Adult Authority is of the opinion that it has the authority to release William McManus on parole;" and that "the Adult Authority does not presently believe that William McManus is a person who should be released on parole."

Accordingly, there appears to be no basis for petitioner's anxiety concerning the Adult Authority's correct understanding of its powers, duties and jurisdiction in the consideration and determination of the question whether and when he merits the privilege of parole.

The writ heretofore issued must be discharged. There is no occasion to remand the petitioner to custody for he has continued in the custody of the respondent warden pursuant to the provisions of the writ. In view of our conclusion that there was no error in the second judgment as rendered and pronounced, we have no occasion to consider, nor do we undertake to say, what if any remedy might have been accorded petitioner in this proceeding if we had found that judgment erroneous in respect to the commencement of the term of imprisonment imposed.

The petition is denied and the writ heretofore issued herein is discharged.

PETERS, P. J., and BRAY, J., concur.

123 Cal.App.2d 465

In re CORBETT'S ESTATE.

NOONAN v. SCHUBAL et al.

Civ. 15729.

District Court of Appeal, First District, Division 1, California.

Feb. 25, 1954.

Hearing Denied April 21, 1954.

Will contest. From an order of the Superior Court, Marin County, N. Charles Brusatori, J., refusing to admit purported will to probate and denying petition for letters testamentary, proponent appealed. The District Court of Appeal, Bray, J., held that the evidence sustained finding that will was procured through undue influence.

Order affirmed.

1. Attorney and Client 🔑123(1)

Where attorney profits from his dealings with client, a rebuttable presumption of fraud or undue influence arises in view of confidential relationship between attorney and client, and such presumption can be overcome only by clear and satisfactory evidence that transaction was fair and equitable, that attorney took no advantage of relationship and that client was fully informed as to all matters relating to transaction.

2. Wills 🔑163(4)

In order to overcome rebuttable presumption of undue influence arising from testamentary bequest of almost entire estate to testatrix' attorney, who prepared will and supervised its execution, attorney must, at least, show that he reminded testatrix of the natural objects of her bounty by more than a casual reference to them, so that testatrix could freely choose between them and him.

3. Wills 🔑166(1)

Contestant has the burden of proving undue influence by a preponderance of the evidence, and proponent does not have to overcome any presumption or other prima facie showing of undue influence by a preponderance of the evidence.

4. Wills 🔑166(1)

Evidence sustained finding that will was procured through undue influence.

5. Wills 🔑386

Whether proponent's evidence outweighs presumption or prima facie showing of undue influence is ordinarily a question for trial court.

6. Wills 🔑384

Where evidence sustained finding that will was procured through undue influence, whether finding as to mental incompetency of testatrix was similarly supported was immaterial on appeal from order refusing to admit will to probate.

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G. H. Van Harvey, San Francisco, Paul C. Thorne, Mill Valley, for appellants.

Bagshaw, Schaal & Martinelli, A. E. Bagshaw, San Rafael, for respondent.

BRAY, Justice.

Petitioner James J. Schubal appeals from an order denying admission to probate of a document purporting to be the last will of Josephine B. Corbett, deceased, and denying his petition for letters testamentary.

The sole question presented is the sufficiency of the evidence to support the court's findings of undue influence and mental unsoundness.

Facts.

On April 4, 1951, Josephine B. Corbett, a widow, aged about 67 years, signed the will in question. She died July 28th. Surviving her were three brothers and a sister, all living in Australia. Petitioner is an attorney and had been acting as her attorney since 1946. He was also her friend and business advisor. Her property consisted of her home, apparently worth between $10,000 and $12,000, $875 in U. S. bonds, $1,095 in cash, and jewelry and furniture. Petitioner had drawn two previous wills for her. The first one, in November, 1950, provided $500 bequests to three of her friends. It had no residuary clause and was never executed. Petitioner testified that she wanted to complete it later by codicil. About January, 1951, she instructed petitioner to draw a new will leaving everything to the Red Cross, and appointing petitioner executor. He thereupon tore up the first will. This second will she destroyed when the will in question here was executed. Petitioner destroyed his copies of both former wills. She went to the hospital for a short period. Petitioner visited her there and she told him she wanted to make a new will, to complete the first will she had started. She said she wanted to remember Mrs. Harrs, Mrs. Sward and Constance Diernesse. On her return from the hospital petitioner offered to buy her home from her at whatever price appraisers might fix and to let her live there the rest of her life. He did that to get her to go to Australia to live with her sister. After she returned home she said she wanted to complete her will. Petitioner desired that she put in writing what she wanted so that he could feel sure what he was doing. She gave him a list which included the three persons above mentioned, him and his wife. He told her she did not need to put either his or his wife's name in the will. She said she wanted it that way. From the list she gave him, petitioner had typed a form of "Codicil To My Last Will And Testament." Under "San Anselmo, California" a blank line was typed, evidently for a date. It then stated: "It is my wish that the people whose names appear below receive the item, or article appearing opposite their name." Below this on typewritten blank lines petitioner wrote in the names of the three friends of Mrs. Corbett above mentioned, his wife's name, and the addresses of each, followed by the figure $500. Then appears "Residue to J. J. Schubal" and "Change of codicil later." Under the typewritten blank line in the normal signature position, was typed "Josephine B. Corbett" and in petitioner's handwriting "A.K.A. Jose Corbett." In spite of the obvious inference to be drawn from the instrument itself, petitioner testified he did not intend Mrs. Corbett to sign it, nor did she. His explanation was: "Well, now, I will tell you. Mrs. Corbett had intended to prepare a codicil—see? And I told her that in the event we never completed it, she could copy this form, just this way, and put out what she wanted and give it to me and I would put it with the will. That was merely directions for Mrs. Corbett." He then stated that the list he had received from her was directions for the will, and this was for a codicil to the will. Yet both instruments and the will as drawn contained exactly the same disposition of her estate. Petitioner stated that he explained to her that "Residue to J. J. Schubal" meant that whatever was left would come to him. She then said, "That's all right, we will leave it that way, and I will make some changes later." Petitioner explained that "The reason that the will was executed to the extent it was —the reason that the codicil was to follow later, was the fact that she intended additional bequests to be made later." He did not tell her what would be left to him nor what would be done to her home on her death. He did suggest that she get another attorney to prepare the will, and she stated that he was her attorney and she wanted him to do it. He asked her if she wanted to mention her parents or any relative. She said she did not. He asked her if she wanted to remember her sister in Australia (the one to whom he desired to send her if she would sell her property). She said she did not. He did not ask her who her other relatives were. Although he saved the "codicil" above mentioned, he destroyed the list in her handwriting.

Mrs. Harrs, one of the legatees in the will, testified that about two months after the date of the will Mrs. Corbett spoke to her about having drawn a will "a few days ago," stating, "She said that she had prepared a new will not very long ago, and she said, 'Remember, I had left everything to the Red Cross, and Mr. Schubal suggested that it would be nice to remember my close friends and relatives.'" She then stated that in addition to leaving Mrs. Harrs $500, she had left a similar sum to Mrs. Sward, Mrs. Schubal, Elsie Hiller, Mrs. Henneberry, and possibly someone else and had left the residue to the witness. Neither Elsie Hiller nor Mrs. Henneberry are mentioned in the will. This statement has some significance in view of a conversation had between the witness and petitioner, shortly after Mrs. Corbett's death and before the will was filed. He told the witness that Mrs. Corbett had made a new will, that her former will left all to the Red Cross, and that he suggested that she should remember "her friends and relatives." He said, "We made a new will. Who is Elsie Hiller?" He then told her that Mrs. Sward, Mrs. Schubal, Constance Diernesse and the witness were remembered. Petitioner denied having this conversation with the witness or ever having heard the name Elsie Hiller before.

The actual execution of the will took place at testatrix' home on April 4th. Petitioner testified he drew the will, left it with testatrix three or four days before that with instructions to look it over. Petitioner saw her daily and it was finally arranged that he would come to her house on the following day for the signing of the will. She was to get the witnesses. When he arrived at the appointed hour, one Holloway was present. Testatrix wanted a Mr. Kraehl as a witness. She phoned for him but could not get him. She then called Mr. Selvage and petitioner said he knew a neighbor that he could get. Apparently Holloway left about this time. Just why he was not asked to witness the will does not appear. Petitioner went to the home of Mrs. Kaehler and asked her to come over.

Selvage testified that he thought Mrs. Kaehler signed first. Both Schubal and testatrix asked him to witness the will. The witness picked the will up to read it. Petitioner took it from him and told him it was not necessary for him to read it. Testatrix made no objection to the witness reading it. He testified that she did not state that she had read it nor did petitioner ask her if she wanted to, nor did she state that it was her last will and testament. She signed the will after Mrs. Kaehler and he had signed it.

Mrs. Kaehler testified that testatrix stated it was her will, asked her and Selvage to witness it, and that testatrix signed before the witnesses did. Petitioner was present at all times during the signing of the will. His version of its signing was similar to that of Mrs. Kaehler. He admitted telling Selvage not to read it but claimed he then asked testatrix if she wanted Selvage to read it and she said she did not. Mrs. Kaehler did not testify on this subject.

Dr. Nutting had treated testatrix for three or four years prior to her death. He had hospitalized her on two occasions, March 22nd to April 5, 1950, and January 16th to February 8, 1951. She was suffering from cirrhosis of the liver. She was a sherry addict. She was subject to hemorrhages and her life expectancy was not over a year or two. On returning home from the hospital she started drinking again and vomited occasionally. She was having difficulty seeing. She was flighty. She varied from time to time in her lucidity. Her judgment was poor. At times she did not know the witness. She did not have sound judgment. Petitioner testified he knew she was not a well woman and drank to some extent, although not excessively.

The contest is by testatrix' sister. The court found that testatrix was not capable of making a will and that it was obtained by the undue influence of petitioner, her attorney.

Undue Influence.

[1] "There can be no doubt that under section 2235 of the Civil Code there is a rebuttable presumption of undue influence and insufficient consideration in transactions involving a trustee and beneficiary, and that this section includes the relationship of attorney and client. * * * '* * * But if he does deal with him in such manner as to obtain an advantage, the trustee has the burden of showing by evi-

dence that the transaction was fair. (Citing cases.)' See, also, Moore v. Hoar, 27 Cal.App.2d 269, 288, 81 P.2d 226. * * *

"Another good case discussing the problem is In re Estate of Phillipi, 76 Cal.App. 2d 100, 102, 172 P.2d 377, 378, where the court stated: 'That Mr. Wilson was the attorney of the testator and that a confidential relationship existed between them is not questioned. Where such a situation exists the rebuttable presumption of fraud or undue influence arises where the attorney profits from his dealings with his client. That presumption can only be overcome by clear and satisfactory evidence that the transaction between the attorney and his client was fair and equitable and that the attorney had taken no advantage of the relationship and that the client was fully informed as to all matters relative to the transaction.' See, also, In re Estate of Witt, 198 Cal. 407, 245 P. 197." McDonald v. Hewlett, 102 Cal.App.2d 680, 686–687, 228 P.2d 83, 87, 24 A.L.R.2d 1281.

[2] It is obvious from petitioner's own testimony that he has not made a clear showing that the transaction was fair and that he had taken no advantage of his relationship with testatrix. The fact of the destruction of the writing which he claims she gave him, the peculiar "codicil" which he made out and to which he added "Change of codicil later," the will containing the identical provisions of the "codicil," the fact that he made no suggestion to her that she consider her relatives, his failure to insist that she obtain independent advice, his refusal to let her neighbor Selvage see the contents of the will, the fact that he and his wife are willed all of her estate but $1,500, the ill condition of testatrix, the fact that during the execution of the will he remained in the room and directed all the proceedings,—all are circumstances which add weight to the presumption. An attorney dealing with his client to his own advantage by getting practically her whole estate, must, at least, show that he reminded her of the natural objects of her bounty so that she could freely choose between them and him. Such reminder must be more than the casual reference to them which his testimony shows he made.

[3–5] It is true that the burden was on the contestant to prove undue influence by a preponderance of the evidence, and that the proponent does not have to overcome the presumption or other prima facie showing of such undue influence by a preponderance of the evidence. Estate of Eakle, 33 Cal.App.2d 379, 91 P.2d 954. The circumstances here, while they might have supported a finding of no such influence, amply support the finding of undue influence. It is normally for the trial court to determine whether proponent's evidence outweighs the presumption or prima facie showing. As said in McDonald v. Hewlett, supra, 102 Cal.App.2d 680, 688, 228 P.2d 83, 88, "Obviously, where the trial court reasonably does not believe the rebutting testimony the presumption is unimpaired."

A significant fact bearing upon the credibility of the petitioner is that in his petition for probate of the will, he completely omitted the names and addresses of the sister or brothers. He definitely knew of the existence and address of the sister, and having access to all of testatrix' papers and letters probably knew of the addresses of the brothers. At least, he did not claim that he did not. His explanation was that while he knew as an attorney that the names and addresses of all heirs of the testatrix were supposed to be included in such a petition, he did not consider them heirs as they were not mentioned in the will.

[6] As we have determined that the evidence amply supports the court's findings of undue influence, it becomes unimportant whether the finding of mental incompetency is supported or not. For that reason we have not included the additional evidence on that issue, nor do we deem it necessary to discuss it.

The order is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

123 Cal.App.2d 169

CAPITELLI v. SAWAMURA et al.

Civ. 15588.

District Court of Appeal, First District,
Division 2, California.
Feb. 15, 1954.

Lessee's action for breach of oral contract allegedly made to settle dispute between parties when lessors retook possession of leased nursery. The Superior Court, San Mateo County, A. R. Cotton, J., entered judgment adverse to lessors, and they appealed. The District Court of Appeal, Nourse, P. J., held that oral testimony to show existence of alleged oral agreement forming basis of suit was not admissible (1) on theory that such contracts related to same matters, between same parties, and were parts of one transaction, (2) on theory that oral contract explained terms of written contract, or (3) on theory that oral agreement was inducing and moving cause for written agreement.

Judgment in favor of plaintiff reversed, and judgment for defendants on cross-complaint affirmed.

1. Evidence ⚷441(15), 443(2), 448

In lessee's action against lessors for breach of oral contract allegedly made to settle dispute between parties when lessors retook possession, oral testimony to show existence of alleged oral agreement forming basis of suit was not admissible (1) on theory that such contracts related to same matters, between same parties, and were parts of one transaction, (2) on theory that oral contract explained terms of written contract, or (3) on theory that oral agreement was inducing and moving cause for written agreement. Code Civ.Proc. § 1856; Civ.Code, §§ 1625, 1639, 1647.

2. Contracts ⚷75(2)

Where, by terms of lease, lessee had agreed to return premises at expiration of lease in condition in which it was at time that lease was executed, money expended by lessee to put leased premises in condition prior to return to lessors could not form consideration for alleged oral agreement by lessors to pay lessee per cent of net profits from operation of leased premises for one year after its return to lessors.

3. Licenses ⚷39.1

A contract made by an unlicensed person in violation of licensing statute is void.

4. Factors ⚷2

Lessee not licensed as commission merchant could not recover on alleged contract by lessors to let lessee retain percentage of gross sales made by lessee for lessors after they repossessed leased nursery. Agricultural Code, § 1261(e).

5. Appeal and Error ⚷1172(5)

Where award of damages was based on illegal oral contract, part of judgment awarding damages would be reversed without regard to matter of proof of damages.

Guy C. Calden, Elliot W. Seymour, San Francisco, for appellants.

Dolwig & Miller, South San Francisco, for respondent.

NOURSE, Presiding Justice.

This action was based on a claim for damages allegedly caused by defendants' breach of an oral contract. Judgment went for plaintiff in the sum of $3,892.14, plus 7% interest thereon from December 31, 1947, and costs of $175.46. Defendant William Kitagawa filed an amended cross-complaint alleging that cross-defendant, George Capitelli, is indebted to him in the sum of $1,706.71, and asking for judgment against cross-defendant in that amount plus interest. The trial judge made no ruling on the cross-complaint but in his findings subtracted from the total figure of damages of $5,598.85 amounts equalling $1,706.71, leaving the figure of $3,892.14, the amount of the judgment for plaintiff.

The Kitagawa nursery was owned by William and Reo Kitagawa. In 1941 William joined the army leaving the management of the nursery to Reo and George Sawamura, an employee. In 1942 they were sent to a relocation camp. Reo was the first to leave; the leasing of the nursery was left to George Sawamura. It was alleged in the complaint, which allegation the trial judge found to be true, "That on or about the 9th day of April, 1942, plaintiff, as lessee, and George H. Sawamura, one of the defendants, as lessor, entered into a lease by the terms of which plaintiff obtained the exclusive possession, use and occupancy of the said premises, * * * for a term commencing with the date thereof and ending the 2nd day of January of the year next succeeding the year in which the said defendant would return to San Mateo County, California, ready, able and willing to resume his operation of a nursery and flower business under the name of Kitagawa Nursery; that on or about March 12, 1942, the defendant, Reo Kitagawa, consented in writing to the execution of said lease and on or about April 27, 1942, the defendant, William Kitagawa, also consented in writing to the execution of said lease."

Under the terms of the lease lessee was to make the monthly payments of $40 due on a loan secured by a deed of trust on the real property and pay the city and county taxes. The pertinent provisions of the lease read as follows:

"2. The term of this lease shall be from the date hereof to and including the 2nd day of January of the year next succeeding the year in which lessor returns to San Mateo County, California, ready, able and willing to resume said business. Upon such return lessor personally shall be obliged promptly to notify lessee of his return and of his willingness and ability to resume said business."

"7. Lessee agrees to keep and maintain said premises and improvements in the same state and condition as they are in on the date hereof, reasonable wear and tear excepted, * * *. Lessee further agrees upon the expiration of the term of this lease to surrender said premises and improvements to lessor in such state and condition, * * *."

In December, 1945, William Kitagawa made demand by letter for return of the premises under the lease stating he was returning to Redwood City and was ready, able and willing to take over the property before January 2, 1946. Also in December, 1945, George Sawamura notified plaintiff by telegram he was returning to the premises. Plaintiff did not surrender the premises until January 3, 1947, when an agreement drawn by plaintiff's attorney was signed by William and Reo Kitagawa, Sawamura and Capitelli. The wording of this agreement would indicate that it was drawn up pursuant to the terms of the lease agreement signed by the parties when Capitelli became the lessee. However, plaintiff alleges in his complaint and testified in court that the only condition under which he would agree to release the property was the making of an oral agreement to supply him with one-half of the gross yield of gardenias, which oral agreement will later be more fully set forth.

The agreement of January 3, 1947, reads in part:

"Whereas the undersigned, George H. Sawamura, Reo Kitagawa and William Kitagawa, by a lease dated April 9th, 1942, leased to the undersigned, George Capitelli, an individual, certain real property together with improvements, * * * upon the terms and conditions as more particularly set forth in said lease; and

"Whereas the undersigned, George H. Sawamura, Reo Kitagawa and William Kitagawa, have requested said lessee to surrender the possession of said premises:

"Now therefore, in consideration of the release by the undersigned, George H. Sawamura, Reo Kitagawa and William Kitagawa, of said George Capitelli from each and every of his obligations under said lease, and of the acceptance of this surrender by the undersigned, * * * together with the sum of One Dollar ($1.00) paid to the undersigned, * * * said lessee does hereby grant, assign and surrender said lease to the undersigned, George H. Sawamura, Reo Kitagawa and William Kitagawa.

"The undersigned, * * * in consideration of the premises, does hereby accept said surrender and does hereby release said lessee, George Capitelli, from all obligations and liabilities arising out of or under the terms and conditions of said lease.

* * * * * *

"By the acceptance of the surrender of this lease the undersigned, George H. Sawamura, Reo Kitagawa and William Kitagawa, acknowledge that the premises * * * have been returned to them in the same state and condition as at the time of the execution of said lease on the 9th day of April, 1942."

Plaintiff alleges in his complaint "That on or about January 2, 1947, and while said lease was in full force and effect, * * * a bona fide dispute arose between plaintiff and defendants herein, concerning the duration of the term of said lease, for the reason that lessor had renounced his American Citizenship, and the probable return of lessor 'ready, willing and able' to exercise his right of reentry under said lease, thereby became indefinite and uncertain." (Sawamura was the only one whose status as an American citizen was uncertain. William Kitagawa was the sole owner of the property in January, 1947, Reo having conveyed his interest in the property to William in 1946. There has not been at any time any question of William's American citizenship.)

"That said dispute was settled on January 2nd, 1947, upon the express oral understanding and agreement entered into * * * by and between the parties to this action, that if plaintiff would surrender said lease-hold to defendants, plaintiff would receive from defendants, and defendants would furnish to plaintiff fifty (50) percent of the entire production of flowers which defendants would produce from said premises, during the period from January 3rd, 1947, to and including December 31st, 1947, and providing further that plaintiff would retain as his profit twenty (20) percent commission on the gross sales of said flowers by plaintiff on the open market, plus one (1) percent for advertising expense; that thereupon, and in pursuance of said undertaking and agreement, plaintiff and defendants entered into a written release and surrender of the said lease dated April 9th, 1942. * * *" The trial court found these allegations to be true.

Appellants base their appeal on the following grounds:

(1) The admission of evidence, over objections of defendants, to prove an oral contract was reversible error.

(2) The trial court's failure to find that the alleged oral contract was illegal and void because plaintiff was not a duly licensed commission merchant, dealer or broker dealing in horticultural products was reversible error.

(3) The evidence is insufficient to establish that defendants breached any agreement.

(4) The proof is insufficient to justify the damages awarded by the trial court.

(1) The trial court erroneously admitted testimony in proof of the alleged oral contract over the repeated objections of the defendants. Appellants argue that the release agreement was prepared by plaintiff's own attorney, that if the real consideration for surrender of the leasehold was the agreement to supply flowers to plaintiff, then it should have been made a part of the written agreement for surrender of the leasehold. Plaintiff testified that his attorney had advised him to put the oral agreement into writing but that he "was duly informed by all parties concerned that if that particular phase of the agreement was—went into the release that they wouldn't sign it." It would appear that the defendants did not agree to the oral agreement. Appellants contend that the admission of testimony to attempt to prove such alleged oral agreement violated the parol evidence rule, precluding the admission of parol or extrinsic evidence to add to or vary a written instrument. Section 1856, Code Civil Procedure. Appellants also cite section 1625, Civil Code and section 1639, Civil Code, "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; * * *."

[1] Respondent answers that the sections quoted by appellants are qualified by section 1642, Civil Code, "Several con-

tracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together", and section 1647, Civil Code, "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Respondent also cites Peterson v. Wagner, 52 Cal.App. 1, 198 P. 25, to the effect that evidence of a contemporaneous oral agreement, which was the inducing and moving cause for a written agreement, or forms part of the consideration for the written agreement is admissible. However, aside from the testimony of respondent that he surrendered the property only on the consideration of the oral agreement by which the Kitagawas were to furnish him with 50% of their gross output in 1947, which claim the trial judge found to be true, there is no evidence to support respondent's claim that the oral agreement was the "inducing and moving cause for the written agreement." Under the terms of the lease lessee was to relinquish the property upon notification from the lessor that he was ready, willing and able to take back the property, on January of the year following such notification. If, as respondent contended, he was doubtful of Sawamura's ability to take over the nursery because of his uncertain status as to citizenship, the oral agreement wouldn't cure this difficulty. Sawamura worked in the nursery during the greater part of the year 1946, as did William and Reo Kitagawa, and respondent produces no evidence showing they were not able to take back and operate the nursery. He testified in response to the question: "And you knew in the spring of 1946 that you were going to have to return the possession of the premises to the Kitagawas, did you not? A. I presumed eventually I was going to have to return it to them. It wasn't a question of whether you wanted to or not." Respondent could not have failed to understand that under the lease agreement he was to relinquish the property within a certain length of time after appellants returned. The agreement of January 3, 1947, effected this release. There was nothing ambiguous or uncertain about it. Therefore, the admission of parol evidence to vary the terms of this agreement was error.

[2] Respondent testified that he expended a large amount of money on the nursery in 1946, that it was a bad year financially and he wanted some return on his investment, which he sought to obtain by the oral agreement. He had replanted some 8,000 gardenia plants in 1946. However, under the terms of the lease he was obligated to return the property in the same condition in which he received it. The nursery, when he took over was devoted entirely to gardenias; he replanted over half of it with tomatoes and peppers, hence the necessity in 1946 of restoring the gardenia plants at his expense. Appellants contend that plaintiff may not now be heard to claim, as a detriment suffered by him that which he was obligated to do, that there was a complete failure of consideration for the alleged oral agreement upon which his action is predicated. This contention is sound, and it negates any recovery by respondent on the oral agreement.

(2) Lack of license made any oral contract illegal or void.

[3, 4] It is undisputed that respondent had no license as a commission merchant, dealer or broker. To act as such, a license was required under section 1263, Chapter 6 of the Agricultural Code. Appellants contend that plaintiff's complaint and testimony that he was to receive the flowers for sale on the open market, respondent to retain a 21% commission showed that he was acting as a commission merchant, dealer or broker. Section 1261(e) Chapt. 6, Agricultural Code, defines a commission merchant as follows: "The term 'commission merchant' means any person who shall receive on consignment or solicit from the producer thereof any farm product for sale on commission on behalf of such producer, or who shall accept any farm product in trust from the producer thereof for the purpose of resale, or who shall sell or offer for sale on commission any farm product, or who shall in any way handle for the account of or as an agent of the producer thereof any farm product." The records show that

plaintiff from the first part of January until about February 22, 1947, received flowers from Kitagawa nursery, sold them, made weekly reports of sales, remitted proceeds of sales less commission, freight and dumped flowers, which was the procedure followed by commission merchants. Mr. Charles J. Lane, agent for the California Department of Agriculture, charged with enforcement of the provisions of the Agricultural Code, was called as a witness on behalf of the defendants. He testified: "In my opinion, after listening to the testimony and Mr. Kitagawa's statements to me, I would say Mr. Capitelli was definitely a commission merchant. As a matter of fact when I wrote Mr. Capitelli on September 4th, I stated that to him in my letter." Appellants maintain that under circumstances where a license is required, a contract made by an unlicensed person in violation of a statute is void. Loving & Evans v. Blick, 33 Cal.2d 603, 614, 204 P.2d 23. Therefore, appellants rightly conclude that if there was an oral contract it was illegal and void and the trial court erred in not so finding.

Respondent contends that under the oral agreement each of the parties undertook to share the crop on an agreed basis and that in effect he was to receive an agreed division of the crop yield which was the end product of his own capital and labor, and that the sections of the Agricultural Code in question are not here involved. We are not impressed with the contention.

Whether it is determinative of his status in regard to the Kitagawa nursery, it is worthy of note that respondent was obtaining flowers from thirty or forty other sources, supplying a number of customers both local and out of state at the time he was handling the flowers from the Kitagawa nursery. After being contacted by Mr. Lane respondent took out a license in November, 1947, as he was required to have it in his business.

(3) Evidence is insufficient to establish that defendant breached any agreement.

There was testimony given by both sides that during the month of January and extending to about the 22nd of February, 1947, respondent, or one of his employees, would telephone orders to the nursery and pick up the flowers which had been set aside for him the next day. There is no testimony in the record that defendants refused or failed to supply any gardenia flowers ordered by the plaintiff or his employees. The last flowers were picked up about the first week in April. Appellants charge Capitelli never accounted for the flowers received after February 22, 1947, to and including April 5, 1947, when he discontinued receiving flowers and contend that such failure to account and pay the sums owing for the flowers received by him constituted a material breach of the agreement between the parties. Respondent in his brief makes no answer to this contention.

Appellants claim a further breach of the contract occurred when instead of selling the flowers on the "open market", which meant for the highest price obtainable, as he had agreed, respondent sold the gardenias at $3.50 a dozen to his regular customers at a time when the Kitagawa nursery was selling the same grade for $7 a dozen in the open market. If we were to hold that the oral contract was valid this would be substantial evidence of its breach. But with an invalid oral contract this question does not call for discussion.

(4) Proof insufficient to justify damages awarded by the trial court.

[5] The amount of damages awarded by the trial court was based upon 21% of half of the gross sales of the Kitagawa nursery for 1947. A referee was appointed by the court, over the objection of appellants, to determine the gross sales of the nursery for 1947. The figure arrived at by the referee as respondent's share of the proceeds from the sale of the gardenias was $5,598.85. The trial court accepted this figure and after allowing credits and set-offs awarded $3,892.14 as the damages suffered by respondent due to appellants' breach of the contract. Aside from the fact that no competent evidence supported the amount of the award, such award is founded wholly on the invalid oral contract. For that reason this part of the judgment must be reversed without regard to the matter of proof.

There is no controversy concerning the propriety of the allowance to William Kitagawa on his cross-complaint though the findings and the judgment itself are confusing as to that item. However the respondent did not appeal from that portion of the judgment. There is no question as to the amount due cross-complainant. It is therefore proper to assume that the trial court meant to give him judgment for the amount prayed. For the purpose of a clear record we deem it proper to direct a new and complete judgment.

The judgment in favor of plaintiff is reversed. Judgment is to be entered in favor of William Kitagawa on his cross-complaint for $1,706.71 with interest at 7% from April 5, 1947, and as so entered is hereupon affirmed. All defendants should recover their costs.

DOOLING, J., and O'DONNELL, J. pro tem., concur.

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123 Cal.App.2d 446

Guardianship of WILLIS.

WILLIS v. NEILL et al.

Civ. 4648.

District Court of Appeal, Fourth District, California.

Feb. 24, 1954.

Petition by father for appointment as guardian of his minor son, consolidated for hearing with petition by persons having custody of such child to have him declared free from custody and control of the father. The Superior Court of Kings County, W. G. Machetanz, J., denied both petitions but appointed the persons having present custody as guardians and awarded them custody subject to visitation, and the father appealed. The District Court of Appeal, Mussell, J., held that evidence did not support the finding that the father was unfit to have custody of the child.

Reversed.

1. Guardian and Ward 🔑13(4)
Parent and Child 🔑2(4)

In proceeding by widower for appointment as guardian of his two-year old son, consolidated for hearing with petition by persons having custody of such child to have him declared free from custody and control of father, evidence did not support finding that father was unfit to have custody of child.

2. Parent and Child 🔑2(3.3)

Fitness of father to have custody of child must be determined as of time of hearing on the petition.

3. Parent and Child 🔑2(3.5)

Where parent applying for custody is in a position to take child and is not shown to be unfit, court may not award custody to strangers merely because it feels that they may be more fit or more able to provide financial, educational, social or other benefits.

David S. Folsom, Corcoran, for appellant.

Robert R. Rosson and A. Hugo Pearson, Hanford, for respondents.

MUSSELL, Justice.

On July 16, 1952, Cecil H. Willis, hereinafter referred to as "Willis", filed a petition herein for appointment as guardian of his minor son, Gerald David Willis, then of the age of two years, hereinafter referred to as "Gerald". On August 8, 1952, Wallace Neill and his wife, Margaret, who then had custody of the child, filed a petition in the Juvenile Court to have him declared free from the custody and control of his father. The two proceedings were consolidated for hearing by stipulation and the trial court denied the petition of Willis to be appointed guardian and also denied the Neill petition. However, the court appointed Wallace Neill and his wife as guardians of the child and awarded them his sole custody, subject to reasonable visitation by the father.

In his appeal from the order and judgment denying his petition and appointing the Neills as guardian Willis contends (1) That a finding of unfitness is essential before a parent can be deprived of the custody of a child; and (2) That the finding of the trial court that "Cecil H. Willis is not a fit person to be the guardian of the person of the minor child, Gerald David Willis" is not supported by the evidence.

Cecil and Beulah Willis were married October 24, 1931, and at the time of the trial herein there were ten living children of the marriage, including Gerald, who was born on July 10, 1950. His mother, Beulah, died five days later and was in ill health during the last three months before her death. The family then lived in Corcoran and the home was in a deplorable and filthy condition. Willis, the husband and father, was working for the Kings county road district for $205 per month. He also worked in the evenings and on vacations for a lumber company to help support his family.

Gerald was a premature baby and when he was nineteen days old he was released from the hospital and Willis placed him with Mrs. Wallace Neill and her husband. The child was then in very poor health and the Neills nursed and cared for him to such an extent that he has now become a healthy child. He has been in the custody of the Neills since he was first accepted by them. He is well cared for and has a comfortable, well kept home.

After the death of Beulah Willis the Welfare Department supplied aid to the Willis family by paying for the support of Gerald and employing a housekeeper. The home conditions then improved and in the latter part of 1950 Willis employed a Mrs. Wright as housekeeper. She lived with the Willis family for several months. At the time of the trial both she and Willis stated they were in love with each other and planned to marry as soon as she was able to obtain a final decree of divorce from her husband. In August, 1952, the Willis family moved to Bakersfield and at the time of the trial Willis and his children, Mrs. Wright and her minor child all lived there in a comfortable three bedroom house. The home and the children were kept neat and clean. Apparently Willis and Mrs. Wright were married since the trial.

There was evidence that on one occasion Willis, while intoxicated, took one of the children and drove his automobile to the home of a friend; that on another occasion he drove his car at a "very dangerous speed in *a* erratic manner" when three of his small children were in the car with him; that on the same date he used vile and abusive language in the presence of children, became intoxicated, rolled off a couch in the living room of his home and lay there cursing; that on several occasions Mrs. Wright used profane language in the presence of the Willis children; that on one occasion she created a disturbance in a store in Hanford. In this connection Mrs. Neill testified that Mrs. Wright swore at her and that "she told me that I felt like I was so God damn smart she would beat the God damn hell out of me right there." The evidence shows that Willis visited Gerald occasionally and that he paid the Welfare Department for the child's support until April, 1952, when the Neills refused to give him possession of the child.

The trial court found:

> "That in view of all the evidence and because the home now maintained by the said Cecil H. Willis is now occupied by said Cecil H. Willis and eight (8) of his children, and a housekeeper, who is his promised bride, and her child, eleven (11) persons in all, and in view of the smallness of the home for such a large family, and because of the unladylike demeanor of the housekeeper, Mrs. Wright, and because of the fact that she is the promised bride of the said Cecil H. Willis, although *not* finally divorced from her husband, and residing in the same home of the said Cecil H. Willis and the minor children, and because of the additional fact that the sleeping

> conditions of said home are not satisfactory, all of which would not be for the best interests or moral welfare of the minor child, Gerald David Willis, said Cecil H. Willis is not a fit person to be the guardian of the person of the minor child, Gerald David Willis.
>
> "That Wallace and Margaret Neill are fit and proper persons to be the guardians of the person of the child, Gerald David Willis."

[1] It is contended by appellant that this finding is not supported by the evidence. We are in accord with this contention. The trial court heard and determined the issue as to whether Willis was a fit and proper person to have the custody of his child. Stewart v. Stewart, 41 Cal.2d —, 260 P.2d 44, 48. As was there said:

> "It is true that a change of custody of children may entail 'serious emotional disturbance.' The courts are concerned with avoiding these distresses and are given wide discretion within the law in the determination of such matters. * * * 'The discretionary power of a trial court necessarily is limited by those provisions of the codes wherein the express policy of the legislature regarding general questions of custody are set forth, Civ. Code, §§ 138, 197; Prob.Code, §§ 1407–1408, and by the judicial interpretation of those code provisions in relation to the specific questions presented by the instant case.' * * * The code sections contemplate that the care of a minor child be awarded to a parent, if a fit and proper person, as against a stranger. * * * The Supreme Court of the United States has well pointed out the guiding principle in custody cases in Prince v. Massachusetts, 321 U.S. 158, at page 166, 64 S.Ct. 438, at page 442, 88 L.Ed. 645. It is there said: 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. (Citations.) And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.'"

The court also stated that the issue of fitness should be tried out in the usual way with evidence and findings on the subject.

[2] Fitness of the father to have the custody of a child must be determined as of the time of the hearing on the petition. Guardianship of McCoy, 46 Cal.App.2d 494, 116 P.2d 103. The evidence shows that Willis was honest and industrious, that at the time of the hearing he was working for a construction company as a blade operator and was earning $500 per month. The family was living in a three bedroom home, with bath, large living room and a three-quarter acre, fenced yard. The house was kept clean and the children were clean, well fed and clothed. There is no evidence that Willis mistreated or abused any of his children. There was testimony that he treated them as well as any father could under the circumstances. While the record shows that he became intoxicated on one or two occasions, the trial court found he was not habitually intemperate. Mrs. Wright was employed by Willis as a housekeeper and lived with the family. However, the evidence is that she did not sleep in the same room as Willis and there is no evidence that she indulged in any immoral acts with him and there is no finding to that effect. The circumstances under which Willis left his child with Wallace Neill and his wife do not indicate that he intended to abandon it and the understanding was that he was to take the baby when he was able to take care of it. Mrs. Neill told Willis she did not want any support for the child. However, Willis paid for its support until April, 1952, when Mrs. Neill refused to permit him to take it.

Under the circumstances disclosed by the record the finding that Willis is "unfit" is not supported by substantial evidence. As stated by Mr. Justice Schauer in his dissenting opinion in Guardianship of Smith, 42 Cal.2d 91, 265 P.2d 888, 898, to brand a parent as unfit would almost certainly mean that the parent could never hope to gain either the respect or affection of his child. The finding of unfitness necessarily implied that Willis was unfit to care for all of his other children, an implication not supported by the record.

Apparently the word "unfit" has not been defined by statute in this state. In Richards v. Forrest, 278 Mass. 547, 180 N.E. 508, 510, it is said:

> "In general, the word means unsuitable, incompetent, or not adapted for a particular use or service. As applied to the relation of rational parents to their child, the word usually although not necessarily imports something of moral delinquency. Violence of temper, indifference or vacillation of feeling toward the child, or inability or indisposition to control unparental traits of character or conduct, might constitute unfitness. So, also, incapacity to appreciate and perform the obligations resting upon parents might render them unfit, apart from other moral defects."

As stated by Mr. Justice Traynor in his concurring opinion in Guardianship of Smith, supra, 42 Cal.2d 95, 265 P.2d 891:

> "Unless the upbringing of the child is so defective as to call for action by the juvenile court, it is unlikely that an outsider will challenge the parental custody or seek by legal process to prove that the child's welfare would best be served elsewhere. It is generally understood that the stability of established family units would be jeopardized by outside interference."

[3] One of the apparent reasons for the court's finding that it would not be for the best interests or moral welfare of the child to be awarded to his father was that the Willis home was too small for such a large family and that the sleeping conditions were not satisfactory. However, as was stated in Guardianship of Smith, supra, 42 Cal.2d 92, 265 P.2d 889:

> "Where a parent applying for custody is in a position to take the child and is not shown to be unfit, the court may not award custody to strangers merely because it feels that they may be more fit or that they may be more able to provide financial, educational, social, or other benefits."

The record indicates that Willis was attempting to the best of his ability to properly provide for and care for his children; that he was affectionate toward his children and that they all loved him. The evidence is insufficient to support the order and judgment depriving Willis of the custody of his son, separating the members of his family and depriving the child involved of the comfort, companionship, love and affection of his brothers and sisters and his father.

Judgment and order reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

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123 Cal.App.2d 390

STINSON et al. v. BLODGET et al.

Civ. 4650.

District Court of Appeal, Fourth District, California.

Feb. 19, 1954.

Action by owner to enjoin foreclosure sale and to quiet title. The Superior Court, Kern County, Warren Stockton, J., upon proper showing dissolved temporary restraining order permitting sale of property, and subsequently entered judgment declaring purchaser at trust deed foreclosure sale owner in fee. Owners appealed. The District Court of Appeal, Griffin, J., held that evidence sustained judgment.

Judgment affirmed.

1. Appeal and Error 🔑843(2)

In action to enjoin foreclosure sale and to quiet title, whether court erred in denying injunction was a moot question on appeal when sale had already been completed.

2. Declaratory Judgment ⚿365

In declaratory relief action, the court has the powers of a court of equity.

3. Mortgages ⚿74

In action to enjoin foreclosure sale and to quiet title, wherein evidence conflicted as to understanding at time of execution of trust deed, evidence sustained finding that owners executed trust deed and that property was encumbered by the amount stated therein.

4. Appeal and Error ⚿1011(1)

When a case is tried by the court without a jury, and testimony creates a conflict in the evidence, trial court is the sole judge of that conflict.

5. Mortgages ⚿338

Quieting Title ⚿47(2)

In action to enjoin foreclosure sale and to quiet title, where pleadings did not allege that trust deed foreclosure sale price was inadequate, and no such claim was pressed in trial court, it was unnecessary to make finding that price was adequate.

6. Appeal and Error ⚿173(8)

Where note secured by trust deed provided for eight per cent interest and debtor agreed to pay additional sum to creditor as compensation for securing loan and handling transaction, debtor could not for the first time on appeal claim that loan was usurious.

Miller & Sinclair, Loren Miller, and Harold J. Sinclair, Los Angeles, for appellants.

Baker, Palmer & Wall, Bakersfield, for respondents.

GRIFFIN, Justice.

Plaintiffs and appellants Archie Stinson and wife brought this action against defendants and respondents Viola G. Blodget, Claude Blodget, et al., in which they allege that defendants claim an interest adverse to that of plaintiffs in certain described real property in Kern County, consisting of two small houses located on two small lots.

The evidence shows that plaintiffs owned the property in question; that certain plumbing was faulty and the City officials required its repair and that plaintiffs needed money; that Mr. Blodget, a real estate agent and friend of plaintiffs, went on plaintiffs' note for $700, as an accommodation endorser or co-maker; and that plaintiffs paid him $60 in cash for signing it. Plaintiffs defaulted in payment and Blodget was compelled to satisfy a judgment in favor of the finance company. Several other suits were pending against Archie Stinson. Blodget and plaintiffs had a conference, and to give Blodget some security for the repayment of the monies advanced on behalf of plaintiffs by him and to avoid other creditors realizing on plaintiffs' equity in their home, it was suggested that plaintiffs deed their property to their two sons and that they execute a second trust deed for $1,246, at 8 per cent interest to Blodget's wife for the money advanced by them, and allow said sum to be paid off at the rate of $20 per month. This arrangement was carried out. There was a first trust deed on the property in the approximate sum of $500, and back taxes were due. Blodget paid an obligation of plaintiffs for $160.69, and other items, all totaling $1,246, the amount of the second trust deed. Included therein was an item wherein Blodget charged plaintiffs $100 for his efforts in the matter and in securing the loan.

Only two payments were made on Mrs. Blodget's trust deed, leaving a balance of $1,219.07. After two or three years delinquency, the defendant Title Insurance and Trust Company, trustee, gave the sons notice of default. Plaintiffs paid approximately $400, the balance due on the first trust deed, just before foreclosure sale under the second trust deed, at which sale Mrs. Blodget purchased the property for the amount then due on her note.

Plaintiff Archie Stinson testified generally that he was ill and did not remember talking to the defendants about the transaction and did not remember signing the deed to his two sons, but admitted the signature on it was his. He said he was indebted on the first trust deed but was later informed that Blodget had paid this trust deed and it was released because defendants then owned the property. He conceded he owed defendants $672 on the co-signer note to the finance company but stated that he thought Blodget obtained payment of that amount out of another foreclosure sale. He admitted receiving notice of foreclosure under the second trust deed and that the amount claimed therein "was $1224". He stated that he never talked with Blodget about the amount due or how the title to the property happened to be taken in the sons' names; and that he never authorized his sons to sign any trust deed. He admitted the taxes were not kept up on the property although he knew his sons were receiving some exemption on the taxes by virtue of some military service. He testified to the value of the property at the time of foreclosure as being between $3,500 and $4,000; that he was living on the premises until the foreclosure sale; that he made certain payments on the bills in excess of the amounts which Blodget claimed; and that his sons had made payments on the trust deed. He later admitted on cross-examination, signing certain receipts for money paid in his behalf by Blodget for material furnished to him. It appears that after Stinson regained his health, his sons and their wives, in December, 1950, deeded the property back to Stinson. The notice of default was dated December 8, 1950.

One son testified Blodget came to him and told him of the judgment against his father and Blodget and that he wished to save the property for his father; that if the father would deed the property to the sons they could execute a trust deed for that amount ($605) and pay off the trust deed and note; that he agreed to this and Blodget had the plaintiffs sign the deed; and that he later signed the note and trust deed at a time when he was alone with Blodget in his office; that he did not read it carefully; and that he believed it was for $605 rather than the $1,224 indicated on the face of the note. He now claims no amount was typed in the space indicated for the amount of the note but that the spaces were filled in on the trust deed at the time he signed it. He admitted that Blodget later mailed him a "record of payments in the payment book on the trust deed", indicating that $1,224 was due and that they made one payment on it thereafter. He likewise admitted that Blodget furnished a statement to him of the items making up the sum of $1,224, and later discovered that Blodget had paid a bill or judgment obtained against plaintiffs by the Butler Company, but claims Blodget only paid $150 as the balance due, and that it was then when Blodget said he had charged $100 for his trouble.

The other son admitted going to Blodget's office together with his brother, and stated that his brother had already signed the note so he "signed it too"; that he did not remember whether the amount was filled in or not at the time but he believed it was for $605. He then testified they did not sign the trust deed at Blodget's office; that it was later taken to their home and signed by him, but he did not remember the amount indicated.

Plaintiff Mrs. Stinson identified the deed from plaintiffs to their sons and admitted she signed it in the presence of her husband and sons; that her sons explained to her what the transaction was, i. e., that the sons were going to pay off the indebtedness which she thought was $600, so she signed the deed.

In rebuttal, Blodget refuted this testimony and specifically testified that all blanks were filled in on the note and trust deed when the parties signed them; that in addition to the payment of the $700 judgment in question he also paid the other obligations mentioned, as well as the first trust deed; that all of these payments could not have been made from the proceeds of a trust deed loan of $605, and that all parties fully understood the transaction.

The prayer of the complaint is that defendants be enjoined from selling the property; that the trust deed be removed as a cloud on plaintiffs' title; that plaintiffs' title thereto be quieted, and for general relief.

Upon the filing of the complaint plaintiffs obtained a temporary order restraining the defendants from disposing of the property pending the determination of the action. Upon a proper showing the restraining order was dissolved and defendants sold the property for $2,000. Subsequently, after trial of the action, the court found that the property was encumbered by a first trust deed for "at least $345"; that a judgment was recovered against Stinson by the Butler Company for $160.69, which Blodget paid; that a judgment was obtained for $700.80 against both Stinson, as maker, and Blodget, as accommodation co-signer, and paid by Blodget; that plaintiffs agreed to and did convey the property to their sons and that they did execute a note and trust deed in the sum of $1,224.60 in consideration of Blodget's satisfying the obligations mentioned; that at the time of sale there was due on the note and second trust deed $1,605.01 principal, interest and costs; and that the sale was made to Mrs. Blodget in said sum on June 4, 1951. The court then found directly against plaintiffs' testimony above mentioned and that plaintiffs had not offered to restore to defendants any sums paid by them, but retained the benefit of the consideration paid by Blodget for said second trust deed and note, and are, accordingly, estopped to deny their validity; that Viola G. Blodget became the owner in fee of the property by virtue of the sale under the trust deed foreclosure, and that plaintiffs now have no title to it. Judgment was entered accordingly.

[1–5] Plaintiffs, in propria persona, perfected this appeal. Different counsel now represent plaintiffs. Since the property has been sold the question whether an injunction should be granted restraining the sale has become moot. Diederichsen v. Sutch, 47 Cal.App.2d 646, 118 P.2d 863; Mitchell v. Warren, 95 Cal.App.2d 594, 213 P.2d 413. It appears that by reason of the sale of the property by defendants to an innocent third party, some of the other questions presented may be similarly affected. Since, under a declaratory relief action, the court has equity powers, City of Los Angeles v. City of Glendale, 23 Cal.2d 68, 81, 142 P.2d 289, we will consider the only questions presented, i. e. (1) the claim that the findings are not sustained by the evidence. We see no merit to this contention. It is apparent that the testimony of plaintiffs only created a conflict in the evidence and the trial court was the sole judge of that conflict. Gould v. Escondido Valley Poultry Ass'n, 56 Cal. App.2d 681, 133 P.2d 448. (2) The other claim is that there was no finding that the price for which the property was sold to Mrs. Blodget under the trust deed was adequate. Plaintiffs' pleadings do not allege that the sale price was inadequate. Apparently no such claim was pressed in the trial court. The property was duly advertised for sale by the trustee and plaintiffs, as well as other persons, had an opportunity to bid on it. It was sold to Mrs. Blodget for the amount of the indebtedness. No finding on the subject was therefore necessary to a proper determination of the action. 2 Cal.Jur. p. 234, sec. 67.

[6] Some mention is made in appellants' brief that plaintiffs' agreement to pay an additional $100 to defendants as compensation in securing the loan and handling the transaction for plaintiffs, in addition to the eight per cent interest they agreed to pay on the note and trust deed, made the loan a usurious one and plaintiffs should have some relief by reason of that fact. The pleadings do not mention this contention and apparently such claim was not made in the trial court. It appears to be raised for the first time on appeal. Questions of this character may not be so raised. Hayward Lumber & Investment Co. v. Ford, 64 Cal. App.2d 346, 353, 148 P.2d 689. In addition, it is not pointed out by plaintiffs wherein the addition of this amount would, in fact, make the loan usurious.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

123 Cal.App.2d 413

BROWN et al.

v.

FRANCISCO, Controller and Auditor of Santa Clara County.

Civ. 15765.

District Court of Appeal, First District, Division 1, California.

Feb. 24, 1954.

Petition by members of county board of supervisors for writ of mandate to compel county controller and auditor to pay salaries as demanded. The Superior Court, County of Santa Clara, Ralph McGee, J., denied petition, and supervisors appealed. The District Court of Appeal, McMurray, J., pro tem., held that constitutional provision that county charters shall provide "for boards of supervisors and * * * for their compensation" did not require that amount of such compensation be set forth in charter itself, and provision in charter that supervisors' salaries were to be fixed by ordinance was not unconstitutional.

Judgment affirmed.

1. Counties 🔑3

Constitutional provision authorizing counties to adopt home rule charters is primarily intended to permit home rule to counties upon action by the county electorate. Const. art. 11, § 7½.

2. Statutes 🔑190

The province of construction of statutes lies wholly within the domain of ambiguity, rules of construction being an aid to resolve doubts and not to create them.

3. Statutes 🔑190, 206

The intention of the Legislature will be determined so far as possible from the language of a statute, read as a whole, and if the words of the enactment, given their ordinary and popular signification, are reasonably free from ambiguity and uncertainty, courts will look no further to ascertain its meaning.

4. Counties 🔑39, 46

Constitutional provision that county charters shall provide "for boards of supervisors and * * * for their compensation" does not require that amount of such compensation be set forth in charter itself, and hence provision in charter that supervisors were to be paid salaries as fixed by ordinance was not unconstitutional. St.1951, p. 4647, § 207; Government Code, § 28106; Const. art. 11, § 5.

5. Counties 🔑46

Provision in county charter that supervisors' salaries were to be fixed, within maximum limits, by ordinance passed by supervisors themselves, but that no increase should take effect during incumbency of a supervisor, was not void as against public policy. St.1951, p. 4647, § 207.

Smith, Wool & Perren, Vernon E. Perren, San Jose, for appellants.

Howard W. Campen, County Counsel, San Jose, for respondent.

McMURRAY, Justice pro tem.

This is an appeal from a judgment denying appellants' petition for a writ of mandate.

Appellants, the members of the Santa Clara County Board of Supervisors, sought the writ to compel respondent, controller and auditor of said county, to pay their salaries at the rate of $6,000 a year, as provided by Government Code, section 28106, as amended in 1951, rather than at the rate of $3,600 a year under county ordinances enacted by the Board in accordance with section 207 of the Santa Clara County charter, St.1951, p. 4647.

It is contended by appellants that the above section of the charter is unconstitutional and that the ordinances enacted thereunder are void. Based on this premise it is urged that they are entitled to the salaries provided in section 28106 of the Government Code inasmuch as sections 53070 and 53071 of that code suspend the prohibition against such increases found in Article XI, section 5, of the Constitution.

Section 7½ of Article XI of the California Constitution provides for "home rule" by counties, and outlines the method whereby a county may frame and adopt a charter for its own government "consistent with and subject to the Constitution * * and relating to matters authorized by provisions of the Constitution, * * *" and contains the following:

"It shall be competent, in all charters, framed under the authority given by this section to provide, in addition to any other provisions allowable by this Constitution, and the same shall provide, for the following matters:

"1. For boards of supervisors and for * * * their compensation * * *

"2. For sheriffs, county clerks [etc.], * * * and for their compensation, or for the fixing of such compensation by boards of supervisors * * *

"3. For * * * justices of the peace and constables * * *, and for their compensation, or for the fixing of such compensation by boards of supervisors * *."

On November 7, 1950 the electorate of Santa Clara County voted for and ratified a charter which was approved by the Legislature on June 5, 1951, and became operative on September 4, 1951. St.1951, p. 4642. Section 207 of that charter, so far as here pertinent, reads: "Salaries of Supervisors shall be based upon the time required for the proper performance of their public duties and shall be fixed by the terms of an ordinance passed by the Board. Such salaries shall not exceed the amount allowable by the applicable provisions of general law as of August, 1950. Subject to the same limitation, salaries may be revised or changed biennially to take effect before new supervisorial terms commence, but no such change shall affect the salary of an incumbent Supervisor during the continuance of his current term of office. * * *" Two ordinances were enacted by the Board, one on September 4, 1951, and one on May 15, 1952, each fixing the members' salaries at $3,600 a year (the amount fixed by Government Code, § 28106, in effect in August, 1950; the provision of general law referred to in the charter.)

It is appellants' position that this portion of section 207 is void since it is inconsonant with the mandate of the Constitution that a charter shall provide "for boards of supervisors and * * * for their compensation * * *." since no compensation is "provided" for the board in the body of the charter. The rule is cited by appellants that where the enactor of a statute has shown an awareness of alternate methods, a court will not presume that the drafter intended an alternative where none was provided in the statute, People v. Valentine, 28 Cal.2d 121, 142, 169 P.2d 1; Southern Pacific Co. v. McColgan, 68 Cal.App.2d 48, 54, 156 P.2d 81; McCarthy v. Board of Fire Com'rs, 37 Cal.App. 495, 497, 174 P. 402; and 23 Cal.Jur. p. 754, and urge that this rule is applicable here since subdivision 1 of the pertinent Constitutional section sets forth but one method of fixing supervisors' compensation, namely, to "provide" therefor by charter, whereas subdivisions 2 and 3, in addition to stating that the salaries of the named officers may be "provided" for by charter, contain the alternative that the charter may provide "for the fixing of such compensation by boards of supervisors". It is then contended that the inclusion of the last-quoted language implies that boards of supervisors cannot act in fixing their own compensation.

Respondent contends that the charter and the ordinances passed pursuant thereto are valid, as the Constitution does not require that the charter expressly fix the salaries of supervisors, and that substantial compliance with the Constitution is sufficient to avoid holding the charter unconstitutional. He cites California Teachers Ass'n v. Collins, 1 Cal.2d 202, at page 204, 34 P.2d 134, where it is said: "If that [the requirements of the Constitution] be accomplished in any given case, little more can be asked than that a substantial compliance with the law and the Constitution be had, and that such compliance does no violence to a reasonable construction of the technical requirement of the law", and further that, as stated in Cornell v. Harris, 15 Cal.App.2d 144, 149, 59 P.2d 570, 572: "It is a primary rule of construction that constitutional provisions must be liberally construed to give them effect and to achieve the real purpose of their enactment. [Citing cases.] In Gibson v. Civil Service Commission, supra [27 Cal.App. 396, 399, 150 P. 78], it is said:

"'The most important rule, however, to be observed in giving construction to ambiguous or apparently conflicting provisions of a constitution, is that the interpretation must not be narrow, but broad, and that the object to be accomplished by the law is not to be left out of view.'" It is apparent that appellants are asking that a narrow interpretation be given the words "provide for," whereas respondent asks that these words be broadly construed.

[1, 2] Section 7½ of Article XI has, for its main purpose, the permitting of home rule to counties upon action by the county electorate. The language here questioned seems clear and it is only by adopting an ingenious and narrow view that an apparent ambiguity appears. "It is fundamental that the province of construction of statutes lies wholly within the domain of ambiguity. The rules of construction are an aid to resolve doubts and not to create them." (Santa Monica Mountain Park Co. v. United States, 9 Cir., 99 F.2d 450, 455.)

[3, 4] As said in Taylor v. Lundblade, 43 Cal.App.2d 638, at page 641, 111 P.2d 344, at page 345: "[T]he intention of the legislature will be determined so far as possible from the language of the statute, read as a whole, and if the words of the enactment, given their ordinary and popular signification, are reasonably free from ambiguity and uncertainty, the courts will look no further to ascertain its meaning." The Honorable Ralph McGee, the trial judge, followed these cases and in his Memorandum of Opinion stated: "* * * the construction placed upon the constitutional phrase by the petitioners is too narrow. Fairly read, the constitution simply requires the charter to make provision for the compensation of supervisors. This the charter does. The constitution does not require, nor state explicitly that the compensation of the supervisors shall be set forth and fixed in the charter itself, which in substance, is the construction which petitioners would place upon these words." This is a correct statement of the rules of construction here involved.

The constitutional language appearing in the pertinent section "or for the fixing of such compensation by boards of supervisors" must be considered in the light of the basic purpose of the section; to establish a framework for county home rule. The framers of this section outlined two methods whereby the officers named might have their compensation established. At the time of the enactment of this section supervisors did not, under general law, have the right to fix the compensation of the officers named and in order to assure that, if desired by the voters, supervisors would have some measure of control over those officers this power was spelled out in subdivisions 2 and 3. The fact that such power was not expressly granted to the boards by subdivision 1, does not mean that they were denied the power to fix their own compensation, but merely that it was the intention of the enactment that, if the electorate so indicated, the boards would have power to control the compensation of the named officers, or that, alternatively, another method of fixing such compensation might be provided in the charter whereby boards would have no control over the compensation of such officers.

[5] It is argued that the power in the board of supervisors to fix their own compensation is against public policy, but in view of the limitations here as to maximum amount and the restriction upon increases during incumbency the argument fails. Remembering that the Congress of the United States has always had the same power and has never abused it, makes this point extremely tenuous.

Government Code sections 53070 and 53071 have no application to this case as section 207 of the charter has superseded the general laws, Mapes v. Williams, 2 Cal.2d 177, 39 P.2d 421, and the salary limit in that section of the charter is not so expressed as to be subject to the provisions of these Government Code sections.

The judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

123 Cal.App.2d 570

In re PHILLIPS' ESTATE.

PHILLIPS et al. v. HIESTAND.

Civ. 4652.

District Court of Appeal, Fourth District, California.

Feb. 26, 1954.

Hearing Denied April 21, 1954.

Proceedings in probate involving the fixing of executor's commission and an attorney's fee with reference to the estate of a decedent who was survived by a widow. The Superior Court of Fresno County, Milo Popovich, J., entered order from which objectant appealed. The District Court of Appeal, Barnard, P. J., held that the wife's share of the community property is to be included in the amount used as a basis for fixing the ordinary commissions and fees of the executor and attorney.

Order affirmed.

1. Husband and Wife ⚷276(1)

By virtue of statutes applicable to administration of estates of decedents, surviving wife's one-half of the community property is subject to administration and is, at least impliedly, subject to the costs of administration. Probate Code, §§ 201, 202, 300, 901, 910, 1001, 1021.

2. Courts ⚷200½

When a husband dies, probate court has jurisdiction to pass upon wife's claim to a community interest. Probate Code, §§ 201, 202, 300, 901, 910, 1001.

3. Husband and Wife ⚷276(5, 7)

A surviving wife's share of the community property is a part of the "estate" which comes into the hands of husband's executor within meaning of provisions of Probate Code providing for payment of executor's commissions and attorney's fees upon the amount of the estate accounted for by the executor, and is properly included in the amount used as a basis for fixing the ordinary commissions of the executor and the fee of the attorney. Probate Code, §§ 201, 202, 300, 901. 910, 1001.

See publication Words and Phrases, for other judicial constructions and definitions of "Estate".

Robert H. Fouke, San Francisco, David E. Peckinpah, Harold M. Child, Fresno, Robert S. Thaman, Oakland, for appellants.

James J. Baker, Long Beach, for respondent.

BARNARD, Presiding Justice.

This is an appeal, on an agreed statement, from an order fixing ordinary executor's commission and attorneys' fee in an estate.

Rufus A. Phillips died testate on October 1, 1949. During the course of administration, and in connection with a proceeding to determine heirship, the court made an order on May 28, 1951, in which, after finding that all of the property described in the inventory was the community property of the deceased and his widow, and that she had waived any right to take under the will and had elected to take her one-half of the community property, it was ordered that the executor "pay out of said estate" all debts and claims "and all expenses of administration," and that there be distributed to the widow "one-half of all of said estate after the payment of the amounts specified."

Subsequently, the executor filed his first account and a petition for partial distribution requesting, among other things, the fixing of statutory fees for himself and for his attorneys. Objections were filed and after a hearing an order was made on January 7, 1953, settling the account, decreeing partial distribution, and allowing statutory fees based on the value of the entire community property. This appeal is from the portion of that order fixing and allowing ordinary commissions and fees to the executor and his attorneys.

All of the property involved stood in the name of the husband, and was the post-1927 community property of the decedent and his surviving widow. The sole question presented is whether, under such circumstances and where the husband's will attempted to exercise the right of testamentary disposition over all of said property, the statutory commissions and fees are to be computed "upon the estate of the decedent accounted for by the executors and subject by law to testamentary disposition of the decedent by will, alone, or are such statutory fees to be computed upon the estate of the decedent accounted for by the executor, including the one-half of the community property which belongs to the surviving widow." The appellants contend that under sections 901 and 910 of the Probate Code an executor and his attorney are entitled to statutory fees upon the amount of "estate" accounted for; that under section 13303 of the Revenue and Taxation Code "estate" means the property or interest of the decedent; that the surviving wife's half of the community property is not a part of the estate of her deceased husband, although it is "subject to the payment of one-half of the debts, charges and expenses of administration incurred in connection with the probate of the husband's estate"; and that the term "estate", as used in sections 901 and 910 of the Probate Code, means the estate of the decedent only, excluding the wife's half of the community property.

The appellants rely on Estate of Lampman, 15 Cal.2d 212, 100 P.2d 488, and on certain cases involving various forms of state and federal inheritance and estate taxes. In Estate of Lampman, it was held that the executrix was not responsible for, or chargeable with, the portion of the selling price of certain property which was represented by a trust deed, and for which no claim had been or could be filed in the estate. While the tax cases, involving liability under various tax laws as they existed at different times, are not controlling here, some of the observations there made are suggestive with respect to the present problem. In Estate of Coffee, 19 Cal.2d 248, 120 P.2d 661, 664, after discussing various amendments to the statutes and the liability of the community property for debts, the court said: "It is clear, therefore, that the portion of the community property which belongs to the wife is the one-half which remains after the payment of the husband's debts and the expenses of administration * * *." In Estate of Hirsh, 122 Cal.App.2d 822, 265 P.2d 920, the court, in accordance with the Coffee case, affirmed an order charging all of the community property with the family allowance. In Estate of Atwell, 85 Cal.App.2d 454, 193 P.2d 519, 524, after reviewing the history of the statutes now found in sections 201 and 202 of the Probate Code, the court said: "The alterations in the statutes throughout their history have not varied the imposition upon the entire community property of the debts of the husband, expenses of administration, and lawful charges against the estate", and also "One-half of the entire community property belongs and goes to the widow upon condition, the condition being that the property lawfully diverted during the course of administration, i. e., necessary for the payment of debts, expenses of administration, the federal estate tax, etc., shall be used for such purposes and shall not go to the widow. The property so lawfully diverted therefor never passes to the widow." In Estate of Cushing, 113 Cal.App.2d 319, 248 P.2d 482, 487, while it was held that a recent change in the federal law affecting the federal estate tax had changed the law as applied in the Atwell case, in certain respects, it was pointed out, in accordance with the ruling in the Coffee case, that "The debts of the husband and the ordinary costs of administration are chargeable against the entire community property", and the court further said: "Thus, the federal estate tax, unlike the ordinary costs of administration, is not made a charge against the wife's share of the community property."

While section 201 of the Probate Code provides that on the death of the husband one-half of the community property "belongs" to the surviving widow, section 202 provides that the community property passing by reason of the husband's death "is subject to his debts and to administration and disposal under the provisions of Division III of this code". In Division III, section 300 provides that when a person dies the title to his property passes, among other things, to the persons who succeed to his estate as provided in Division II.

but that "all of his property shall be subject to the possession of the executor * * and to the control of the superior court for the purposes of administration, sale or other disposition under the provisions of Division III of this code, and shall be chargeable with the expenses of administering his estate," and the payment of his debts and any family allowance. Sections 901 and 910 provide for the payment of executor's commissions and attorneys fees "upon the amount of estate accounted for" by the executor. Section 1001 provides, in the case of partial distribution, for the delivery by the executor to the person entitled thereto, upon the court's order, of such share of the estate as the court may designate. Section 1021 provides, upon final distribution, for delivery by the executor to the proper persons of the part to which each is entitled, as ordered by the court.

[1] The wife's one-half of the community property is by the statutes made subject to administration and, impliedly at least, to the costs of administration. Being subject to administration, and necessarily to be handled and accounted for by the executor of the husband's estate it should naturally be considered a part of the estate being administered insofar as fixing and paying all costs of administration is concerned. In Estate of Lampman, supra [15 Cal.2d 212, 100 P.2d 491] it was held that while possession of the property was one element to be considered the true test, in determining whether the value of certain property should be considered in fixing fees, is whether or not the executor "was chargeable with, or responsible for," the portion of the property in question.

[2, 3] While one-half of the community property "belongs" to the widow the statutes make it subject to administration, and to proper "disposal" as ordered by the court in that administration. When a husband dies, the probate court has jurisdiction to pass upon the wife's claim to a community interest, In re Estate of Kurt, 83 Cal.App.2d 681, 189 P.2d 528, and must determine what part of the property is community property, what part is needed to pay debts, what election has been made by the widow, and other questions, before it can be known what "belongs" to the widow. When these matters are determined, and the wife's share can be identified, it must then be separated from the rest of the estate in some orderly manner by an order or decree made by the court. In the meantime the executor must remain in possession, and it cannot reasonably be said that he is not chargeable with, and responsible for, all the property thus placed in his keeping. The wife's community interest is necessarily involved in a large part, if not all, of such administration, and should logically be considered a part of that estate for the purpose of fixing and paying the proper cost of administration. The executor remains responsible for and chargeable with all of the property, until released by the court through some order making a proper "disposal" of the remaining portion which "belongs" to the widow. We conclude that the wife's share of the community property is a part of the "estate" which came into the hands of this executor within the meaning of that term as used in sections 901 and 910, is property which the executor is responsible for and is chargeable with, and was properly included in the amount used as a basis for fixing the ordinary commissions and fees.

A further consideration in this case may appear in the fact that by an earlier order made on May 28, 1951, the court ordered all expenses of administration paid out of the estate and one-half of the remainder "after the payment of the amount specified" paid and distributed to the widow, and this order was never appealed from.

The portion of the order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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